No. 20-1104

IN THE
SUPREME COURT OF THE UNITED STATES

MAUMEE INDIAN NATION,
Petitioner,

v.

WENDAT BAND OF HURON INDIANS,
Respondent.

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

BRIEF FOR PETITIONER

Team No. T1005

Counsel for Petitioner

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QUESTIONS PRESENTED

1. Whether the Treaty with the Wendat abrogated the Treaty of Wauseon and/or whether the Maumee Allotment Act of 1908 diminished the Maumee Reservation. If so, whether the Wendat Allotment Act also diminished the Wendat Reservation.
2. Assuming the Topanga Cession is still in Indian country, whether either the doctrine of Indian preemption or infringement prevents the State of New Dakota from collecting its Transaction Privilege Tax against a Wendat Tribal Corporation.

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

This case involves a dispute between two federally recognized Indian tribes, the Maumee Indian Nation and the Wendat Band of Huron Indians. It also concerns the circumstances under which Congress can extinguish rights it previously granted to a sovereign nation and the application of state authority to Indian tribes.

Both tribes have a treaty relationship with the United States. The Treaty of Wauseon with the Maumee Nation was ratified in 1802, and reserved to the Maumee Nation the lands west of the Wapakoneta River. Treaty of Wauseon, Oct. 4, 1801, 7 Stat. 1404. The Treaty with the Wendat was ratified in 1859 and reserved to the Wendat Band the lands east of the Wapakoneta River. Treaty with the Wendat, March 26, 1859, 35 Stat. 774. In the years between the ratification of the two treaties, the Wapakoneta River moved three miles to the west, creating a tract of land in which was west of the River in 1802 and east of the River in 1859. This area, located in Door Prairie County, is known as the Topanga Cession, and both tribes claims that it belongs to their reservation.

Both the Maumee Nation and the Wendat Band were also subject to allotment by Congress: the Wendat Band in the Wendat Allotment Act in 1892 and the Maumee Nation in the Maumee Allotment Act of 1908. The Wendat Band was paid exactly $2,200,000 in "complete and total" compensation for the western half of its treaty lands. Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892). The Maumee Nation was paid about $2,000,000 for an indeterminate amount of land in the eastern quarter of its reservation. Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908). The exact amount of money paid to the Maumee and the parcels of land for which the Maumee were actually compensated are both unknown, as the Bureau of Indian Affairs has lost or spoilt those record.

The State of New Dakota requires businesses in the state to obtain a Transaction Privilege Tax (TPT) license and collects 3% of the gross proceeds of sales or income from each licensed business. 4 N.D.C §212(1-2). Tribal businesses operating on their own reservation land held in trust with the United States do not have to procure TPT licenses or pay the tax. 4 N.D.C §212(4). New Dakota also remits to the governing tribe the 3% TPT proceeds from any business operating on their reservation that does not fall within the exception of §212(4). 4 N.D.C §212(5). Finally, New Dakota remits specifically to the Maumee nation half of the TPT (1.5% of gross proceeds) collected from businesses in Door Prairie County that are not in Indian Country. 4 N.D.C §212(6).

Though the ownership of the Topanga Cession has always been disputed, the present issue arose after the Wendat Band's purchase in 2013 of land in the Topanga Cession upon which they planned to build a development owned by the Wendat Commercial Development Corporation (WCDC), which is an IRA § 17 Corporation wholly owned by the Wendat Band. This development is to include a shopping complex comprised of a café, grocery store, salon/spa, bookstore, and pharmacy, as well as a museum, cultural center, public housing and a nursing care facility.

In 2015, the Maumee Nation notified the Wendat Tribal Council that the Maumee Nation viewed the WCDC as a non-member business operating on the Maumee Reservation, and thus expected it to obtain a TPT license and pay the 3% tax on its business to New Dakota, which would then be remitted to the Maumee. The Wendat Tribal Council and the WCDC refused to do so, arguing that the Topanga Cession had become part of the Wendat Reservation upon ratification of the Treaty with the Wendat in 1859, and alternatively that it had reverted back to Wendat control following the 1908 Allotment Act. It also argued that

because the shopping center is located in Indian country, New Dakota is prevented from collecting the TPT by the doctrines of Indian preemption and infringement.

II. STATEMENT OF THE PROCEEDINGS

The Maumee Indian Nation filed a complaint against the Wendat Band in United State District for the District of New Dakota on November 18, 2015. *Maumee Indian Nation v. Wendat Band of Huron Indians*, 305 F. Supp. 3d 44, 48 (D. New Dak. 2018). The complaint sought declaratory judgement that the Topanga Cession is part of the Maumee reservation, and that any development on it must file for a TPT license and pay the 3% tax to the state of New Dakota, who shall remit it back to the Maumee Nation. *Id.* Alternatively, the Maumee sought declaration that the Topanga Cession is not in any Indian country, and therefore must file for a TPT license and pay the 3% tax to the state of New Dakota, who shall remit half of the proceeds back to the Maumee Nation per 4 N.D.C. § 212(6). *Id.* The Wendat Band answered that imposition of the TPT would violate the doctrines of both infringement and preemption. *Id.* at 44. It further argued that the Topanga Cession was part of the Wendat reservation, so the State shall remit all of the proceeds back to the Band. *Id.*

The District Court ruled in the Maumee's favor on both issues. *Id.* at 49. It held that the Topanga Cession belonged to Maumee per the Treaty of Wauseon, after which Congress provided no clear intention to diminish the reservation via the Treaty with the Wendat or the Maumee Allotment Act of 1908. *Id.* The court also found that neither the doctrine of infringement or preemption justified denial of the TPT in this case. *Id.* Therefore, it found that the WCDC must file for the license and pay the tax which should be remitted to the Maumee Nation. *Id.*

The Wendat Band appealed to the United States Court of Appeals for the Thirteenth Circuit. *Wendat Band of Huron Indians v. Maumee Indian Nation*, 933 F.3d 1088 (13th Cir. 2020). The case was held until after the U.S. Supreme Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). *Id.* The Court of Appeals held that the Topanga Cession was part of the Wendat Reservation because the Treaty with the Wendat of 1859 diminished the Maumee reservation and the Wendat Allotment Act did not diminish the Wendat Reservation. *Id.* It further held the State of New Dakota was prohibited from enforcing the TPT because it both infringed on tribal sovereignty and is preempted by federal Indian law. *Id.* at 1089.

The Maumee Indian Nation filed a petition to the U.S. Supreme Court who granted certiorari to decide (1) whether the Topanga Cession belongs to the Maumee Reservation, the Wendat Reservation, or neither and (2) whether preemption or infringement prohibits the enforcement of New Dakota's TPT on the WCDC.

SUMMARY OF ARGUMENT

The Topanga Cession is part of the Maumee Reservation because neither the Treaty with the Wendat nor the Maumee Allotment Act of 1908 diminished the Maumee Reservation land as established by the Treaty of Wauseon. Furthermore, neither the doctrine of Indian preemption or infringement prevents the State of New Dakota from collecting its Transaction Privilege Tax against the WCDC. Alternatively, if the Court finds that the Maumee Reservation was diminished, it should find that the Topanga Cession is outside of Indian Country because the 1892 Wendat Allotment Act diminished the Wendat Reservation.

The Treaty with the Wendat did not abrogate the Treaty of Wauseon and did not diminish the Maumee Reservation. This Court has repeatedly held that Congress must show

explicit intent to diminish the pre-existing treaty rights of Indian nations and that courts should use caution and impute good faith to Congress when deciding whether that intent was present. *See United States v. Dion*, 476 U.S. 734, 739 (1986); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 568 (1903). Neither the Treaty with the Wendat nor its legislative history shows that Congress intended to remove the Topanga Cession from the Maumee Reservation, or even that they understood the conflict that would arise over the Topanga Cession. In order to assume that Congress acted in good faith to both tribes, this Court must find that the Treaty with Wendat did not transfer the Topanga Cession to the Wendat Reservation. Therefore, the Topanga Cession remained part of the Maumee Reservation after 1859.

The Maumee Allotment Act of 1908 also did not diminish the Maumee Reservation. This Court has held that declaring tribal land surplus or opening it for allotment does not on its own imply that it has been removed from a reservation; Congress must express clear intent to diminish a reservation before a court may find that it has done so. *See Solem v. Bartlett*, 465 U.S. 463, 470 (1984). Courts should not use legislative history and demographic evidence to find an intent not supported by the statutory text. *See McGirt v. Oklahoma*, 140 S. Ct. 2452, 2469 (2020). Applying *McGirt* to the instant case, this Court should find that Congress did not directly express intent to diminish the Maumee Reservation, and that the allotment of Maumee lands was consistent with continued reservation status. Even if the Court considers extratextual evidence to make a decision, it should still find insufficient Congressional intent for the Maumee Allotment Act to diminish the Maumee Reservation. Therefore, the Topanga Cession land still remained part of the Maumee Reservation after 1908. If the Court accepts the above arguments, an investigation of the Wendat Allotment Act is unnecessary.

In that case, the court should also find that the TPT is not preempted by federal law and does not infringe on tribal sovereignty. The notion that Indians are exempt from state taxation on their own reservations is well established. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985). However, "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973).

In this case, New Dakota designed the TPT to comply with federal Indian law. First it exempts all tribes and tribal businesses operating on their own reservations on land held in trust with the United States. 4 N.D.C § 212(4). Second, the state commits to remit the proceeds of this tax which are collected on any reservation to that reservation's respective tribe. 4 N.D.C § 212(5). Regardless of which reservation the Topanga Cession is a part of, it is undisputed that the land is not held in trust, but in fee, subjecting any businesses on it to the TPT per § 212(5).

The Court should hold that the TPT is valid because it is neither precluded by federal law, nor does it unlawfully infringe on tribal sovereignty. After weighing the federal, state, and tribal interests at play, there is no compelling argument to prevent enforcement of the tax. The federal government has no stated regulations concerning the operations of a general commercial centers on reservations. Nor are there any specific federal goals which might be impeded by applying the TPT. New Dakota also has a legitimate interest in advancing the state's commercial activities. However, the state's true interest in this case is in returning the funds to the respective tribe. And the Wendat Band should not be immune to state interference when conducting commercial activities outside their own reservation.

The TPT also does not infringe on the rights of the reservation Indians, which is the Maumee Nation. The WCDC is a non-member operating on their reservation, which allows for state regulation. Additionally, it is the Maumee who seek enforcement of the TPT, so the argument that it could infringe on their tribal rights is without merit.

If, however, the Court does not find that the Topanga Cession is part of the Maumee Reservation because it was diminished by either the Treaty with the Wendat or the 1908 Allotment Act, it should also find that the 1892 Allotment Act diminished the Wendat Reservation. A presumption of Congressional intent to diminish a reservation is supported when the act in question demonstrates an unconditional commitment to compensate the tribe for the taken land. *See Solem,* 465 U.S. at 470. Unlike the Maumee Allotment Act, the Wendat Allotment Act provided for "complete and total" compensation to the Wendat Band for their land, which constitutes sufficient evidence to suggest that Congress intended the Wendat Allotment Act to diminish the Wendat Reservation. Therefore, in the event that this Court rules against the Maumee Nation on it first two arguments, it should find that, both reservations having been diminished, the Topanga Cession is not in Indian Country. In that event, the WCDC must obtain a TPT license and the State of New Dakota will remit to the Maumee Nation half of the TPT (1.5%) collected from the WCDC pursuant to 4. N.D.C. §212(6).

ARGUMENT

I. THE TOPANGA CESSION HAS BEEN PART OF THE MAUMEE RESERVATION SINCE 1802 BECAUSE THE TREATY WITH THE WENDAT DID NOT ABROGATE THE TREATY OF WAUSEON, AND THE 1908 ALLOTMENT ACT DID NOT DIMINISH THE MAUMEE RESERVATION.

This Court should find that the Thirteenth Circuit erred in holding that the Treaty with the Wendat abrogated the Treaty of Wauseon. It should also find that the Allotment Act of 1908 did not diminish the Maumee reservation.

This Court has found in a number of cases that Congress must express clear intent to abrogate treaties or diminish the rights and claims of Indian Nations before courts may find that they have done so. *See, e.g.*, *Dion*, 476 U.S. at 740; *McGirt,* 140 S. Ct. at 2469.

There is no clear language in the Treaty with the Wendat or its legislative history that shows an intent by Congress for the Treaty to abrogate the Treaty of Wauseon and extinguish the Maumee Nation's claims to that land. Nor is there clear language in the 1908 Allotment Act or its legislative history that shows Congressional intent to diminish the Maumee reservation via that Act. Therefore, the Topanga Cession remains part of the Maumee Reservation, notwithstanding the Treaty with the Wendat and the Allotment Act, and the Maumee Nation is entitled to remittance of the 3% TPT from the WCDC pursuant to 4 N.D.C. §212(5).

A. The Treaty with the Wendat did not abrogate the Treaty of Wauseon.

The Thirteenth Circuit erred in concluding that the Treaty with the Wendat implied abrogation of the Treaty of Wauseon because there is no clear evidence that Congress intended in 1859 to abrogate its existing treaty with the Maumee Nation.

1. **Courts should use caution when deciding whether Congress has expressed clear intent to abrogate previously agreed-upon treaty rights.**

This Court has repeatedly reiterated the importance of using extreme caution when deciding whether Congress meant to abrogate previously agreed-upon treaty rights. *See, e.g.*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 229 U.S. 498 (1999); *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019). Though Congress has the ultimate authority to abrogate treaties by way of other treaties or statutes, it must express the clear intent to do so; extinguishment of tribal rights requires "plain and unambiguous action" on the part of Congress. *United States v. Santa Fe P.R. Co.*, 314 U.S. 339, 346 (1941). "An intention to alter, and, pro tanto, abrogate, [a] treaty, is not to be lightly attributed to Congress." *United States v. Payne*, 264 U.S. 446 (1924).

Courts may infer intent in the absence of clear statutory language only if there is clear evidence in the statute's legislative history and surrounding context that Congress "actually considered the conflict between its intended action on the one hand and treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Dion*, 476 U.S. at 739-40. Courts cannot assume that a statute has abrogated treaty rights in "a backhanded way." *Id.* at 739 (quoting *Menominee Tribe v. United States*, 391 U.S. 404, 412 (1968)). *See also Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463 (1979).

Because treaty agreements were historically understood as making Indian Nations legally "wards of the [United States], and dependent wholly upon its protection and good faith," *Choate v. Trapp*, 224 U.S. 665, 675 (1912), courts should assume that Congress has acted in good faith and judgement whenever possible. *See Lone Wolf*, 187 U.S. at 568.

2. Congress did not express sufficient intent to abrogate the Treaty of Wauseon via the Treaty with the Wendat.

The Treaty with the Wendat makes no reference to the Maumee Nation whatsoever. Under the authority of *Dion*, in order for the Court to assume intent to abrogate the Treaty of Wauseon, it would have to find contextual evidence that Congress understood the conflict arising from the Wapakoneta River's movement and resolved that conflict by divesting the Maumee Reservation of the Topanga Cession. *Dion*, 476 U.S. at 739-740. The legislative history of the Treaty with the Wendat expresses no such thought process on the part of Congress to abrogate its treaty with the Maumee. In fact, Senator Foot indirectly referenced the continued existence of the Treaty of Wauseon *without* indicating that he thought the Treaty with the Wendat would affect it in any way. Cong. Globe, 35th Cong., 2nd Sess. 5411-12 (1859). He suggested that because the Maumee had "yielded their claims to the bulk of the territory" in the Treaty of Wauseon (without referencing any later abrogation of the reservation status of the Topanga Cession), the United States should leverage this to secure additional cessions from the Wendat. *Id.* There is no evidence in the record that the debating Senators understood the conflict between the Maumee's treaty rights and its ambiguous language about the Wapakoneta River. Indeed, there is no evidence that they realized the river had moved to the west at all.

Moreover, if the Court is to assume that Congress has acted in good faith, it must find that the Treaty with the Wendat did not abrogate the Treaty of Wauseon. To hold otherwise is to find that Congress entered into a treaty with another Nation with the intention of diminishing land it had formerly promised the Maumee, without notifying or consulting them. Knowingly promising the same tract of land to two Nations can hardly be considered acting in good faith, nor with good judgement, in its dealings with either. While it was

certainly careless for Congress to not specify the boundaries of the Wendat Reservation in the Treaty with the Wendat, it is not "a backhanded way" of abrogating treaty rights. *Dion*, 476 U.S. at 739.

The Treaty of Wauseon was not entered lightly by the Maumee. To hold that their right to the land they bargained for has been extinguished with no clear evidence of Congressional intent goes against all of this Court's previous policy on this matter. Congress did not express anything like clear intent to abrogate the Treaty of Wauseon, nor can that intent be attributed to them in good faith. In sum, there is not nearly enough evidence in the record to conclude that Congress understood the conflict over the land and knowingly resolved it by abrogating the Treaty of Wauseon. For these reasons, this Court should find that the Treaty with the Wendat did not abrogate the Treaty of Wauseon, and therefore that the Topanga Cession remained part of the Maumee Reservation after 1859.

B. The Maumee Allotment Act of 1908 did not diminish the Maumee Reservation, and the Topanga Cession is still part of the Maumee Reservation.

This court should find that the Thirteenth Circuit erred in its interpretation of *McGirt v. Oklahoma*. The Thirteenth Circuit held the instant case for two years pending this Court's decision in *McGirt*, then found that the Wendat Allotment Act did not diminish the Wendat Reservation. It acknowledged ambiguities in the language of the Maumee Allotment Act, but declined to examine that issue fully in light of the *McGirt* decision, having held that the Treaty with the Wendat abrogated the Maumee Nation's claim to the Topanga Cession. *Wendat Band,* 933 F.3d at 1088. A full application of the McGirt decision to the Maumee Allotment Act supports a finding that it did not diminish the Maumee reservation.

1. **Congress must express clear intent to diminish a reservation; subjecting land to allotment or declaring it surplus does not automatically deprive it of reservation status.**

For a court to find that an act has diminished a reservation, Congressional intent must be clearly expressed either "on the face of the Act" or by "surrounding circumstances and legislative history." *Mattz v. Arnett*, 412 U.S. 481, 505 (1973); *see also Seymour v. Superintendent of Wash. State Penitentiary*, 386 U.S. 351, 355 (1962); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998).

In *Solem v. Bartlett*, the Court explained that intent to diminish a reservation can be imputed to Congress in the absence of specific statutory language only if other factors "unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Solem v. Bartlett*, 465 U.S. 463, 471 (1984).

Merely declaring land surplus in an allotment act is not sufficient to abrogate its reservation status; even if Congress opens land to settlement, sells the title of individual plots on that land, and allocates the proceeds of the sale to the tribe, "the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem,* 465 U.S. at 470 (citing *United States v. Celestine*, 215 U.S. 278, 285 (1909)); *see also DeCoteau v. Dist. Cnty. Ct. for Tenth Jud. Dist.,* 420 U.S. 425 (1975).

Relying on the above, this Court reiterated in *McGirt* that the purpose of allotment was to allow settlers to own land on a reservation, not necessarily to disestablish or diminish the reservation itself. *McGirt*, 140 S. Ct. at 2464 (2020). It specified that the factors laid out in *Solem* to be considered when deciding a disestablishment question, particularly "extratextual evidence," can be used only to supplement or clarify the plain meaning of the statutory language. *Id.* at 2469 (noting that a court may not "favor contemporaneous or later

practices *instead of* the laws Congress passed."); *see also Nebraska v. Parker*, 136 S. Ct. 1072, 1082 (2016) (holding that this type of evidence has "limited interpretive value"); *Yankton Sioux*, 522 U.S. at 356. In *Oneida Nation v. Village of Hobart*, the Seventh Circuit, following *McGirt*, further explained that finding Congressional intent to diminish a reservation without specific statutory guidelines would necessitate cession of reservation status from pockets of land, one at a time, as allotments are selected and land is settled. *Oneida Nation v. Village of Hobart*, 968 F.3d 664, 675 (7th Cir. 2020). This would lead to "a haphazard pattern of diminishment [producing] an impracticable checkerboard pattern of state and Indian jurisdiction," which courts have rejected. *Id.* at 675-76 (citing *Moe v. Confederated Salish & Kootenai Tribes of Flathead Rsrv.*, 425 U.S. 463, 479 (1976)).

2. Congress did not express explicit intent to diminish the Maumee Reservation in the Maumee Allotment Act.

The Thirteenth Circuit waited two years to decide this case pending the outcome of *McGirt* only to decline to apply its reasoning to the Maumee Allotment Act, precluding an analysis by finding that the Treaty with the Wendat abrogated the Maumee's claim to the Topanga Cession (the court conveyed, however, its impression that the Allotment Act's language was ambiguous). No court so far has fully examined the facts of this issue with *McGirt* in mind.

The 1908 Allotment Act does not contain language that expressly indicates an intent to disestablish the Maumee Reservation. According to the Act, the Maumee "agreed to consider the entire eastern quarter surplus and to cede their interest in the surplus lands." Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908). As discussed above, declaring land surplus does not necessarily imply extinguishment of its reservation status. Furthermore, the Act provided that the United States would compensate the Maumee only for

the lands "actually sold." *Id.* This implies that the Maumee would remain free to do as they saw fit with any land not sold. The legislative record of the Maumee Allotment Act supports this reading; Mr. Gaines of Tennessee asked whether "all lands unsold will continue to belong to the Indians…[u]ntil there is payment the land belongs to the Maumee?" 42 Cong. Rec. 2345 (1908). No objection was expressed to this framing. *Id.* Because the Bureau of Indian Affairs no longer has the records, there is no way of knowing the parcels of land for which the Maumee were actually compensated. Congress, by choosing not to compensate the Maumee for the land in its entirety, likely did not intend to establish an indeterminate "checkerboard" of jurisdiction. *See Village of Hobart*, 968 F.3d at 675. Therefore, the "interest" the Maumee agreed to cede probably refers to the financial management of the land and its distribution to settlers, rather than requiring the Maumee to incrementally cede their tribal sovereignty over each block of reservation land as it was sold. Read in the context of the rest of the Act, whose sections are concerned almost exclusively with the financial aspect of surveying and allotting land, it is clear that the cession language is focused on changing the method of interaction between the government and the settlers of the land, not on diminishing the Maumee Reservation.

3. Even considering extratextual evidence to interpret the Allotment Act, Congress has not expressed explicit intent to diminish the Maumee Reservation.

As this Court has instructed, extratextual evidence, along with demographic evidence like census data and selection of allotments, cannot override the original meaning of the Allotment Act itself, which is to allow settlers to purchase land and does not demonstrate a specific intent to diminish the Maumee Reservation. However, even if the Court were to consider the legislative and demographic history of the Act, no clear intention comes to light. It is true that the legislative history of the 1908 Allotment Act gives the impression that at

least several of the House members, in particular Mr. Ferris, believed that the Act would eventually lead to the dissolution of the Maumee Reservation. 42 Cong. Rec. 2345 (1908). It is not clear, though, that this vaguely expressed belief was widely held, and is also not the same as an intent to diminish the Maumee reservation directly via the Act itself. It is equally true, moreover, that the Maumee Nation has openly claimed the Topanga Cession as its land since the Allotment Act, and the government has made no effort to claim otherwise. The fact that few tribal members selected allotments on the Topanga Cession following the Act does not bear on the status of tribal ownership, nor does the number of individual tribal members residing or owning property on the land. *See Solem*, 465 U.S. at 470.

4. The Topanga Cession has been part of the Maumee Reservation since the ratification of the Treaty of Wauseon in 1802.

The Topanga Cession has been part of the Maumee Reservation since the ratification of the Treaty of Wauseon in 1802. The District Court for the District of New Dakota relied on a persuasive body of precedent to conclude that, based on the particular facts of this case and language of the relevant statutes, it was "unable to find any intent to diminish the Maumee Reservation." *Maumee Indian Nation v. Wendat Band of Huron Indians*, 305 F. Supp. 3d 44 (D. New Dak. 2018). The Thirteenth Circuit departed from that precedent and erred in finding that the Allotment Act diminished the Maumee Reservation. *Wendat Band of Huron Indians v. Maumee Indian Nation*, 933 F.3d 1088 (13th Cir. 2020).

This Court should find, following the precedent of *McGirt*, that the Maumee Allotment Act of 1908 did not diminish the Maumee Reservation because Congress did not express the clear intent for it to do so. Therefore, the Topanga Cession remained part of the Maumee Reservation after 1908 because the reservation was not diminished by the Maumee Allotment Act. Since the Maumee Reservation was also not diminished by the Treaty with

the Wendat (see Part A), the Topanga Cession has been part of the Maumee Reservation since the Treaty of Wauseon's ratification in 1802. The WCDC thus constitutes a non-member entity operating on the Maumee Reservation that does not fall within the exemption of §212(4) of the TPT, and must pay the 3% Transaction Privilege Tax to be remitted to the Maumee Nation as per 4 N.D.C. §212(6).

II. NEW DAKOTA'S APPLICATION OF THE TPT TO WCDC IS NEITHER PRECLUDED BY FEDERAL LAW NOR WOULD ITS APPLICATION INFRINGE ON TRIBAL SOVEREIGNTY BECAUSE IT IS A NON-MEMBER ON THE MAUMEE RESERVATION.

The Court should reverse the Thirteenth Circuit's error in finding that the application of the TPT is preempted by federal law and would infringe on tribal rights. Applying a tax to a commercial center is not preempted by any express federal law or policy goal. Nor would it infringe on the rights of the governing tribe, who seek enforcement of the tax in the instant case.

In *Williams v. Lee*, 358 U.S. 217 (1959), the court enumerated the two possible barriers to application of state authority over non-members; preemption by state authority or infringement on tribal sovereignty. Either one can invalidate a state law as applied to the reservation, tribe or Indian. The two are separate but related, with the federal and Indian interests relevant to both. The Court has at times also considered the state's interests in regulation or taxing. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980) ("any applicable regulatory interest of the state must be given weight"); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 171 ("notions of Indian sovereignty have been adjusted to take account of the State's legitimate interests in regulating the affairs of non-Indians"). While New Dakota does have a valid interest in enforcement in the instant case, it does not need to be weighed against tribal interests as they are aligned in seeking to enforce

the TPT. There are also no federal laws or policies about the operation of a general commercial center on the reservation which could preempt application of the TPT. Finally, WCDC is a non-member, and application of the TPT therefore would not infringe on the governing tribe's rights. However, if the reservation activities are held to be the exclusive authority of the Maumee Nation, then they are within their power to tax and are using New Dakota as an agent. Using either interpretation, the Court should find the TPT should be applied to the WCDC.

A. The Court should treat the WCDC as non-members on the Maumee reservation and therefore within the state's jurisdiction.

While the Wendat Band is a recognized Indian tribe, commercial activities done off of their own reservation, even on another reservation, are not be afforded the same privileges as those within because they are non-members on that reservation.

Historically, the distinction between Indian status and tribal membership has not been dispositive in most cases. However, the Court has at times used the distinction between members and non-members to determine where state authority may begin. In *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, (1980), the Court validated a state tax on cigarette sales to non-members on the reservation, regardless of Indian status. "[T]he mere fact that nonmembers resident on the reservation come within the definition of "Indian" for purposes of the Indian Reorganization Act of 1934, 48 Stat. 988, 25 U. S. C. § 479, does not demonstrate a congressional intent to exempt such Indians from state taxation." *Id.* at 161. The *Colville* Court acknowledged the tribe's taxation authority, but determined it did not preempt the state's authority to tax non-members of the tribes. Because the tax was reasonably designed to serve a legitimate governmental interest, the state's

interest in raising revenues justified the tax. New Dakota's interest in applying the TPT is strengthened because the Band are non-members operating on another tribe's reservation.

B. The TPT is not preempted by federal law because there is no federal interest in commercial centers.

There are no federal statutes or regulations implicated by the creation of a commercial complex by the Wendat Band. Determining whether exercising state authority over activities of non-Indians, or in this case non-members, on a reservation is valid, requires a "particularized inquiry into the nature of the state, federal, and tribal interests at stake." *White Mountain Apache*, 448 U.S. at 144-45. This includes a review of relevant the text of federal treaties and statutes, and their underlying policies, and with the historical backdrop of tribal sovereignty. *Id.* Federal interests may be either explicit in the statutes and regulations, clearly indicating no additional regulation or tax by the state would be permitted, or it may be implied, where it would impede the goals of federal Indian laws or programs. *See, e.g.*, *White Mountain Apache*, 448 U.S. 136 (1980); *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965). The federal government has no statues, regulations, or policies around commercial centers, leaving ample room for state authority over the matter and the Court should find TPT valid in this case.

1. There are no federal statutes or regulations implicated by the creation of a commercial complex by the Wendat Band.

There are no federal statutes on the operation of such general businesses as a café, grocery store, salon/spa, bookstore, museum, cultural center and pharmacy that would prevent a non-member from being taxed on the reservation.

When there is extensive federal involvement in a type of commercial activity, additional burdens by the state may not be imposed. *White Mountain Apache*, 448 U.S. at

151. In *White Mountain Apache*, the Court invalidated a state motor carrier license requirement and fuel tax on a non-Indian company for its operations on tribal and BIA roads by pointing to comprehensive federal regulation and management of Indian timber, including Acts of Congress, detailed regulations by the Secretary of the Interior, and "literally daily supervision" by the Bureau of Indian Affairs. *Id.* at 147. The Secretary was required to approve all sales of timber and to direct all resulting profits to the Indian owners' benefit. *Id.* The Court found that the tribe would bear the ultimate economic burden of the taxes, interfering with the profits meant for the benefit the tribe. *Id.* at 149, 151. Federal regulations also required the development and maintenance of the roads used, making the state requirements duplicative. *Id.* at 150. "In these circumstances we agree with petitioners that the federal regulatory scheme is so pervasive as to preclude the additional burdens sought to be imposed in this case." *Id.* at 148.

2. There are also no implied federal regulations around commercial centers, nor any policy goals that would be impeded by the application of the TPT.

There are also no federal policies which could implicitly preempt taxation of the WCDC's shopping complex. In *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965), the Court held that a state gross proceeds tax on a reservation trading business was preempted by comprehensive federal regulation of Indian traders, despite not being precluded explicitly by any federal statute. The full federal regulation over Indian traders, beginning with the Commerce Clause, U.S. Const. art. I, § 8, cl 3, and including regulations over minute details, left no room available for the operation of state laws which imposed additional burdens. *Id.* at 688-90. The complete federal coverage of regulation on Indian traders was re-affirmed in *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980). Another comprehensive federal regulatory scheme which precluded

enforcement of state taxes is education. *Ramah Navajo Sch. Bd., Inc. v. Bur. of Revenue*, 458 U.S. 832 (1982) (holding a state gross proceeds tax on a non-Indian construction company for building a school on a reservation was preempted by federal policies on Indian education).

The only federal policy which could possibly be implicated by the WCDC's commercial complex is that the profits are intended to fund the public housing and nursing care facilities, enabling the Wendat Band to further its economic development and achieve higher self-sufficiency. This is a general policy goal and the relationship between the source of funds and their stated intended use is too attenuated to import the policy goal back to the source of the funds, which is otherwise unencumbered. If the stated use of funds could be used to protect the activity at source, every single commercial tribal activity could be alleged for that purpose. Congress and the Supreme Court have clearly indicated that while the bearer of ultimate economic burden is relevant, discussed below, the question of preclusion is based on the actual activity at stake. *See, e*.g., *Williams v. Lee*, 358 U.S. 217 (1959); *Warren Trading*, 380 U.S. 685 (1965); *White Mountain Apache*, 448 U.S. 136 (1980); *Washington v. Confederated Tribes of the Colville Indian Rsrv.*, 447 U.S. 134 (1980).

3. New Dakota's interest in applying the TPT would be valid, but is superseded by its commitment to return the funds to the tribe.

New Dakota created the Transaction Privilege Tax in order to further the state's commercial capabilities, which justifies its application to the WCDC. The Court has required that a state have a "specific, legitimate regulatory interest" in the activity before it may tax it. An interest in generally raising revenue, or for the purpose of funding off-reservation services is not sufficient to justify taxation. *White Mountain Apache*, 448 U.S. at 150; *Ramah*, 458 U.S. at 844.

While the New Dakota TPT is paid into the general revenue fund, it is applied to businesses operating within the state for the purpose of facilitation of a robust and viable commercial market for the benefit of those businesses. The funds support, among other things, funding for civil courts to adjudicate contracts disputes and collection actions and for maintaining roads and other infrastructure. Both of these services also benefit the Wendat Band and would especially help support the development of the WCDC. Tribes are permitted and often need to utilize state courts to adjudicate contracts and debts. *Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Eng'g*, 467 U.S. 138 (1984) (holding that a state court jurisdiction over an action brought by the tribes was compatible with tribal autonomy). Building a commercial center of that magnitude will require numerous contracts with non-Indians. Additionally, the WCDC hopes to bring in business from off the reservation; doing so requires the use of state infrastructure and those individuals are also recipients of other state services.

Regardless, New Dakota's true interest in this case is in returning the funds to the local governing tribe. It exempts tribal companies operating on their own reservations on land held in trust, and commits to return the TPT from all other businesses on reservation land to its respective tribe. 4 N.D.C. § 212. Thus, New Dakota's interest need not be weighed against the interest of the Maumee because they are aligned in seeking enforcement of the TPT, for the ultimate benefit of the Maumee.

4. The Wendat Band's rights are not at-risk when they are off the reservation, nor is their economic burden relevant to the *Williams* tests.

It is the interests of the governing tribe that should be balanced during the *Williams* tests. As the Topanga Cession is part of the Maumee reservation, it is the Maumee tribe's right to be free from state interference on its land that should be considered by the Court.

While the impact on the Wendat Band's interests need not be considered, they are nevertheless of note. The Wendat Band would bear the ultimate economic burden of the TPT, but that does not infringe on their right to self-governance in activities beyond their own reservation's borders.

In *White Mountain Apache*, 448 U.S. at 151, the Court pointed to the fact that the ultimate economic burden of the tax on the non-Indian logging company would be borne by the tribe as part of the reason it was preempted by federal law. But the taxes in that case were assessed for on-reservation services performed for the tribe. *Id.* "The Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the preemption inquiry; though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits." *Id*. On the other hand, states are permitted to impose a tax on tribal activities beyond their reservation. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) (holding that a gross receipts tax was valid against a ski resort owned by the Mescalero Apache Tribe because it was not on the reservation). This points to a policy, supported by a large body of precedent, that a tribe's right to be free from taxation ends at its own borders. The no suitable reason in the instant case to deviate from that precedent. Because the WCDC is not on the Wendat Band's reservation, they therefore cannot point to their economic burden to escape the TPT.

C. A law cannot be said to infringe on a tribe's sovereignty when that same tribe is suing to seek its enforcement, as in the instant case.

The Petitioner of this case is the Maumee Indian Nation, who seeks to enforcement of the TPT on the WCDC on their own reservation. While taxation often risks undermining tribal sovereignty, that risk is not present here.

State authority is barred where it infringes "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). The *Williams* Court held a state court did not have jurisdiction over a debt collection action by a non-Indian against Indians over debt incurred at his store on the reservation. While Indians may choose to use state courts to pursue non-Indian defendants, the use of state court against an Indian defendant for an occurrence on the reservation would have infringed on the tribe's ability to govern itself and its members. *Three Affiliated Tribes*, 467 U.S. 138 (1984); *Williams*, 358 U.S. at 223. "The cases in this Court have consistently guarded the authority of Indian governments over their reservations." *Williams*, 358 U.S. at 223; *see also*, *Fisher v. Dist. Ct. of the Sixteenth Jud. Dist.*, 424 U.S. 382 (1976) (holding that state court jurisdiction over an adoption proceeding in which all parties were members of the Northern Cheyenne Tribe would infringe on tribal sovereignty); *Kennerly v. Dist. Ct. of the Ninth Jud. Dist.*, 400 U.S. 423 (1971) (holding that a state court had no jurisdiction over a suit against a tribe for a debt that arose on the reservation). "Over the years this Court has modified [the Worcester principle] in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized." *Williams*, 358 U.S. at 219-220. Only state actions which implicate the rights of the resident Indians can be construed as infringing.

Application of the TPT would have no detrimental effect on the Maumee Nation, it's members, or it's reservation. In fact, it's application would be the to benefit of the Nation. It is impossible for the Court to hold that a state law might infringe on a tribe's sovereignty when that Tribe is seeking its enforcement.

If the Court believes that the authority to tax the businesses of even non-members on the reservation, it implicitly holds that it would be within the Maumee's power to enforce the

tax. Protecting tribal rights on the reservation has often required extending tribal authority to include jurisdiction over non-members acting on its reservation in civil contexts. Congress has also unambiguously indicated that a governing tribe has criminal jurisdiction over all Indians acting on their reservation, regardless of tribal affiliation, through the 1991 "Duro-fix" amendment to the Indian Civil Rights Act, 25 U. S. C. § 1301; a distinction that was affirmed by the Court in *United States v. Lara*, 541 U.S. 193 (2004). This established policy shift toward treatment of Indians as a group may support the same treatment in civil contexts as well. In which case, the Maumee is undoubtedly within its rights to ask the WCDC to comply. Further, a tribe's ability to govern within its reservation, including imposing taxes and regulations on businesses, is well established. While the TPT is authorized by state law and imposed by the State, the proceeds derived on a reservation are returned in full to the governing tribe, in this case the Maumee. In this way, the state is effectively acting as an agent for the Maumee, fulfilling collection activities on their behalf, which is recognized in the law as written: "While the Department of Revenue recognizes that each Tribe could collect this tax itself, the centralization of collection and enforcement by the State of New Dakota is the most efficient means of providing these funds to the tribes." 4 N.D.C. § 212 (4). The Maumee Tribe approves of the collection of the TPT on its reservation as evidenced by this lawsuit in which Maumee seeks to the enforce the tax. Thus, the state is not infringing on the Maumee tribe's rights by enforcing them.

Regardless of whether the Court views the State as having the authority to enforce the TPT, it should absolutely find that the Maumee have this right, and it is appropriately applied to the WCDC.

III. IF THE COURT FINDS THAT TOPANGA CESSIONS IS NOT PART OF THE MAUMEE RESERVATION, IT SHOULD FIND THAT THE WENDAT ALLOTMENT ACT OF 1892 ALSO DIMINISHED THE WENDAT RESERVATION, AND IT IS NO LONGER IN INDIAN COUNTRY AT ALL.

If this Court adopts the arguments advanced in parts I(A) and I(B) of this brief, it will find that the Topanga Cession was never truly contested and remains part of Maumee Reservation land regardless of the Wendat Allotment Act. However, if this Court declines to adopt those arguments and finds that the Maumee reservation was diminished by either the Treaty with the Wendat or the Maumee Allotment Act, it will then examine the Wendat Allotment Act, and should find that it diminished the Wendat Reservation, that the Topanga Cession has been outside of Indian Country since that time, and that the Maumee Nation is therefore entitled to remittance of half of the Transaction Privilege Tax (1.5%) from the WCDC pursuant to 3 N.D.C. §212(6).

1. Courts may infer Congressional intent to diminish a reservation if the language of an act contains unconditional commitment to compensation for the taken land.

If the language of an act makes explicit reference to the "present and total surrender of all tribal interests" in a tract of land, courts may presume that Congress meant to remove that land from a reservation. *Solem,* 465 U.S. at 470. When the act also contains an "unconditional commitment" to compensation for the land, "there is an almost insurmountable presumption" of intent to diminish the reservation. *Id.* at 470-71. This Court has differentiated cases in which maintaining a land's reservation status is "inconsistent with the mere opening of lands," and cases in which allotment can occur without requiring diminishment of a reservation. *DeCoteau*, 420 U.S. at 447-49 (citing *Mattz*, 412 U.S. at 503-05; *Seymour*, 368 U.S. at 355).

2. The Wendat Reservation was diminished because the Wendat Band was paid total and complete compensation for the land declared surplus by the Wendat Allotment Act.

The divided Thirteenth Circuit found that there was no cession language in the Wendat Allotment Act that would imply the diminishment of the Wendat Reservation. *Wendat Band*, 933 F.3d at 1088. However, Judge Lahoz-Gonzales, in dissent, concluded that both reservations had been diminished; "the Maumee Act contains clear cession language while the Wendat Act clearly contains an unequivocal commitment to pay a sum certain." *Id.* at 1089. As this brief has addressed, the cession language of the Maumee Allotment Act is not sufficient to diminish the Maumee reservation because it does not require a present or total surrender of tribal interests, and its provisions are consistent with continued reservation status (see Part I(B)(1)).

On the other hand, the Wendat Allotment Act stipulates the exact amount, $2,200,000, that Congress was to pay as "total and complete compensation" for the land. Wendat Allotment Act §2, P.L. 52-8222 (Jan. 14, 1892). The Wendat Band was subsequently paid that full amount. This constitutes an unconditional commitment to compensation that strongly supports an intent to diminish the Wendat Reservation, per the authority of *Solem*. Though the word "cession" is never used in the 1892 Allotment Act, the stipulation that the Wendat's payment would serve as "total and complete" compensation makes continued reservation status incompatible with the allotment of the land in question; Congress may properly have intended for the payment to abrogate all of the Wendat's tribal property interests in the territory.

3. If both reservations were diminished by allotment, the Topanga Cession is not in Indian Country.

If the Wendat Reservation was also diminished by allotment, the Topanga Cession and the WCDC are not in Indian Country at all, and the WCDC must acquire a TPT license and pay the State of New Dakota 3% of its gross proceeds. 4 N.D.C. §212(2). Pursuant to 4 N.D.C. §212(6), half of those proceeds (1.5%) will be remitted to the Maumee Nation.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Thirteenth Circuit and hold that (1) the Topanga Cession is part of the Maumee Reservation because there was no Congressional intention to abrogate it by either the Treaty with the Wendat nor the Maumee Allotment Act of 1908 and (2) the TPT is valid as applied to the WCDC because as non-members on the Maumee reservation, application of the TPT is not preempted by any federal laws or policies nor can it be said to infringe on the Maumee's rights when the Maumee seek enforcement; or if it does infringe, the state is acting on Maumee's behalf in enforcing it.

If the Court does not agree that the Topanga Cession remains part of the Maumee Reservation, it should hold that it is not in Indian country at all because there was clear Congressional intent to diminish the Wendat Reservation in the Wendat Allotment Act of 1892, and the Maumee are therefore entitled to the 1.5% of the TPT collected from the WCDC.

Respectfully Submitted,

January 2021 *Counsel for Petitioner*