No. 20-1104

IN THE SUPREME COURT THE UNITED STATES

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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 PETITIONERS

Team No. 1003

Counsel for Petitioners

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II. Assuming the Topanga Cession is still in Indian country, does either the doctrine of Indian preemption or infringement prevent the State of New Dakota from collecting its Transaction Privilege Tax against a Wendat tribal corporation and remitting the funds to the Topanga Cession's governing tribe?

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

The Treaty of Wauseon was ratified by Congress in 1802 and established the Maumee Indian Reservation. R. at 4-5. The treaty reserves to the Maumee Indian Nation the lands "west of the Wapakoneta River," which in 1802 included the land now known as the Topanga Cession. R. at 5. The Wendat Band of Huron Indians traces its rights to the Treaty with the Wendat, ratified in 1859. *Id*. The treaty provides the Wendat the lands "east of the Wapakoneta River." *Id.* At some point in the 1830s the Wapakoneta River moved approximately three miles to the west so that in 1859, the lands east of the river then included Topanga Cession. *Id.* When the Treaty of Wendat was ratified, certain members of Congress raised the possibility of purchasing "[the land] near the river Wapakoneta...when the price may be lower than to allow the Indian to continue to cross upon lands destined for our settlement." Cong. Globe, 35th Cong., 2nd Sess. 5411-5412 (1859). Additionally, at this same hearing, members of Congress mentioned the Maumee Indian Nation as exemplary residents, where, following their own successful treaty, "trade and commerce between the Maumee and the noble residents of Fort Crosby have expanded to the benefit of both parties." *Id.*

In June 2015, the Wendat announced its intention to construct a combination residential-commercial development to be owned by the Wendat Commercial Development Corporation, "WCDC," (a section 17 IRA Corporation wholly owned by the Wendat Band with 100% of corporate profits remitted quarterly to the tribal government as dividend distributions). R. at 7-8. This complex would include public housing units for low-income tribal members, a nursing care facility, a tribal cultural center, tribal museum, and shopping center. R. at 7. The WCDC estimates it will support at least 350 jobs and earn more than $80 million in gross sales annually.

R. at 8. Additionally, WCDC plans to use the revenue from the complex to fund its tribal public housing and nursing care facility. *Id*.

In November 2015, representatives from the Maumee Nation approached the WCDC and the Wendat Tribal Council to remind them that the Maumee Nation considered the Topanga Cession to be its land, that they considered any dispute surrounding the land ownership of the Topanga Cession resolved by the 1892 Wendat Allotment Act, and that the shopping complex would be expected to pay the State of New Dakota the 3.0% Transaction Privilege Tax (TPT). *Id*. Since climate change was severely threatening timber harvesting, the Maumee Nation's largest source of revenue, the Tribe was in desperate need of the proceeds from the TPT. *Id.* Therefore, the Maumee Nation planned to use the new funds to help pay for tribal scholarships and invest in renewable energy to help diversify its economy so it could maintain providing basic services and jobs for its members. *Id.*

Under 4 N.D.C. §212, North Dakota's TPT is levied on retailers in the state who receive more than $5,000 on transactions arising in the state. R. at 5. Businesses must apply and pay $25 for a TPT license, as well as remit 3.0% of their gross proceeds to North Dakota. *Id*. Proceeds of the TPT are deposited into the state's general revenue fund, which is used to maintain a viable commercial market within the state. R. at 6. In recognition of the relationship between the state and its constituent Indian tribes, §212(4) of the statute exempts any Indian tribe and tribal business operating within its own reservation on trust land from the TPT license and tax. *Id*. Furthermore, §212(5) holds that, for efficiency purposes, the state will remit all proceeds from entities within a reservation that do not fall under the §212(4) exemption to the respective reservation. *Id*. Lastly, under §212(6), the Maumee Indian Nation is to receive half of the TPT

proceeds collected from entities in Door Prairie Country that are not located in Indian country in recognition of the valuable mineral interests they ceded. *Id*.

Approved in January 1892, the Wendat Allotment Act stated that all "lands not selected within one year of the survey's completion shall be declared surplus lands and open to settlement." Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892). Congress noted in their hearing on the Act that "there are many families awaiting the opening of these additional lands," and it passed unanimously in both the House and the Senate. 23 Cong. Rec. 1777, 1777-80 (1892). Additionally, the Act outlined Congress's explicit agreement to pay the Wendat a sum of no more than $2,200,000, which the Tribe ultimately received for more than 650,000 acres of land. R. at 5; Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892). Prior to the passage of the Act, a corps of allotting agents were sent to the field in the summer to assist with moving the Wendat Indians onto their allotments, but the Indians refused to do so until they received payment. 23 Cong. Rec. at 1777. They stated that "they would travel but one road at a time" and were described as "silent, stubborn, and obstinate," while the allotting agents stood by ready to assist. *Id.* Congress set out an additional $40,000 to the Secretary of Interior to pay for the final costs of the survey and allotment, "to move the Wendat Indians unto their allotments as quickly as possible, and to open the surplus lands to settlement." Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892). Immediately following the passage of the Act, the American Indian population in the Western Half of the Wendat Reservation (excluding the Topanga Cession) dropped from 96.9% in 1890 to 22.5% in 1900. R. at 7. The Topanga Cession saw no such drastic change with its American Indian population remaining at a steady 82.0% in 1900 as compared to 97.0% in 1890. *Id.*

Conversely, the Maumee Allotment Act of 1908 was passed under the issue of no quorum, with almost half of the House of Representatives not voting on the question to pass the bill for the Act. 42 Cong. Rec. 2345, 2349 (1908). The Act 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 where it may be returned to the public domain by way of this act." Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908). However, the act also states that "nothing in this law provides for the unconditional payment of any sum to the Indians but that the price of said lands actually sold." *Id*. The Tribe did receive about $2,000,000 for about 400,000 acres of land. R. at 5. However, the Act did not "in any manner bind the United States to purchase any portion of the land," except sections sixteen and thirty-six which are to be given to the State of New Dakota to be used for its schools. Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908). According to this Act, the United States acted "as a Trustee for said Indians to dispose of the said lands and to expend and pay over the proceeds received from the sale thereof." *Id.* The Bureau of Indian Affairs has lost or spoilt the records which show exactly which parcels the Maumee Tribe was compensated for. R. at 7.

Ahead of the passage of the Maumee Allotment Act, in the summer of 1907, Major Hans, who "has been connected with the Indian Service for the past thirty-seven years," met with the Maumee Indians in a general council meeting to discuss the terms. 42 Cong. Rec. at 2345. The meeting was held such that "the Indians were made to understand just what [the Act] was proposed to do," and it ultimately resulted in a written agreement between the two parties. *Id.* During the congressional hearing, members of Congress raised questions regarding the Act's intentions "that all lands unsold will continue to belong to the Indians…Until there is payment the land belongs to the Maumee" and questions about whether the tribe is being adequately

compensated in stating, “surely after all this time the land is worth more?” 42 Cong. Rec. at 2346.

In 1910, two years after the passage of this Act, American Indians consisted of 90.6% of the population of the Maumee Indian Reservation, as compared to 92.9% in 1900. R. at 7. The population decreased to 61.3% in 1920, but it began to stabilize around 40-50% in 1930. *Id.* Similarly, immediately following the Maumee Allotment Act, the American Indian population in the Topanga Cession saw a modest decrease from 92.0% in 1900 to 80.4% in 1910. *Id.* Beginning in 1920, the American Indian population in the Topanga Cession stabilized around 20%. *Id.*

II. STATEMENT OF PROCEEDINGS

The Maumee Nation brought suit against the Wendat Band in the United States District Court for the District of New Dakota. R. at 8. In its complaint, the Maumee Nation asked the federal court for a Declaration that any development by the WCDC in the Topanga Cession 1) was located on Maumee land and 2) would necessitate a TPT license and payment of the tax. *Id.* In the alternative, the Maumee Nation asked for a Declaration that the Topanga Cession was outside of Indian country, meaning one-half of the TPT tax would be remitted to it under §212(6). *Id.* In response, the WCDC argued that 1) the Topanga Cession had been part of the Wendat Reservation since either the Treaty with the Wendat of 1859 or the Allotment Act in 1908 and 2) the state of North Dakota was prohibited from collecting the TPT in Indian Country based on the doctrines of preemption and infringement. R. at 8.

The District Court found for the Maumee Tribe on both issues, stating that the issues raised were “easily resolved” and the resolution did not “ require much elaboration.” R. at 9. The District Court held that the Maumee Reservation was not diminished and North Dakota was

permitted to apply its TPT directly on the WCDC. R. at 9**.** The Wendat Band appealed this decision in the Thirteenth Circuit, and the case was held for almost two years for the United State's Supreme Court's *McGirt v. Oklahoma* decision. R. at 10. On appeal, the Thirteenth Circuit reversed and remanded. *Id.* The Thirteenth Circuit held that the Topanga Cession was located on the Wendat Reservation and North Dakota's imposition of the TPT infringed on tribal sovereignty and should be subject to preemption under Supreme Court precedent. R. at 11. On November 6, 2020, the United States Supreme Court granted certiorari. R. at 1.

SUMMARY OF ARGUMENT

Using the three-factor test determined by the Court in *Solem*, the statutory language used in the Maumee Allotment Act specified that Congress was "not [bound]" to pay for the land and when combined with the other language in the Act, Congress did express clear intent to diminish the Maumee Reservation. Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908); *see also Solem v. Bartlett*, 465 U.S. 463 (1984) (the Court set out a three-factor test including the language used in the Act, the circumstances surrounding passage and the subsequent events, and the demographic history of the land to determine if Congress intended to diminish the Cheyenne River Reservation). The events surrounding passage of the Act also support this interpretation by highlighting Congress's questions within its own hearing about its understanding of the Act and the fact that the Act was passed under issue of no quorum. 42 Cong. Rec. at 2346. Further, the demographic history shows the behavior of the Tribe after the Act passed, displaying the effect of the Act in practice as there is still a strong American Indian population in the region according to Census Data. R. at 7. Additionally, within the Maumee Reservation, the Tribe has treaty rights by way of the Treaty of Wauseon, and Congress has not made any "clear and plain" intention to abrogate those treaty rights through its Treaty with the Wendat or any other Act. Treaty of

Wauseon, Oct. 4, 1801, 7 Stat. 1404; Treaty with the Wendat, March 26, 1859, 35 Stat. 7749; *see also United States v. Dion*, 476 U.S. 734, 738 (1986) (Court found that in order to abrogate Indian treaty rights, Congress's intention to do so must be "clear and plain").

Conversely, Congress's Wendat Allotment Act was passed with unanimous support from both the House and Senate, and it demonstrates Congress's clear intention to diminish the Wendat Reservation. 23 Cong. Rec. at 1777. Congress included within the Act's statutory language its desire to move the Wendat Band onto allotments as quickly as possible to open the land for settlement, and further, Congress included an unconditional agreement to pay the Band a lump sum. Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892). Congress also demonstrated its intent to diminish the Reservation through its expending considerable resources to send a team of allotting agents to assist with moving the Band onto its allotments, despite the lack of cooperation from the Tribe. 23 Cong. Rec. at 1777. Any ambiguities in the statutory language are even further resolved by the immediate, drastic decrease in the American Indian population in the region, demonstrating that Congress was successful in its mission to diminish the Wendat Reservation. R. at 7.

Assuming the Topanga Cession is still in Indian country, North Dakota is not barred by the doctrines of preemption and infringement from imposing its TPT on the WCDC. Although the doctrines of preemption and infringement are sufficient independently to invalidate a state tax, the two barriers are related and the Court has often applied the sovereign doctrine as "a backdrop against which the applicable treaties and federal statutes must be read." *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1972). Additionally, the Court has recognized that the preemption inquiry is "not dependent on mechanical or absolute conceptions of state or tribal sovereignty." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980).

Therefore, the Court generally applies "a particularized inquiry into the nature of the state, federal, and tribal interests at stake" when examining cases involving the imposition of a tax on a non-Indian in Indian country. *Bracker*, 448 U.S. at 145. Here, the imposition of the TPT against the WCDC not only involves state, federal, and tribal interests, but also the conflicting sovereignty interests of the Wendat Band and the Maumee Nation. Since the Court's preemption analysis necessitates an awareness of "traditional notions of tribal sovereignty," the Court should apply the *Bracker* balancing test to properly examine the relevant interests at stake in this case. *McClanahan*, 411 U.S. at 175.

Under the *Bracker* balancing test, North Dakota's application of the TPT is not prohibited, because it does not impose an unlawful burden on tribal sovereignty or interfere with implied congressional intent. Additionally, North Dakota has a legitimate regulatory interest. First, the burden of the TPT does not infringe on tribal sovereignty, because proceeds from the tax are remitted back to the governing tribe and a state may impose "minimal burdens" on tribal retailers in collecting a tax. Additionally, federal enactments and regulatory schemes do not imply an intent to preempt North Dakota's application of the TPT. Lastly, North Dakota has a justifiable state interest in imposing its TPT on the WCDC, because the taxation provides a legitimate regulatory function.

ARGUMENT

I. Congress did not establish any clear intent to diminish the Maumee Reservation nor or intent to abrogate the Treaty of Wauseon, however, the three-part test established in Solem v. Bartlett helps to demonstrate Congress's intent to diminish the Wendat Reservation.

Congress did not consider the conflict between the Maumee Tribe's treaty rights to the Topanga Cession and the Treaty with the Wendat, and therefore did not demonstrate any intent to abrogate the Treaty of Wauseon. 23 Cong. Rec. 1777. Further, Congress did not intend to

diminish the Maumee Reservation when it passed the Maumee Allotment Act, as demonstrated by its lack of an unconditional agreement to compensate the Tribe and no clear understanding from the Tribe or even certain members of Congress as to the intentions behind the Act in practice. 42 Cong. Rec. 2345; Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908). In contrast, Congress did unanimously intend to diminish the Wendat Reservation with its passage of the Wendat Allotment Act. 23 Cong. Rec. at 1777, 1780. The Act included an unconditional guarantee from Congress to pay a sum certain payment to the tribe and emphasized the importance of opening the land for settlement "as quickly as possible." Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892). Further supporting Congress's intent to diminish the Wendat Reservation, a group of agents remained on site multiple months prior to passage of the Act to assist the Band in moving to its allotments and after the Act's passage, the population of American Indians in the region dramatically decreased. 23 Cong. Rec. at 1777; R. at 7.

18 U.S.C. §1151 sets forth the definition of "Indian country" as being "(a) all land within the limits of any Indian reservation…, (b) all dependent Indian communities…, and (c) all Indian allotments, the Indian titles to which have not been extinguished." 18 U.S.C. § 1151 (1949). Under the first definition, where diminishment does not exist and the reservation has not been revoked by Congress, Indian country can be defined as the land within a reservation boundary. *Id*. The case in question concerns the third definition, whether two distinct reservations, the Maumee and the Wendat, have been "extinguished" or "diminished," and are therefore no longer Indian country.

Only Congress has the authority to diminish a reservation. *Solem*, 465 U.S. at 470. "Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress

explicitly indicates otherwise." *Id*. Congressional intent to diminish a reservation is determined by a three-factor test: the statutory language within the act, the events surrounding the passage of the act, and the demographic history or Indian character of the land. *Solem*, 465 U.S. 463. Similarly, "Congress's intention to abrogate Indian treaty rights must be clear and plain." *Dion*, 476 U.S. at 738. To determine congressional intent to abrogate Indian treaty rights "what is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Dion*, 476 U.S. at 740.

Congress did not demonstrate any consideration of any conflict between the Maumee Tribe's treaty rights to the Topanga Cession and the Treaty with the Wendat that would abrogate the Treaty of Wauseon. The Maumee Tribe and its rights were hardly mentioned at the time of the Treaty with the Wendat's formation. Cong. Globe, 35th Cong., 2nd Sess. 5411-5412 (1859). Additionally, Congress did not demonstrate clear intent to diminish the Maumee Reservation when it passed the Maumee Allotment Act under issue of no quorum, with no unconditional agreement to compensate the Tribe, and no clear understanding from the Tribe or even certain members of Congress as to the intentions behind the Act in practice. 42 Cong. Rec. 2345; Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908). However, Congress did demonstrate clear intent to diminish the Wendat Reservation in its unanimous passage of the Wendat Allotment Act. 23 Cong. Rec. at 1777, 1780. Not only did the statutory language outline Congress's guarantee to provide an unconditional lump sum payment to the tribe, it stated its commitment to transferring the Wendat Band onto allotments "as quickly as possible" in order to open the land for settlement. Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892). The events surrounding passage included a corps of allotting agents deployed to help assist the Band in

moving to its allotments six months prior to the Act's passage, and the Indian character of the land dramatically receded immediately following the Act's passage - both further supporting that Congress intended to diminish the Wendat Reservation. 23 Cong. Rec. at 1777; R. at 7.

A. The Maumee Reservation was not diminished by the Maumee Allotment Act of 1908 because the statutory language contains ambiguities with no financial commitment from the government, the events surrounding passage of the Act further support these ambiguities, and the demographic history in the region shows a persistent Indian character which also supports that the Reservation has not been diminished.

All three factors set out in Solem support that Congress did not intend to diminish the Maumee Reservation. These three factors used to determine Congress's intent to diminish are the statutory language used in the act, the events surrounding the passage, and the demographic history or Indian character of the land. *Solem*, 465 U.S. 463.

1. *The statutory language used in the Maumee Allotment Act of 1908 distinguishes the sale of sections sixteen and thirty-six from the rest of the land in question and does not provide an unconditional financial commitment from Congress to compensate the Tribe, failing to demonstrate clear congressional intent to diminish.*

Of the three factors, "the most probative evidence of congressional intent is the statutory language used to open the Indian lands." *Solem*, 465 U.S. at 470. Clear statutory language in the form of "explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands." *Id.* The Maumee Allotment Act does include language 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 where it *may* be returned to the public domain by way of this act." Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908); *see also Hagen v. Utah*, 510 U.S. 399 (1994) (where the use of the term "public domain" in the statutory language evidences congressional intent to diminish). However, according to *Hagen*, disestablishment has "never required any particular form of words." *Hagen*, 510 U.S. at 411.

"But it does require that Congress clearly express its intent to do so, '[c]ommon[ly with an] [e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests.'" *McGirt v. Oklahoma*, 140 U.S. 2452, 2463 (2020); *see also Nebraska v. Parker*, 136 U.S. 1072, 1075 (2016). In the Maumee Allotment Act, any such language implying cession is only included in the shadow of Congress's lack of commitment to actually purchase the entire block of land if there is no interested buyer on the other side. Thus, the word "may" used here can be interpreted to hold significant weight in light of the Act in its entirety, demonstrating Congress's intent to potentially keep the land under Maumee control, particularly if there are no interested buyers.

Further, under the Act, Congress has not agreed to pay a lump sum to the Tribe for the majority of the land in question. "When such language of cession is buttressed by an *unconditional* commitment from Congress to compensate the Indian tribe for its opened land, there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." *Solem,* 465 U.S. at 470. In addition to having ambiguity surrounding its language of cession, the Act did not "in any manner bind the United States to purchase any portion of the land," except sections sixteen and thirty-six, which are to be given to the State of New Dakota to be used for its schools. Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908). While the Tribe did receive about $2,000,000 for about 400,000 acres of land, this payment likely came from land that was ultimately sold to new buyers because "nothing in this law provides for the unconditional payment of any sum to the Indians but that the price of said lands actually sold." R. at 5; Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908). As was seen in *Solem,* where the Cheyenne River Sioux Reservation was held to have not been diminished, Congress did not buy all of the land and instead acted as a "sales agent." *Solem*, 465

U.S. at 473. This fact is supported by the language of the Act itself stating that the United States acted "as a Trustee for said Indians to dispose of the said lands and to expend and pay over the proceeds received from the sale thereof." Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908). The payment here is not unconditional and Congress, having explicitly arranged for an unconditional payment for the school land, certainly could have written the Act to include the rest of the Maumee land under this guarantee if that was its intent.

2. *The events surrounding passage of the Maumee Allotment Act demonstrate the lack of clear intent from Congress through its no quorum vote on the Act and the expectation from the Tribe that it was able to keep their land.*

The Maumee Allotment Act of 1908 was passed under the issue of no quorum, with almost half of the House of Representatives not voting on the question to pass the bill for the Act. 42 Cong. Rec. at 2349. As established in this Court's most recent opinion on the issue of diminishment, *McGirt*, "to determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress." 140 U.S. at 2462. Further, "if Congress wishes to break the promise of a reservation, it must say so" *Id*. The clear voice and intent of this body of the legislature cannot be established when such a significant portion of the membership was absent at the time the vote was taken.

Over a year prior to the passage of the Act, in the summer of 1907, Major Hans, who "has been connected with the Indian Service for the past thirty-seven years," met with the Maumee Indians in a general council meeting to discuss potential terms. 42 Cong. Rec. at 2345; *see also Hagen v. Utah*, 510 U.S. at 416-17 (where the "Acting Commissioner for Indian Affairs in the Department of the Interior directed Indian Inspector James McLaughlin to travel to the Uintah Reservation to 'endeavor to obtain [the Indians'] consent to the allotment of lands as provided in the law, and to the restoration of the surplus lands.'"). The meeting was held such

that "the Indians were made to understand just what [the Act] was proposed to do," and it ultimately resulted in a written agreement between the two parties. 42 Cong. Rec. at 2345. While this meeting might have suggested negotiation on behalf of the Maumee Tribe as was seen in *South Dakota v. Yankton Sioux Tribe*, where negotiations with the Yankton Tribe showed an understanding that the legislation would modify the reservation, there is no such clear understanding on behalf of the Maumee here. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 331 (1998).

The Maumee continued to operate under the presumption that the land was not diminished. Shortly after the Wendat Band announced its plans to construct a residential-commercial development on the eastern side of the Maumee Tribe's reservation, land known as the Topanga Cession, representatives from the Maumee Nation approached the WCDC and the Wendat Tribal Council to remind them that the Maumee Nation considered the Topanga Cession to be its land. R. at 8. In fact, even members of Congress during the congressional hearing on the Act asked about the Act's effect in clarifying "that all lands unsold will continue to belong to the Indians…Until there is payment the land belongs to the Maumee." 42 Cong. Rec. at 2346*; see also Parker*, 136 U.S. at 1080 (Members of Congress made conflicting statements on whether or not the land opened up for settlement would remain within the Reservation or whether they had the intent to diminish the Reservation. Conflicting remarks from individuals do not meet the "clear and plain" evidence required to show intent to diminish).

To further add to the lack of clarity from the Federal government, the Bureau of Indian Affairs has lost or spoilt the records which show exactly which parcels the Maumee Tribe was compensated for. R. at 7. Additionally, it is supported by the language in the Act, as mentioned above, that "the United States shall act as a Trustee for said Indians to dispose of the said lands

and to expend and pay over the proceeds received from the sale thereof." Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908). In *Solem*, the reservation was held to not be diminished as supported by the fact that it sent to the tribe the money from any land sold, but it did not unconditionally buy the land. 465 U.S. at 473. When Congress acts as a sales agent instead of a purchaser, Congress has not intended to diminish the reservation. *Id*.

3. *The Indian character of the land remained largely intact after the passage of the Maumee Allotment Act demonstrating that the Act did not intend to drive the Maumee off of their land and diminish the reservation.*

This last consideration has been termed the "least compelling" form of evidence. *Yankton*, 522 U.S. at 356 (the Court held that this final consideration is the least compelling because "every surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the "Indian character" of the reservation," but the Court has not found that every surplus land Act has diminished the affected reservation); *see also Parker*, 136 U.S. at 1075 (finding that the Reservation was not diminished despite the Tribe's significant absence from the land over the past 120 years and noting that the "Court has never relied solely on this third consideration to find diminishment" such that the case could not "overcome the statutory text.") The value of this evidence can only be interpretative and might be used to shed light on what the terms found in a statute meant at the time of the law's adoption, not as an alternative means of proving disestablishment or diminishment. *Parker*, 136 U.S. at 1081. On the Maumee Reservation, the Indian character remained intact, supporting that the Tribe understood their reservation to still be Indian country and that Congress's did not intend to diminish. Prior to the passage of the Maumee Allotment Act in 1908, census data from 1900 shows that American Indians consisted of 92.9% and 92.0% of the western Maumee Indian Reservation and the Topanga Cession, respectively. R. at 7. Immediately following the passage of the Act in 1910,

the American Indian population remained high at 90.6% and 80.4%, respectively. *Id*. The American Indian population of the western Maumee Indian Reservation decreased to 61.3% in 1920, but it began to stabilize around 40-50% in 1930. *Id.* Beginning in 1920, the American Indian population in the Topanga Cession stabilized around 20%. *Id.*

As mentioned previously, "once a block of land is set aside for an Indian Reservation and *no matter what happens to the title of individual plots within the area* [emphasis added], the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem,* 465 U.S. at 470. Therefore, under the Treaty of Wauseon which granted all of this land to the Maumee Indian Nation, it is not proper to view the Indian Character of the western Maumee Indian Reservation and the Topanga Cession in isolation. Treaty of Wauseon, Oct. 4, 1801, 7 Stat. 1404. This point is further supported because it is not clear which land the tribe has been compensated for due to the fact that the Bureau of Indian Affairs has lost or spoilt these records. R at 7. When looking at the combined American Indian population for the entire Maumee region, the percentage is stable in both regions and on average around 30% Indian. R. at 7. This demonstrates a significant population and suggests that the land has maintained its Indian character. In *Solem,* the Cheyenne River Sioux Reservation was ruled to have not lost its Indian character despite having only about a 50% American Indian population. *Solem,* 465 U.S. at 480 n.26. Although this factor is the least probative, when combined with the lack of unconditional payment in the statutory language and the lack of clear demonstrated intent from Congress in the events surrounding passage of the Act, the consolidated population of American Indians on the Maumee reservation presents a strong case that the Reservation has not been diminished. If the desired effect of the Act had been to remove the Tribe from the region to open the land from settlement, the Census Data would show that effect following the Act's passage in 1908.

B. The Treaty of Wendat does not abrogate the Maumee Nation's claim to the Topanga Cession because Congress did not demonstrate any "clear and plain" intention to abrogate the Treaty of Wauseon.

Similar to demonstrating intent for diminishment, "Congress's intention to abrogate Indian treaty rights must be clear and plain." *United States v. Dion*, 476 U.S. 734 (1986). The Treaty of Wauseon was ratified by Congress in 1802 and established the Maumee Indian Reservation, reserving to the Maumee Indian Nation the lands "west of the Wapakoneta River." R. at 5. In 1802, this land included what is now known as the Topanga Cession. *Id*. The Treaty with the Wendat, ratified in 1859 reserves to the Wendat Band the lands "east of the Wapakoneta River." *Id*. Treaties are the "supreme Law of the Land," and "if Congress wishes to break the promise of a reservation, it must say so." *McGirt*, 140 U.S. at 2462. While at some point in the 1830s the Wapakoneta River moved approximately three miles to the west so that in 1859, the lands east of the river now include the Topanga Cession, this technicality does not erase the rights originally given to the Maumee in 1802. R. at 5.

"In determining whether Congress intended to abrogate Indian treaty rights, what is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Dion*, 476 U.S. at 734. When the Treaty of Wendat was ratified, certain members of Congress raised the possibility of purchasing "[the land] near the river Wapakoneta...when the price may be lower than to allow the Indian to continue to cross upon lands destined for our settlement." Cong. Globe, 35th Cong., 2nd Sess. 5411-5412 (1859). Although this statement contemplating an attempt to purchase the land around the Wapakoneta River was brought up during the discussions of establishing the Wendat Reservation, it does not

preclude the fact that another Tribe could be found to own this land. Congress did not choose to pursue this purchase and no offer to any tribe was ever made. *Id*.

Additionally, at this same hearing, members of Congress mentioned the Maumee Indian Nation by name, acknowledging their successful integration into the community following the Treaty of Wauseon. *Id*. Congress hoped that the Wendat Band could learn from the Maumee's "example," and it is unlikely that Congress was looking to simultaneously revoke some of the Maumee's treaty rights. *Id*. Other than mentioning the successful integration of the Maumee Indian Nation into the broader New Dakota community, there was no direct consideration of the effect the Treaty of Wendat would have on the Maumee's land ownership over the Topanga Cession. *Id*. In fact, the Treaty of Wauseon was only mentioned by name once during the consideration of the Treaty of Wendat to highlight its success as the first treaty of its kind in the region. *Id*. This acknowledgment of the Treaty of Wauseon's existence is insufficient to constitute consideration of "Indian treaty rights" as it does not contemplate the Tribe's actual land ownership. Furthermore, Congress never weighed these Indian treaty rights against any intention to ever purchase the land near the Wapakoneta River. See *Dion*, 476 U.S. at 734.

C. The Wendat Reservation was diminished by the Wendat Allotment Act because the statutory language emphasized Congress's intent to move the Band onto its allotments quickly and incorporated an unconditional commitment to pay the Band a lump sum, the events surrounding passage of the Act included Congress's unanimous support and dedication to removing the Band from the land, and the demographic history in the region showed that the Act achieved its desired effect to diminish the Wendat Reservation.

As demonstrated by the same three-factor test set out in *Solem*, mentioned above, Congress intended to diminish the Wendat Reservation when it passed the Wendat Allotment Act in 1892. These three factors used are the statutory language used in the act, the events

surrounding its passage, and the demographic history or Indian character of the land, with the first factor being the most probative. *Solem*, 465 U.S. 463.

1. *Congress demonstrated a clear intention to diminish the Wendat Band by specifying its want to move the Wendat Band onto its allotments as quickly as possible and including an unconditional agreement to pay the Band a lump sum in the statutory language of the Act.*

Approved in January 1892, the Wendat Allotment Act stated that all "lands not selected within one year of the survey's completion shall be declared surplus lands and open to settlement." Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892). Congress included in the Act its hopes to "move the Indians onto their allotments as quickly as possible." *Id*. While this language is not "explicit reference to cession, ... other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands." *Solem*, 465 U.S. at 470. As mentioned above, disestablishment has "never required any particular form of words." *Hagen*, 510 U.S. at 411. "But it does require that Congress clearly express its intent to do so, '[c]ommon[ly with an] [e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests.'" *McGirt v. Oklahoma*, 140 U.S. 2452, 2463 (2020); *see also Nebraska v. Parker*, 136 U.S. 1072, 1075 (2016). In the Wendat Allotment Act, Congress made its intention to divest the reservation from the open lands clear by including two separate provisions specifying that the Wendat Indians were to be moved to their allotted lands as soon as possible. Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892). The second of which set out an additional $40,000 to the Secretary of Interior to pay for the final costs of the survey and allotment "to move the Wendat Indians unto their allotments as quickly as possible, and to open the surplus lands to settlement." *Id*.

As mentioned in the sections above, "when such language of cession is buttressed by an *unconditional* [emphasis added] commitment from Congress to compensate the Indian tribe for its opened land, there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." *Solem,* 465 U.S. at 470. Unlike in the Maumee Allotment Act, the Wendat Allotment Act outlines Congress's explicit, unconditional agreement to pay the Wendat a lump sum: "no matter how much land is ultimately surplus the Wendat Band shall not be entitled to a payment of more than two-million and two hundred-thousand dollars in total and complete compensation." Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892). The Tribe ultimately received this payment for more than 650,000 acres of land. R. at 5. The receipt of this lump sum payment combined with Congress's emphasis on opening the land "as soon as possible" constitute strong statutory language to support Congress's intent to diminish the Wendat Reservation. Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892); *see also Yankton,* 522 U.S. at 344 (the Court held that the reservation was diminished because the Surplus Land Act contained explicit language of cession as well as terms for a sum certain payment).

2. *Despite the lack of cooperation from the Wendat Band, the events surrounding passage of the Wendat Allotment Act demonstrate Congress's intention to diminish the Reservation.*

Six months prior to the passage of the Act, a corps of allotting agents was sent to the field to assist with moving the Wendat Indians onto their allotments. 23 Cong. Rec. at 1777. The Wendat refused to move onto the allotments until they received payment; They stated that "they would travel but one road at a time." *Id*. The tribe does not have to consent for a reservation to be diminished, and the notification of the tribe of the plan to allot before the act is passed supports diminishment more than if the tribe is only told after the fact. See *Lone Wolf v. Hitchcock*, 187 U.S. 553 (Court decided that Congress could diminish reservations unilaterally without the

Tribe's consent); *see also Yankton*, 522 U.S. at 336 (where Congress's negotiations with the Tribe ahead of passage of the Act presented helped lead to the Court's ruling that the Reservation was diminished). In *Solem*, the majority of the Tribe did not show up to the meeting about the Act due to inclement weather, not due to their disagreement with the act itself. *Solem*, 465 U.S. at 477. In this case, the Wendat Band had ample notice given that the allotting agents arrived in the summer of 1891 and the Act was passed in January of 1892, signaling that the Band was aware of the plan to allot and chose to ignore it by their own volition. 23 Cong. Rec. at 1777.

In addition, the Band demonstrated its understanding of Congress's intent to diminish the Reservation, so much so that they held off from moving onto the allotments, waiting to receive the expected payment upfront. 23 Cong. Rec. at 1777. The more clearly a tribe is told and understands that it would lose control of its land, the more favorable is the case for showing congressional intent to diminish. *Yankton*, 522 U.S. at 336 (in holding that the Yankton Sioux Reservation was diminished, the Court determined that the manner in which the Government officials negotiated the transaction with the Tribe demonstrated its understanding of the terms). The Band was described as "silent, stubborn, and obstinate," while the allotting agents stood by ready to assist them in completing their transition onto the allotted lands. 23 Cong. Rec. at 1779. The Wendat Indians' reluctance to comply with the allotting agents' requests suggests that they understood the reason for the agents' presence.

Additionally, Congress noted in its hearing on the Act that "there are many families awaiting the opening of these additional lands," which demonstrates its intention to sell the land to non-Indian settlers and that this intention has likely been made public to its constituents. 23 Cong. Rec. at 1777. When Congress makes its intention to sell or cede an Indian reservation clear to the public, it further supports the case that Congress intended to diminish the reservation.

See *Hagen*, 510 U.S. at 400 (where lawmakers making explicit public statements further demonstrate intent for diminishment). Further, unlike the Maumee Allotment Act which passed under issue of no quorum, the Wendat Allotment Act passed unanimously in both the House and the Senate, signifying agreement in Congress over its intent to diminish. 23 Cong. Rec. at 1777, 1780.

3. *The demographic history shows the immediate diminishing effect of the Wendat Allotment Act on the Indian character of the Wendat land.*

Immediately following the passage of the Act, the American Indian population in the Western Half of the Wendat Reservation (excluding the Topanga Cession) dropped from 96.9% in 1890 to 22.5% in 1900 and remained around 20%, or 80% non-Indian, thereafter. R. at 7. As noted above, this third factor is the least probative of the three-part test set out in *Solem*, but it can be used to resolve any ambiguities by highlighting the meaning of the terms of the act in question. *Parker*, 136 U.S. at 1081. In *Hagen*, at the time of that case, the population of the area opened by allotment (Uintah Valley) was 85% non-Indian, representing the lack of Indian Character and further supporting that the Reservation had been diminished. 510 U.S. at 421. Additionally, in *Yankton*, the Indian population in the area drastically declined following the passage of the Act, as can be seen with the Wendat Indian population, and this factor helped to support Congress's intent to diminish in that case. 522 U.S. at 356. Therefore, the rapid decline in the Indian population on the Wendat Reservation further supports that the Wendat Allotment Act achieved Congress's desired effect: to diminish the Wendat Reservation.

II. Assuming the Topanga Cession is still in Indian country, the doctrines of preemption and infringement do not prevent the State of New Dakota from collecting its Transaction Privilege Tax (TPT) against the Wendat tribal corporation and remitting the funds to the Topanga Cession's governing tribe.

The doctrines of preemption and infringement do not bar North Dakota from collecting its TPT against the WCDC and remitting the funds to the Topanga Cession's governing tribe because the tax does not impose an unlawful burden on tribal sovereignty or interfere with implied congressional intent. Additionally, North Dakota has a legitimate regulatory interest in imposing the tax, which extends beyond merely generating revenue. "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 325 U.S. 786, 789 (1945). This principle of tribal sovereignty, along with Congress's power to regulate commerce with Tribes, serve as the foundation for the doctrines of preemption and infringement. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980); *see also* U.S. Const. art. I, § 8, cl. 3. Under the infringement doctrine, a state action cannot infringe on the "right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). Although, a violation of preemption or infringement alone will bar the application of a state tax, the Court has repeatedly held that the two barriers are related and has applied the sovereign doctrine as "a backdrop against which the applicable treaties and federal statutes must be read." *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1972).

Additionally, the Court has recognized that the preemption inquiry is "not dependent on mechanical or absolute conceptions of state or tribal sovereignty." *Bracker*, 448 U.S. at 145. Therefore, the Court's preemption inquiries generally fall into one of two categories. First, when a state taxation is imposed on a tribe and tribal members on a reservation, it is categorically barred unless there is cession of jurisdiction or Congress has expressly granted authorization. *See Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995); *see also McClanahan*, 411 U.S. at 175; *Bryan v. Itasca County*, 426 U.S. 373, 376 (1976). On the other hand, in cases

involving state action over the activity of nonmembers on a reservation, the Court has generally applied "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *See Bracker*, 448 U.S. at 145; *see also Ramah Navajo School Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 838 (1982).

Therefore, since North Dakota's imposition of the TPT involves competing tribal sovereignty interests, the Court should weigh the state, federal, and tribal interests at stake. In applying the *Bracker* balancing test, North Dakota's application of the TPT is not prohibited, because it does not impose an unlawful burden on tribal sovereignty, implied congressional intent does not preempt the tax, and the tax serves a legitimate regulatory purpose.

A. Although the doctrines of preemption and infringement are sufficient independently to invalidate a state tax, tribal sovereignty generally serves the purpose of "providing a backdrop" for the preemption inquiry.

While a violation of preemption or infringement is sufficient on its own to invalidate a state taxation, the Court has commonly examined the doctrines together, rather than in isolation. *See, e.g.*, *Bracker*, 448 U.S. at 143. The Constitution grants Congress the power "to regulate commerce with ... the Indian tribes." U.S. Const. art. I, § 8, cl. 3. This broad grant of power, along with the tradition of upholding tribal sovereignty, serves as the basis for the preemption doctrine generally used by courts today. *See, e.g.*, *Bracker*, 448 U.S. at 142. The *Williams* infringement test bars state action that infringes on the "right of reservation Indians to make their own laws and be ruled by them." *Williams*, 358 U.S. at 220.

However, as the *McClanahan* Court noted, "The trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption." *McClanahan*, 411 U.S. at 175. Instead, the Court will generally use the tribal

sovereignty doctrine as "a backdrop against which the applicable treaties and federal statutes must be read." *Id.* Therefore, when analyzing whether a state action is preempted by federal law, the Court often looks at treaties and statutes with an awareness of the "traditional notions of Indian self-government." *Id.* As a result, the general rule is that when examining statutes "doubtful expressions"' are resolved in favor of the tribe or tribal member. *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930).

B. Since the imposition of the TPT involves competing tribal sovereignty interests, the Court should apply the *Bracker* test and balance the state, federal, and tribal interests at stake.

The Court should apply the *Bracker* balancing test to this case, because the application of the TPT on the WCDC involves the competing sovereignty interests of the Maumee Nation and the Wendat Band. Generally, this Court has held that "absent cession of jurisdiction or other federal statutes permitting it, there is no authority for state taxation of Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973). However, in cases involving the imposition of a tax on a non-Indian in Indian country, the Court has repeatedly applied a specialized inquiry into the state, federal, and tribal interests at hand in the case. *See Bracker*, 448 U.S. at 145 (preempting a state fuel tax imposed on a non-Indian business harvesting timber on a reservation); *Ramah*, 458 U.S. at 838 (preempting a state tax on gross receipts imposed on a non-Indian company constructing a school on a reservation); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 156-157 (1980) (upholding a state cigarette tax imposed on nonmember consumers on a reservation). Although the Court has generally only applied the balancing test in cases where the legal incidence of the tax falls on a nonmember, it

has also acknowledged that the preemption inquiry is not governed by "mechanical or absolute conceptions of state or tribal sovereignty." *Bracker*, 448 U.S. at 145.

Here, the imposition of the TPT against the WCDC not only involves state, federal, and tribal interests, but also the conflicting sovereignty interests of the Wendat Band and the Maumee Nation. On one hand, the Wendat Band seeks to be preempted from this tax because it plans to use the proceeds from its complex to fund its tribal public housing and nursing care facility. R. at 8. On the other hand, the Maumee Nation needs the funds to pay for tribal scholarships and invest in renewable energy to support its economy and maintain its ability to provide basic services and jobs for its members. *Id.* As stated previously, the Court's preemption analysis involves an awareness of "traditional notions of tribal sovereignty." *McClanahan*, 411 U.S. at 175. Therefore, since this case involves the sovereignty of two different tribes, it is necessary to apply a specialized inquiry into the relevant interests at stake in this case.

Even though the legal incidence of the tax falls on the WCDC, the *Bracker* balancing test is still applicable. As stated in §212, retailers are required to remit 3% of their gross proceeds to the state, and if they fail to obtain a license or pay the tax, it is a class 1 misdemeanor. R. at 5-6. Nevertheless, although the legal incidence falls on WCDC, the unique facts of this case require a balancing standard, rather than a bright-line rule. Since the Court has repeatedly affirmed the importance of recognizing the doctrine of sovereignty as a "backdrop" against which the preemption analysis occurs, it is necessary to apply a specialized inquiry in this case where the sovereignty of two tribes is significantly at stake. *McClanahan*, 411 U.S. at 172.

C. Under the Bracker balancing test, North Dakota's application of the TPT is not prohibited, because it does not impose an unlawful burden on tribal sovereignty or interfere with implied federal intent, and it serves a legitimate regulatory function.

Applying the *Bracker* balancing test, North Dakota can apply its TPT on the WCDC's development because it does not impose a significant burden on tribal sovereignty, federal enactments do not imply a congressional intent to preempt the tax, and the state has a legitimate regulatory interest. The *Bracker* test involves "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Bracker*, 448 U.S. at 145. When applying this test, federal statutes should be analyzed in relation to concepts of tribal sovereignty. *See e.g.*, *Ramah*, 458 U.S. at 838. Additionally, the Court has held that "ambiguities in federal law should be construed generously, and federal preemption is not limited to those situations where Congress has explicitly announced an intention to pre-empt state activity." *Ramah*, 458 U.S. at 838.

1. *The burden of the TPT is not unlawful, because proceeds from the tax are remitted back to the governing tribe and a state may impose "minimal burdens" on tribal retailers in collecting a tax.*

The imposition of the TPT on the WCDC does not create an unlawful burden on federal regulation or tribal sovereignty, because the governing tribe ultimately receives collected proceeds and the licensing requirement is merely a minimal tax collection burden. Although the burden of a tax is generally not a dispositive factor in the preemption balancing test, it can have an impact on the state, federal, and tribal interests at stake in a case. First, the Court has examined the burden of a tax with respect to its impact on a broader federal regulatory scheme. *See Bracker*, 448 U.S. at 151 n.15 (noting that the economic burden of a tax conflicts with federal regulation of timber); *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 691 (1965) (holding that a tax imposing a burden on Indian traders conflicts with congressional intent). If the tax in question is found to impose an "additional burden" that conflicts with an

implied congressional intent and there is no justifiable state interest, the tax may be preempted. *See Ramah*, 458 U.S. at 845 (preempting tax that imposed an additional burden on the federal scheme regulating tribal schooling opportunities absent sufficient state justification).

The Court has also examined the burden of taxation with respect to tribal sovereignty, looking specifically to see if the imposition of a tax creates a burden that infringes on a tribe's right to "make their own laws and be ruled by them."*Colville*, 447 U.S. at 156. However, the Court "has given conflicting signals concerning the significance of indirect economic burdens on tribal interests emanating from state taxation of non-Indians or nonmembers in Indian country." 1 Cohen's Handbook of Federal Indian Law § 7.03 (2019). In *Colville*, the Court held that a tax may be valid, even if it "seriously disadvantages or eliminates the Indian retailer's business with non-Indians."*Colville*, 447 U.S. at 151. Additionally, the Court has established a general principle that a state may require a tribal retailer to collect taxation from non-Indian purchasers, even if the required tax collection imposes a "minimal burden" on the tribe. *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 483 (1976) (affirming state requirement on tribal business to affix tax stamps to cigarette packages); *see also Colville*, 447 U.S. at 151 (upholding state collection requirement mandating tribal business keep detailed records of transactions). As stated by the *Potawatomi* Court, "requiring the tribal seller to collect these taxes was a minimal burden justified by the State's interest in assuring the payment of these concededly lawful taxes." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 512 (1991).

Here, the burden from the TPT does not ultimately fall on the governing tribe. Under §212(5), North Dakota will remit all TPT proceeds from entities operating on a given reservation to the respective governing tribe. R. at 6. Therefore, the tribal government can then disburse the

remitted proceeds to its respective tribal enterprises and members. This tax administration differs significantly from the taxes imposed in *Bracker,* where the Court held that "the economic burden of the state taxes would eventually be passed on to the Indians themselves," thus interfering with Congress's regulatory scheme. *Bracker,* 448 U.S. at 145; *See also Ramah,* 458 U. S. at 844 (preempting tax "whose ultimate burden falls on the tribal organization). Additionally, since the TPT is imposed on the retailer's gross proceeds, rather than the consumer's purchase, it is not an issue that §212(5) does not expressly state an exemption for Indian consumers. R. at 6.

Although the imposition of the tax may result in a decreased number of non-Indian consumers visiting from outside the reservation, this alone does not make the tax unlawful. As the Court held in *Colville,* the fact that a tax "seriously disadvantages" the amount of sales with nonmembers is not a legitimate reason on its own to prohibit a tax. *Colville,* 447 U.S. at 151. Furthermore, North Dakota's TPT licensing requirement is also not an unlawful burden on the tribal enterprise. In comparison to other tax collection cases, this licensing fee is similar to a state-imposed "minimal burden" that has been upheld by this Court. Furthermore, if the governing tribe were to collect the tax itself, it likely would be a greater burden than obtaining the license, as it would likely be required to maintain detailed records of transactions.

2. *Federal enactments and regulations do not imply an intent to preempt North Dakota's application of the TPT against the WCDC.*

There is no implied congressional intent to preempt the imposition of the TPT. In applying the *Bracker* balancing test, the Court has determined Congress's intent by analyzing the language and scope of federal statutes. *See Bracker,* 448 U.S. at 146-148 (holding that there was implied congressional intent to preempt state fuel tax based on the comprehensive federal scheme regulating the harvesting and sale of time); *Ramah,* 458 U.S. at 846 (holding that there was an implied congressional intent to preempt state tax based on the extensive federal statutes

and regulations relating to tribal independence in the field of education). Likewise, the *Warren* Court preempted the imposition of a TPT on a non-Indian business transacting with Indians on a reservation because of Congress's extensive regulations relating to Indian trading. *Warren,* 380 U.S. at 691; *see also Central Machinery Co. v. Arizona Tax Comm'n*, 118 U.S. 160, 166 (1980).

Here, the tax at issue involves a TPT applied against a Section 17 IRA Corporation in Indian country. R. at 7. Therefore, it is necessary to examine the implied congressional intent behind the Indian Reorganization Act and Indian trading regulations. First, Section 17 of the IRA permits the Secretary of the Interior to "issue a charter of incorporation" to a tribe. 25 U.S.C. § 5124 (1990). In *Mescalero,* the Court stated, "The intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" *Mescalero*, 411 U.S. at 152 (quoting H.R.Rep.No.1804, 73d Cong., 2d Sess., 6 (1934)). In this case, the WCDC is a Section 17 IRA Corporation. Since the congressional intent of the IRA was to promote tribal commerce, while also moving away from paternalism, North Dakota's state taxation appears to be in line with the purpose of the IRA. While it is true that the imposition of the TPT may have an effect on the Wendat Tribe's economy, it is also important to note that the tax is applied in a nondiscriminatory manner that treats the WCDC on equal footing with non-Indian enterprises. Therefore, the application of this tax does not conflict with the IRA's purpose of supporting Indian commerce, while also avoiding paternalistic policies.

Next, it is necessary to examine whether federal regulations regarding Indian trading imply an intent to preempt the tax. The tax at issue in this case is a TPT imposed on a retailer located in Indian country, just as in *Warren.* In *Warren,* the Court held that the TPT was preempted due to its burden imposed on Indian traders and tribal members. *Warren*, 380 U.S. at

691 ("This state tax on gross income would put financial burdens on appellant or the Indians with whom it deals in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up…"). Therefore, the imposition of the TPT in this case differs substantially from the TPT at issue in *Warren.* As stated previously, the imposition of the TPT in this case does not impose a significant burden since the proceeds from the TPT are remitted back to the governing tribe. Consequently, the TPT does not conflict with the congressional intent of protecting tribal retailers from additional state-imposed burdens.

3. *North Dakota has a legitimate state interest in imposing its TPT on the WCDC, because the taxation provides a regulatory function and supports tribal interests.*

North Dakota's interest in administering the TPT against the WCDC's development is justified because it provides a beneficial regulatory function for the governing tribe. In Indian tax immunity cases, the Court has held that the state interest must be more than a "generalized interest in raising revenue." *Bracker*, 448 U.S. at 151 (holding that a state's interest is not justified where the state doesn't seek "to assess taxes in return for governmental functions it performs for those on whom the taxes fall"); *see also Ramah*, 458 U.S. at 845 (preempting tax where the state's justification "amounts to nothing more than a general desire to increase revenues"). Similarly, the *Colville* Court held that the tribal interest "is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services" and that a state's interest is "strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services." *Colville*, 447 U.S. at 156-157.

Here, North Dakota has multiple taxation interests, including generating proceeds for its revenue fund, centralizing tax collection, and recognizing its relationship with Indian tribes and the valuable mineral interests ceded by the Maume Indian Nation. R. at 6. Unlike the state action

in *Bracker* and *Ramah,* North Dakota's interests extend beyond merely generating revenue. Under §212(5), North Dakota will remit the proceeds of the TPT collected from all businesses operating on an Indian reservation to its respective tribe. *Id.* The state's purpose for this action is to centralize collection and enforcement. *Id.* As stated in §212(5), "the Tribe could collect the tax itself," but instead the State is performing a regulatory service to promote efficiency. *Id.* Unlike tribal tax immunity cases where a tax imposes a burden on a tribe, here, the State is actually performing a regulatory function that relieves the Tribe of tax collection responsibilities. *See Colville*, 447 U.S. at 151 (holding "state may impose at least 'minimal' burdens on the Indian retailer to aid in enforcing and collecting the tax"). Additionally, unlike in *Bracker*, North Dakota's general revenue fund provides "governmental functions" for the WCDC, including funding for civil courts and maintaining roads. *Bracker*, 448 U.S. at 151. Specifically, since the WCDC intends to collect a significant portion of its revenue from non-Indian consumers living outside of the reservation, North Dakota's maintenance of its roads provides a direct and substantial benefit. R. at 6.

While it is true that the proceeds of the TPT will likely be significantly derived from value generated by the WCDC's own activities, including its cafe, cultural center, and museum, it does not hold that those tribal interests therefore outweigh the state's interests. Here, unlike in *Colville*, the proceeds from the tax are remitted back to the governing tribe. As stated in *Colville*, there is no automatic tribal taxation immunity and tribal sovereignty doctrine involves "an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." *Colville,* 447 U.S. at 156. Here, where North Dakota has a legitimate regulatory interest and proceeds are remitted to the governing tribe, the state interests justify the minimal burden imposed on the tribe.

D. Assuming the Topanga Cession is Maumee land, the WCDC has limited sovereignty over its off-reservation development.

If the WCDC's development is located on Maumee land, the Wendat Band's sovereignty over the complex is severely limited. Under 18 U.S.C. § 1151, "Indian country" refers to a designated geographic area. 18 U.S.C. § 1151 (1949). Although the Court has maintained that the definition of "Indian country" includes more than formal reservation boundaries, it nevertheless has repeatedly affirmed the significance of sovereignty's geographic component. In *Mescalero,* the Court held that "State authority over Indians is yet more extensive over activities . . . not on any reservation." *Mescalero,* 411 U.S. at 148 (quoting *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962)). Similarly, in *Bracker*, the Court held that the geographical component of tribal sovereignty is "highly relevant," although not dispositive, in preemption analysis. *Bracker*, 448 U.S. at 151. Therefore, if the Topanga Cession is Maumee land and the WCDC has planned to open an off-reservation commercial-residential complex, it has subjected itself to greater state authority. Although North Dakota's collection of its TPT is not prohibited regardless of the Topanga Cession's governing tribe, if the WCDC's complex is located on Maumee land, the Wendat Band's sovereignty over the development is substantially limited.

CONCLUSION

For the foregoing reasons, this Court should deny the decision of the United States Court of Appeals for the Thirteenth Circuit and hold that 1) the Topanga Cession is located on the Maumee Reservation and 2) the State of North Dakota may levy its Transaction Privilege Tax in the Topanga Cession.

Respectfully submitted,

January 2021 *Counsel for Petitioner*