No. 20-1104

IN THE

SUPREME COURT OF THE UNITED STATES

MAUMEE INDIAN NATION,
Petitioners,
v.

WENDAT BAND OF HURON INDIANS,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE UNITED STATES

BRIEF FOR RESPONDENT

Team No. T1006

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QUESTIONS PRESENTED

I. Whether in light of this Court's holding in *McGirt* an Indian nation's sovereignty over territory can survive Congress explicitly granting sovereign control of that territory to another Indian nation through a treaty? Does the clear "cession" and "public use" language of the Maumee Allotment Act continue to serve as grounds for diminishment post-*McGirt*? Following *McGirt*'s shift to exclusive focus on statutory text, can congressional intent to diminish the Wendat reservation be inferred in the absence of statutory text explicitly evidencing congressional intent?

II. Whether the State has a sufficient interest in taxing Wendat tribal businesses operating a) on the Wendat Reservation, or alternatively, b) on the Maumee Reservation, to overcome the combined might of tribal interests in maintaining the inherent tribal right to self-governance and the long-held federal policies of regulating trade on Indian reservations and promoting tribal economic growth.

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

This case is about respecting tribal sovereignty and ensuring that tribes remain able to protect their own citizens by allowing the Wendat Band and the Maumee Tribe to generate revenue on their own reservations without state interference. The Wendat Band of Hurons (hereinafter the "Wendat Band" or "Wendat") is a federally recognized tribe with a reservation in the State of New Dakota. R. at 4. The Wendat Band's reservation borders the reservation of the Maumee Indian Nation (hereinafter "Maumee Nation" or "Maumee"), a different federally recognized tribe that also has a reservation in the State of New Dakota. R. at 4. The Maumee Indian Nation's reservation was established by the Treaty of Wauseon, Oct. 4, 1801, 7 Stat. 1404 (hereinafter the "Maumee Treaty"). In the Maumee Treaty, the United States established a reservation for the Maumee Nation with its eastern border marked by the Wapakoneta River. *Id.* at art. 4. In the Treaty with the Wendat, Mar. 26, 1859, 35 Stat. 7749 art. 1 (hereinafter the "Wendat Treaty"), the United States established a reservation for the Wendat Band, with its western border similarly formed by the Wapakoneta river. However, at some point in the 1830s, before the establishment of the Wendat reservation and after the establishment the Maumee reservation, the Wapakoneta River moved "approximately three miles to the west creating a sizable tract of land." R. at 5. This area, referred to as the "Topanga Cession," has been contested by the Maumee Nation and the Wendat Band "since at least 1937." R. at 5.

In 1892 and in 1908, during the Allotment Era, the United States enacted allotment acts for both the Wendat Band and Maumee Nation. In the Act of Jan. 14, 1892, ch. 42, Pub. L. No. 52-8222 (hereinafter the "Wendat Allotment Act"), Congress opened unallotted land in

the western half of the Wendat Reservation to settlement without the Wendat's consent. Wendat Allotment Act §1. In 1908, the Maumee Nation near-unanimously elected to "cede their interest" in the eastern quarter of their reservation and return it to "the public domain." 42 Cong. Rec. 2345 (1908) (Statement of Rep. Pray); Act of May 29, 1908 ch. 818, Pub. L. No. 52-8222 (hereinafter the "Maumee Allotment Act").

Relevant to this litigation, the State of New Dakota maintains a "transaction privilege tax" (TPT) which requires all persons with gross proceeds of sales or gross income exceeding $5,000 on transactions commenced in the State to pay the State $25 for a license to continue to engage in business. 4 N.D.C. § 212. Pursuant to the TPT, all licensees are obligated to pay the State 3.0% of their gross proceeds of sales or gross income on transactions commenced in New Dakota. 4 N.D.C. § 212. Notably, the State remits to each tribe the proceeds of the TPT collecting from all licensees operating on their respective reservations. 4 N.D.C. § 212(5). Furthermore, half of the TPT collected in Door Prairie County, but outside of Indian country, is remitted by New Dakota to the Maumee Nation. 4 N.D.C. § 212(6).

In December 2013, the Wendat Band purchased a tract of land in the "Topanga Cession" to build a "combination residential – commercial development" to help support the Band, ensure access to healthy food, share the Band's culture and history and provide housing for elders and low-income tribal members. R. at 7-8. On November 4, 2015, representatives of the Maumee Nation informed the Wendat Tribal Council that they expected the development to submit to the TPT in full because the Maumee Nation considers the Topanga Cession to be within its own reservation. R. at 8. The Maumee expected to profit from the imposition of New Dakota's tax because 4 N.D.C. § 212(5) remits all proceeds collected on a tribe's reservation to the tribe. R. at 8. The Wendat Tribal Council promptly informed the Maumee

that the Topanga Cession was part of the Wendat Reservation and that as long as the development is within Indian country, the imposition of a state tax is either preempted by federal law or infringes upon the Band's own sovereign powers. In response, on November 18, 2015, the Maumee Nation filed this complaint against the Wendat Band seeking the Declaration of a federal court that the new Wendat development would be subject to New Dakota's requirement to procure a TPT license and pay the subsequent tax.

II. STATEMENT OF PROCEEDINGS

The Maumee Nation initiated these proceedings in federal court, requesting a Declaration that the Wendat Band's development be subject to state tax law. R at 8. The District Court for the District of New Dakota found that the "Topanga Cession" remained part of the Maumee reservation, was not part of the Wendat reservation, and that New Dakota may levy its TPT on sovereign Indian nations' developments. *Maumee Indian Nation v. Wendat Band of Huron Indians*, 305 F.Supp. 3d 44 (D. New D. 2018) *rev'd sub nom. Wendat Band of Huron Indians v. Maumee Indian Nation*, 933 F.3d 1088 (13th Cir. 2020); R at 9. The Wendat Band promptly appealed, which was stayed pending this Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). R. at 10.

Following this Court's decision in *McGirt*, *Id.*, the 13th Circuit heard the appeal and held that the Wendat Treaty clearly diminished the Maumee Reservation, that the language in the Wendat Allotment Act does not evince clear intent to diminish, and that New Dakota cannot levy its tax because it violates tribal sovereignty and is federally preempted. 933 F.3d 1088 (13th Cir. 2020). The Maumee Nation appealed, and the United States Supreme Court granted certiorari to address two questions: 1) Does the Topanga Cession remain in Indian country, or did the Wendat Treaty, the Maumee Allotment Act, or the Wendat Allotment Act

diminish the Wendat and Maumee reservations such as to leave it outside of Indian country? 2) Do the doctrines of Indian preemption or infringement prevent the State of New Dakota from levying taxes against tribal activities in Indian country? R. at 3.

SUMMARY OF ARGUMENT

At its core, this case is about whether the Wendat Nation is free to pursue economic developments on its land for its people's welfare. It is clear the "Topanga Cession" is part of the Wendat Band's reservation and in Indian country, because Congress diminished the Maumee Nation's reservation while leaving the Wendat Reservation undiminished. New Dakota is thereby prohibited from levying its transaction privilege tax (TPT) against the Wendat Commercial Development Corporation (WCDC) because the State's minor interest in enforcing a tax on on-reservation Indian activities is both preempted by federal policy and infringes upon rights traditional held by Indian tribal governments.

McGirt v. Oklahoma, 140 S. C. 2452, 2467 (2020), provides the test in the case at hand for determining which reservations were diminished. The Court should apply *McGirt*'s holding here because there is nothing in *McGirt* that distinguishes it from other diminishment inquiries and holding otherwise would threaten fundamental legal principles. *McGirt* focuses diminishment inquiries to statute' text, rather than any historical factors. *Id.* at 2468.

Applying *McGirt*, it is evident that the Treaty with the Wendat, Mar. 26 1859, 35 Stat. 7749 (hereinafter Wendat Treaty) diminished the Maumee reservation, because it granted that territory to the Wendat Band. Reservations cannot overlap because it would preempt each tribes' exercise of sovereignty, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832). If the Maumee reservation was not diminished by the Wendat Treaty, it was diminished by the Act of May 29, 1908, ch. 818, Pub. L. No. 60-8107 (hereinafter Maumee

Allotment Act). The Maumee Allotment Act bears the provisions laid out in *Nebraska v. Parker*, 136 S. Ct. 1072, 1079 (2016) that evince intent to diminish a reservation. Further, the absence of an "unconditional commitment for compensation," *Id.* at 1079, does not militate against diminishment. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, n.20 598 (1977).

Applying *McGirt*'s test, it is clear the Wendat Reservation was not diminished by the Act of Jan. 14, 1892, ch. 42 Pub. L. No. 52-8222 (hereinafter Wendat Allotment Act), as it lacks sufficient language to indicate a clear Congressional intent to diminish the reservation. And in absence of clear Congressional intent to abrogate the reservation's borders, the Court must follow the "traditional solicitude for Indian tribes" and conclude the "boundaries survived the opening." *Solem v. Bartlett*, 465 U.S. 463, 472 (1984).

New Dakota should not be allowed to impose its TPT on the WCDC so long as it sits in Indian Country regardless of whether it operates in the Wendat or Maumee Reservations. The issue is easiest to resolve should the Court find that WCDC sits within the Wendat Band's own reservation. Absent congressional authorization, state taxes may not be enforced against tribal activities on that tribe's own land. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1972). The legal incidence of the TPT falls directly upon the WCDC, which has the same status as the tribe that incorporated it under Section 17 of the Indian Reorganization Act for purposes of taxation. Rev. Rul. 94-16, 1994-1 C.B. 19. A determination as to the legal incidence of a tax is made solely based upon the text of the relevant statute. *California Bd. of Equalization v. Chemehuevi Tribe*, 474 U.S. 9, 106 (1985). Here, 4 N.D.C. §212 focuses exclusively on taxing "licensees" for the privilege of continuing to operate, thus levying a tax directly upon the Wendat Band. Such a tax is unenforceable

absent congressional authorization, and no such congressional authorization has been made to cover 4 N.D.C. §212.

Even were the TPT meant to tax non-Indian purchasers, it would be unenforceable against the WCDC because New Dakota lacks substantial interest in levying the tax. Tribal interests in self-governance and the overarching federal policy of promoting tribal economic growth preclude such an intrusion. *Wash. v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980). The State has little interest in enforcing its tax because by the language of 4 N.D.C. §212(5), all proceeds would be returned directly to the Wendat Band itself. The net product of enforcing the TPT upon the WCDC would be unnecessary administrative backlog limiting tribal profits.

Should this Court find that the WCDC sits inside the Maumee Reservation, it would be squarely presented with the opportunity to revisit its decision in *Colville* finding that nonmember Indians are subject to state taxation. The decision in *Colville* was founded on a reading of congressional intent which has since been explicitly disavowed by Congress when it enacted the so-called "*Duro*-fix" to overturn the Court's analogous holding in the criminal context. As such, the Court should return to the preemption and infringement analysis required by *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), and *Williams v. Lee*, 358 U.S. 217 (1959) by looking to the balance of state, tribal, and federal interests at stake. *Colville*, 447 U.S. at 154-157. Here, the State's limited interests would infringe directly upon the Maumee Tribe's ability to structure its own system of taxation and the federal government's expansive regulatory scheme with regard to traders on Indian reservations.

On this basis, the TPT should be found to be inapplicable to the WCDC even should it be found to lie within the Maumee Reservation.

ARGUMENT

I. This Court's recent holding in *McGirt* modified the *Solem* test for determining if a reservation has been diminished and the modified test should apply to the definition of Indian Country generally, including the case at bar.

Prior to this Court's recent decision in *McGirt v. Oklahoma,*140 S. Ct. 2452 (2020), "the framework… employ[ed] to determine whether an Indian reservation has been diminished [was] well settled." *Nebraska v. Parker*, 136 S. Ct. 1072, 1078 (2016). The Court determined whether there was clear Congressional intent to diminish a reservation by applying the three step test laid out in *Solem v. Bartlett*, 465 U.S. 463 (1984). First and "most probative," the Court analyzed "the statutory language used to open the Indian lands. *Id*. at 470. Second, the "events surrounding the passage of a surplus land Act." *Id.* at 471. Third, "the events that occurred after the passage of a surplus land Act to decipher Congress' intentions. *Id.* at 471.

However, *McGirt* reduced the second and third "steps" to methods of clarifying ambiguities in "the Acts of Congress," rather than separate grounds for diminishing a reservation. 140 S. Ct. at 2462. As such, "when interpreting Congress' work…. [the Court's] charge is usually to ascertain and follow the original meaning of the law… That is the only 'step' proper for a court of law." *Id*. at 2468. So, absent textual ambiguity "there is no need to consult extratextual sources" to determine whether Congress diminished a reservation. *Id.* at 2469. *McGirt* effectively consolidated *Solem's* three step test into a one step test.

Indian reservations regularly survive being opened to settlement by non-Indians. Only Congress can diminish a reservation, and it must do so clearly, as the "[c]ourt does not lightly conclude that an Indian reservation has been terminated." *Decoteau v. Dist. County Court for*

Tenth Judicial Dist., 420 U.S. 425, 444 (1975). No "particular form" of words has been required to disestablish a reservation, see *Hagen v. Utah*, 510 U.S. 399, 411 (1994). However, there are "[c]ommon textual indications of Congress' intent to diminish boundaries." 136 S. Ct. at 1079. These "include 'explicit reference to cession or other language evidencing the present and total surrender of all tribal interests,'" "unconditional commitment" to compensate a tribe for "its opened land," and "provision[s] restoring portions of a reservation to 'the public domain.'" *Id.* at 1079 (citation omitted).

A. *McGirt* should apply to 18 U.S.C. § 1151 generally, because the definition of Indian Country under the Major Crimes Act is determined by 18 U.S.C. § 1151.

McGirt considered an application of the Major Crimes Act to a member of the Creek tribe in Oklahoma. 240 S. Ct. at 2459. However, at its core, the case considered the definition of Indian Country. *Id.* at 2459. The Major Crimes Act, 18 U.S.C. § 1153, refers to Indian country but neglects to define it, so there is no independent definition of Indian country for 18 U.S.C. § 1153. Indian country for the Act is instead defined by 18 U.S.C. § 1151. *United States v. Antelope*, 430 U.S. 641, 646 n.7 (1977). This is why the Court in *McGirt* specifically looks to 18 U.S.C. § 1151(a). 140 S. Ct. at 2459.

Further, this Court has held that Indian country "as defined in 18 U.S.C. § 1151… applies to questions of both criminal and civil jurisdiction." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 n.5 (1987). The Court should follow its precedent and use *McGirt*'s one step test to define Indian country here. Otherwise, different versions of the same provision would be used for questions of criminal and civil jurisdiction.

B. The Court's holding in *McGirt* and its "one step" test furthers and safeguards the principles of Federal Indian Law.

McGirt's one step test only looks to the statute for Congressional intention, discarding contemporary events, later events, and demographics as irrelevant, unless they "shed light on

the meaning of the text." 140 S. Ct. at 2468. This method of interpretation respects Congress' plenary power over Indians, as it prevents states and individuals from effectively diminishing reservations through the wrongly exercising jurisdiction or settling lands en masse. *Id.* at 2474. To hold otherwise would allow "[u]nlawful acts… to amend the law." *Id.* at 2482.

C. Courts have already applied *McGirt* as broadly as modifying *Solem*. To ensure uniformity and prevent confusion, *McGirt* should be recognized to apply to all Indian reservations in all cases relying on 18 U.S.C. § 1151.

Since *McGirt* was decided, courts have viewed its holding as broadly redefining *McGirt's* test. *McGirt*'s "one step" test has been seen as changing the *Solem* test and applied widely in cases involving different tribes, fields of law, and different states. *See Oneida Nation v. Vill. of Hobart*, 968 F.3d 664, 667, 675 n.4 (7th Cir. 2020) (reading *McGirt* as "adjusting the *Solem* framework" to establish a one step test in a case involving a different tribe, different state, and a different field of law); *see also United States v. Smith*, 2020 U.S. Dist. LEXIS 155530 (D.N.M. Aug. 27, 2020) (reading *McGirt* as reducing the second and third steps of *Solem*'s test to interpretive factors in a case involving a different tribe and a different state). However, some academic confusion remains. *See* Fraser F. Wayne et al., *Implications for the Energy Industry in Light of the U.S. Supreme Court Decision in McGirt v. Oklahoma*, 20 Pratt's Energy Law Report 10.03 (LexisNexis A.S. Pratt) (suggesting that *McGirt's* holding will be limited to the Major Crimes Act). To settle the issue and solidify the trend among lower federal and state courts, the Court should hold *McGirt*'s modification to the *Solem* framework applies to Indian country as defined by 18 U.S.C. § 1151 generally.

D. The situation at issue in *McGirt* was not so unique as to merit a treatment distinct from other Indian reservations.

McGirt dealt simply with whether Mr. McGirt's crime was committed in an Indian reservation. 140 S. Ct. at 2459. This is a question common to Federal Indian law, and the

Court has no reason to see *McGirt* as different from any other case dealing with definitions of Indian country. The holding in *McGirt* recognized that the case followed a rich jurisprudence defining Indian country. *Id.* at 2459-2465. The Court should recognize *McGirt's* place in this jurisprudence and apply its holding to the definition of Indian country generally.

1. There is nothing unique to the Creek that merits special treatment, as any language suggesting special treatment for the Creek is included only to indicate that a reservation was established.

The holding in *McGirt* referred to the "'solemn[] guarantie[s]'" of the treaties with the Creek Nation to "'secure a country and permanent home to the whole Creek'" and to "'forever set apart [the Creek lands] as a home for'" them. *McGirt*, 140 S. Ct. at 2460-61 (citation omitted). This might appear to suggest the Creek Nation received a unique promise granting them special consideration. However, the holding in *McGirt* focuses on this language only to establish that there was a Creek reservation even though "[t]hese early treaties did not refer to the Creek lands as a 'reservation.'" *Id.* at 2461 (citation omitted.).

In the instant case, no parties contest whether the Treaty of Wauseon, Oct. 4, 1801, 7 Stat. 1404 (hereinafter Maumee Treaty), or the Treaty with the Wendat, Mar. 26, 1859, 35 Stat. 7749 (hereinafter Wendat Treaty), established reservations for the respective tribes. Additionally, the Court has held that specific "reservation" language is not required to indicate that Congress set aside land to create a reservation. *McGirt*, 140 S. Ct. at 2461, and the language in the treaties is sufficient to indicate the establishment of reservations. *See* Maumee Treaty, *supra*, arts. 3, 5 (establishing fixed "boundary line[s]" and stating that non-Indians who "attempt to settle" on Maumee lands will be subject to their laws); *see also* Wendat Treaty, *supra*, arts. 1, 6 (recognizing set boundaries for "reserved lands" and

recognizing the Wendat lands to be "their[s]"). Therefore, the language that the Court focused on in *McGirt* is unnecessary in this case.

2. The State of Oklahoma is not unique in such a way as to merit special treatment.

Nothing about Oklahoma merits it special consideration in determing whether tribal reservations were diminished. In *McGirt,* this Court refused to recognize that the Oklahoma Enabling Act somehow made Oklahoma distinct when it came to its jurisdictional grasp. And courts have not hesitated to apply the established diminishment tests to Oklahoma. *See Murphy v. Royal*, 866 F.3d 1164, 1197-98 (10th Cir. 2017); *see also Osage Nation v. State ex rel. Oklahoma Tax Comm'n*, 597 F. Supp 2d 1250, 1257 (N.D. Okla. 2009).

Additionally, no case this Court has handled regarding diminished reservations in Oklahoma have treated the state differently. *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114 (1993); *see also Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977). Such a treatment would threaten the important principle of "equal sovereignty" of states. *United States v. Louisiana*, 363 U.S. 1, 16 (1960). The Court should not begin to further complicate determinations of whether a reservation has been diminished or not by unnecessarily subjecting tribes in different states to fundamentally different tests.

There is nothing to suggest that the holding of *McGirt* should be restricted to the Major Crimes Act, Oklahoma, or the Creek Nation. Such a restriction would unnecessarily complicate Federal Indian law and contradict this Court's previous holdings.

II. The Wendat Treaty diminished the Maumee Reservation established by the Treaty of Wauseon, by recognizing the "Topanga Cession" as part of the Wendat Reservation.

Congress has the power to unilaterally diminish reservations. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565-67 (1903). However, because before 1903 it was unclear whether

Congress had the power to "unilaterally abrogate treaties with tribes and divest them of their lands… what the tribe agreed to has been significant in the Court's diminishment analysis" and what matters here is to what the signatories, i.e. the Wendat Band, agreed to. *Nebraska v. Parker,* 136 S. Ct. 1072, n.1 1081 (2016). Even if what the Maumee agreed to is a "significant" factor, this is not an absolute presumption, and courts have found reservations unilaterally diminished by pre-*Lone Wolf* Acts of Congress. *Sioux Nation of Indians v. United States*, 601 F.2d 1157, 1161 (Ct. Cl. 1979). Although "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," the Court recognized that Congress had unilaterally abrogated treaties prior to *Lone Wolf*'s decision and Congress unilaterally abrogated reservations before the Court confirmed it had the power to do so. *S.D. v. Yankton Sioux Tribe*, 522 U.S. 329, 355 (1998).

When unilaterally abrogating a reservation, Congress can either use its powers of eminent domain to take reservation land or its plenary powers over Indian affairs and its role as a guardian to transmute the property. 601 F.2d at 1161-62. The government must "pay just compensation" when "the United States takes Indian property for its own use or to give it to others." *Id.* at 1170. However, the absence of such compensation at the time has not been taken to mean the reservation was not diminished, so absence of compensation at the time of taking in the instant case is immaterial. *Id.* at 1170. In the case at bar, Congress unilaterally diminished the Maumee Reservation via its eminent domain powers when it granted the "Topanga Cession" to the Wendat Band.

A. Indian tribes cannot have overlapping reservations without explicit Congressional endorsement, because it would prevent them from exercising their sovereignty.

Tribal sovereignty is limited, but it entails a number of powers incompatible with the notion of overlapping reservations. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561

(1832) (finding that Indian nations possess the power to exclude); *see also Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 425 (1989) (holding that tribes have inherent sovereignty independent of their power to exclude). It is impossible for two tribes to possess these powers over the same territory, because each would preempt the others' exercise of their powers. Further, courts have recognized that multiple Indian nations cannot have exclusive claim to overlapping territory. *Seminole Indians of Florida v. United States*, 455 F.2d 539 (Ct. Cl. 1972). Additionally, recognizing overlapping reservations as the default could unsettle previous holdings and permit collateral attacks on previous decisions regarding congressional taking of Indian reservations, a consequence courts have been careful to avoid. *McGhee v. Williams*, 437 F.2d 995 (Ct. Cl. 1971).

Congress and the Courts have recognized that tribes can share an "undivided interest" in a reservation. *See Shoshone Tribe of Indians v. United States,* 299 US 476, 492 (1937). However, this is a rare exception to the rule that tribes are sovereign over their reservations and when such a "shared undivided interest" is present, it is explicitly noted and dealt with by Congress. *Id.* at 488-89.

B. The text of the Wendat Treaty gives the "Topanga Cession" to the Wendat Band.

When interpreting a treaty, the courts should resolve any ambiguities in favor of the Indians, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586 (1977), and "interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them." *Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999). Although the Maumee Tribe had an interest in the land, but they were not included in the Wendat Treaty, so ambiguities should not be resolved in their favor. Wendat Treaty, *supra*, 35 Stat. 7749. In the Wendat Treaty the signatories were the Wendat Band, so the Court should resolve any ambiguities in favor of the Wendat Band and read it as the Wendat would have understood it.

Although mere "erroneous survey" cannot accomplish a taking, as it does not change ownership, the Wendat Treaty was more than just an erroneous survey. *United States v. Creek Nation*, 295 U.S. 103, 103, 111 (1935). Rather, the Treaty was the disposition of land to a tribe, establishing Indian country.

"Diminishment...will not be lightly inferred" and is typically evinced by "explicit reference to cession or other language evidencing the present and total surrender of all tribal interests." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). But such abrogation may be "implied or express." *Surface Waters of the Yakima River Drainage Basin v. Yakima Rsrv. Irrigation Dist.,* 850 P.2d 1306, 1317 (Wash. 1993). When diminishment is the only possible conclusion of Congress' action, such implicit abrogation must be the consequence.

C. Although unilateral acts by Congress before *Lone Wolf* have usually been constructed to preserve the reservation, any textualist reading of the Wendat Treaty requires an abrogation of the Maumee Reservation.

Despite the presumption to preserve reservations, the Court must still give the treaty "a 'sensible construction' that avoids… 'absurd conclusion[s].'" 522 U.S. at 346 (citation omitted). When the saving clause is a canon of construction, not actual text, it should be owed less deference, and the Court should read the treaty "sensib[ly]" as respecting Indian sovereignty, and not read a rare congressional exception into a standard treaty. *Id.* at 346. Any reading of the Wendat Treaty that keeps the "Topanga Cession" in the Maumee reservation would contradict basic notions of sovereignty and ignore explicit text reserving it for the Wendat. The Maumee reservation must have been diminished by the Wendat Treaty.

III. If the Wendat Treaty did not diminish the Maumee Reservation, then the Maumee Allotment Act diminished the Maumee Reservation including the "Topanga Cession."

Even if the Maumee reservation was not diminished by the Wendat Treaty, Congress clearly diminished the Maumee reservation by the Maumee Allotment Act. If the Maumee's claim to the "Topanga Cession" survived the Wendat Treaty, there is no doubt that the easternmost part of the Maumee reservation, the "Topanga Cession," is part of the eastern quarter of their reservation ceded to the United States. Act of May 29, 1908, ch. 818, Pub. L. No. 60-8107, § 1 (hereinafter "Maumee Allotment Act"). The test for diminishment, narrowly focuses on statutory text. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2468 (2020). And the text of the Maumee Allotment Act evinces a clear Congressional intent to diminish.

A. The operative language of "cession" and "restoration to the public domain" are sufficient to diminish the Maumee Reservation.

In the Maumee Allotment Act, the Maumee nearly unanimously agreed to "cede" the eastern quarter of their reservation, including the "Topanga Cession," to "the public domain." Maumee Allotment Act, *supra*, § 1. The combination of clear "cession" and "public domain" are "precisely suited" to reflect Congressional intent to diminish. *DeCoteau v. Dist. County Court for Tenth Judicial Dist.*, 420 U.S. 425, 445 (1975).

The Court has noted that when land is "'restored' to the public domain" its "previous public use was extinguished." *Hagen v. Utah*, 510 U.S. 399, 412 (1994) (citation omitted). This language is "inconsistent with the continuation of reservation status." *Id.* at 414. By extinguishing the previous use, Congress eliminated Maumee sovereignty over the eastern quarter of their reservation, including the "Topanga Cession." Further, when the "restoration" language is in the "operative language of the statute opening the reservation lands for settlement, [it] is relevant… [to] the diminishment inquiry." *Id.* at 413. In the Maumee Allotment Act, the operative language "return[s]" the Maumee reservation to the public way and "cede[s] their interest" in the land. Maumee Allotment Act, *supra*, § 1.

The Court has relied on "tribal consent… to find a contemporaneous intent to diminish." 510 U.S. at 433. Tribal consent helps to safeguard "the general rule that 'doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.'" *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586 (1977) (citation omitted). The Court should continue to consider the consent of Indian nations, even with *McGirt* mostly eliminating the role of historical factors.

The congressional record indicates that the Maumee nearly unanimously ratified the exact agreement that was enacted by Congress. 42 Cong. Rec. 2345 (1908) (Statement of Rep. Pray). And "in the presence of statutory [cession] language 'precisely suited' to diminishment and supported by the express consent of the tribe, "the intent of all parties to effect a clear conveyance of all unallotted lands [is] evident." 510 U.S. at 427 (Blackmun, J., dissenting) (quoting 420 U.S. at 445). So, to the extent consent is relevant, it is indicative of diminishment. Even if post-*Lone Wolf* tribal consent is no longer considered after *McGirt*, the Court should follow the language of the Maumee Allotment Act which evinces clear Congressional intent to diminish the reservation.

B. The granting of areas to the "State of New Dakota for school purposes" does not suggest that Congress viewed the rest of the land as separate from New Dakota.

The Maumee Allotment Act does "reserve...for the use of common schools...sections sixteen and thirty-six of the land in each township." Maumee Allotment Act, *supra*, § 5. Further, the legislative record suggests that Congress explicitly gave the land "to the State of New Dakota." 42 Cong. Rec. 2345 (1908) (Statement of Rep. Pray). Such language might be taken to indicate the rest of the opened land did not become New Dakota territory. However, it is important to note that the United States did not make an unconditional commitment to purchase the Maumee territory. The United States was instead acting as "an agent" for the

Maumee Nation. The language here should thus be interpreted as an independent purchase by the United States of the fee simple title to the land, which was then granted to New Dakota not for jurisdictional purposes, but for ownership in fee simple to be used "for agency and school purposes." *Id.* (Statement of Rep. Pray).

C. "Sum Certain" provisions are not required to diminish a reservation.

The lack of "sum certain" language is not dispositive in determining whether Congress intended to diminish reservation. *Rosebud Sioux v. Kneip*, 430 U.S. 584, n.20 599 (1977). Nor does "the lack of such a [sum-certain] provision lead to the conclusion" that the reservation was not diminished. 510 U.S. at 412**.** Also, this Court has found public domain and cession language without sum certain provisions to be sufficient to diminish a reservation. *Id.* at 404.

Further, this Court has refused to establish a "'clear statement rule,' pursuant to which a finding of diminishment would require both an explicit language of cession or other evidencing the surrender of tribal interests and an unconditional commitment from Congress to compensate the Indians." *Id.* 411. The Court has repeatedly refused to require any kind of precise language to determine if a reservation has been diminished, and should continue to maintain this flexibility in order to accurately adopt particularized congressional legislation. The Maumee Allotment Act notes the United States was acting "as trustee for said Indians to dispose of said lands." Maumee Allotment Act, *supra*, § 9. However, this trustee language alone is insufficient to counter the rest of the text's hallmarks of intent to diminish.

IV. The Wendat Allotment Act did not diminish the Wendat Reservation, as neither the text of the Act nor contemporary understanding evince clear congressional intent to diminish the reservation.

While the "Topanga Cession," did not remain part of the Maumee reservation because it was diminished, the Wendat reservation was not correspondingly diminished. As such, the "Topanga Cession" remains part of the Wendat Reservation. The test for determining whether a reservation has been diminished is established by *McGirt*. Its single step looks solely to the text to determine whether Congress clearly evinced an intent to diminish. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2468 (2020). Since the "reservation system" and "allotment" are coexistent, specific intent to diminish the reservation is required. *Mattz v. Arnett*, 412 U.S. 481, 496 (1973).

A. The unilateral nature of the Wendat Allotment Act calls for a strong reading for the tribe and preservation of the reservation.

The holding in *McGirt* largely eliminates the role of extra-textual evidence, but this should not be taken to exclude from consideration whether an Indian nation agreed to an allotment act, especially in the pre-*Lone Wolf* era. Before *Lone Wolf*, Congress was unsure whether it "could unilaterally abrogate treaties with tribes and divest them of their reservation lands." *Nebraska v. Parker*, 136 S. Ct. 1072, n.1 1081 (2016). Tribal agreement prior to *Lone Wolf* is important because it informs the Court's interpretation of congressional intent. Additionally, as argued above, tribal consent safeguards fundamental tenets of federal Indian law and should therefore be considered here.

The message from the Secretary of Interior reflects that the tribe expressed the lack of agreement by the Maumee acts as a strong presumption for the maintenance of the reservation. Rather than recognizing the Wendat Allotment Act and accepting their allotment, "the Indians refused to act until they received the[ir] per capita." 23 Cong. Rec. 1777 (1892) (Message from Secretary of the Interior). Further, the message indicates less than a quarter of the Band had received their allotments, with the Secretary of the Interior

noting that "much time was lost." *Id.* (Message from Secretary of the Interior). These are not the actions of a people who have consented to being removed from their lands, nor are there any statements suggesting consent was obtained. The apparent lack of consent to their lands being opened to settlement should militate against a finding of intent to diminish.

B. The Wendat Allotment Act lacks the dispositive hallmarks of statutes evidencing a clear congressional intent to diminish a reservation.

Nebraska v. Parker lists the "common textual indications of Congress' intent to diminish." 136. S. Ct. 1072, 1079 (2016). The text of the Wendat Allotment Act does not indicate intent to diminish the Wendat Reservation, rather, it is representative of language merely opening reservations to settlement, not abrogating them. Act of Jan. 14, 1892, ch. 42, Pub. L. No. 52-8222 (hereinafter Wendat Allotment Act). Further, since in the late 1800s "'Congress was fully aware of the means by which termination could be effected'... when such language is not employed the court will not be 'inclined to infer an intent to terminate the reservation.'" *Smith v. Parker*, 996 F.Supp. 2d 815, 836 (Dist. Neb. 2014) (citing *Mattz*, 412 U.S. at 504).

Rather than diminishing the Wendat reservation, the Wendat Allotment Act merely "open[ed] [surplus lands] to settlement" Wendat Allotment Act, *supra*, § 1. Since this is the only "operative language" in the act, it is the relevant language for the inquiry into diminishment. *Hagen v. Utah*, 510 U.S. 399, 413 (1994). In the absence of clear Congressional intent to the contrary, "[the Court is] bound by [its] traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening." *Solem v. Bartlett*, 465 U.S. 463, 472 (1984).

C. The "Sum Certain" provision alone is insufficient to evince clear Congressional intent to diminish the Wendat Reservation.

The list of "common textual indications of Congress' intent to diminish" includes "'unconditional commitment[s] from Congress to compensate the Indian tribe for its opened land.'" 136 S. Ct. at 1079 (citations omitted). However, mere "sum-certain" provisions are not "dispositive." *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, n.20 598 (1977).

The Wendat Allotment Act contains an unconditional commitment for compensation. *See* Wendat Allotment Act, *supra*, § 2 (wherein the United States agreed to pay for lands declared surplus, without any preconditions). However, this language alone is insufficient to diminish the reservation. The Court should not assume Congressional intent to diminish from clause alone, given the absence of any other language evincing intent to diminish.

Petitioners may argue the Court should lower the burden of what is required by statutory language to diminish a reservation because, following *McGirt*, statutory language is the only way to establish that Congress intended to diminish a reservation. However, this would be inappropriate as it would violate the canons of federal Indian law, established precedent of this Court, and perversely contort a holding intended to respect Indian sovereignty.

D. Statements by contemporary members of Congress do not reflect congressional intention to diminish the Wendat Reservation.

"Isolated and ambiguous phrases" are insufficient to establish "a congressional purpose to diminish. *Solem v. Bartlett*, 465 U.S. 463, 478 (1984). Further, neither "wishes" nor "future plans" of Congress are "laws" disestablishing reservations. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2465 (2020).

Congress may have expected the Wendat reservation to "be opened to the public domain by way of allotment," 23 Cong. Rec. 1777 (1892) (Statement of Rep. Harvey), and have been generally working on "cession" of Indian reservations ; *Id.* (Statement of Rep. Ullrich). However, these "isolated phrases" do not indicate that Congress sought to diminish the

Wendat reservation, 465 U.S. at 478, but at most indicate a "wish" of Congress, still insufficient to diminish a reservation. 140 S. Ct. at 2465. Similarly, stating an expectation that land "will be opened to the public domain by way of allotment" is at best a wish of Congress, and does not evince a clear Congressional intent to diminish a reservation. 23 Cong. Rec. 1777 (1892) (Statement of Rep. Harvey).

The only comment that might suggest the Wendat Allotment Act was terminating the tribe's relationship with the federal government refers to "Indian[s]" generally and is best seen as describing what happens when a reservation is terminated and "an Indian becomes a citizen," rather than stating such treatment is being applied to the Wendat. *Id.* (statement of Rep. Ullrich). Even if this is taken to suggest intent to terminate the Wendat Band's reservation, here again "isolated and ambiguous phrases" are insufficient to indicate clear congressional intent to diminish a reservation. 465 U.S. at 478. Such comments should not be allowed to overcome the clear language of the Allotment Act itself indicating that the reservation was maintained.

E. *McGirt's* bans the use of extra-textual factors as separate grounds for diminishment.

McGirt reduced the *Solem* test to an inquiry into the "statute's original meaning" alone. McGirt reduced the Solem test to an inquiry into the "statute's original meaning" alone. 140 U.S. at 2469. The only possible role for extra-textual evidence is to "shed... light on what the terms found in a statute meant at the time of the laws adoption." *Id.* at 2469. However, this is the most such evidence can do. It cannot be used "as an alternative means of proving disestablishment or diminishment." *Id.* at 2469. Therefore, even if "historical practices or current demographics" can be spun to suggest diminishment, this Court just held that this evidence is immaterial. *Id.* at 2468. However, such evidence is of no use as there are no

"ambiguities" in the Wendat Allotment Act that such demographic data can or should be used to "'clear up.'" *McGirt*, 140 S. Ct. at 2469 (citation omitted).

The undeniable conclusion is that there is insufficient evidence to suggest that Congress intended to diminish the Wendat reservation, and in the absence of such evidence, the Court is bound to respect the Wendat's claim to their ancestral and congressionally recognized home.

V. The doctrines of Indian preemption and infringement each independently prevent the State of New Dakota from collecting its Transaction Privilege Tax (henceforth the "TPT") against the Wendat Commercial Development Corporation (henceforth the "WCDC") as a tribal entity in Indian country.

The State of New Dakota's imposition of its TPT on a Wendat tribal enterprise for the privilege of conducting business in the State should be found unenforceable because the WCDC conducts business exclusively in Indian country, the TPT levies taxes directly upon Indian activities, and the balance of federal, state, and tribal interests in this matter militates decidedly against the State.

There are two avenues by which this Court may find that the Topanga Cession remains in Indian country. Either it is within the Wendat Reservation or it is within the Maumee Reservation. *See* 18 U.S.C. § 1151 (Indian country defined). We contend that is it within the Wendat Reservation. However, so long as the Court finds that the Topanga Cession is in Indian country, regardless of which tribe's reservation the "Cession" is in, New Dakota should not be permitted to enforce its TPT on an Indian tribe's federally encouraged activities in Indian country.

A. If the WCDC sits in the Wendat Reservation, the doctrines of Indian preemption and infringement prevent the State of New Dakota from collecting its Transaction Privilege Tax against it as a tribal corporation.

If the Court finds that the Topanga Cession is within the Wendat Reservation, the Court's precedent points squarely to the traditional bars against the enforcement of state taxes on Indian activities on their own land. The Court has consistently found that as a categorical matter state taxes may not be levied against "tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply." *See McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1972); *Williams v. Lee*, 358 U.S. 217 (1959); *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995); *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251 (1992); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985) (recognizing the Federal Government's "exclusive authority over relations with Indian tribes"). In this case, the legal incidence of the TPT falls directly upon the Wendat's tribal activities through the WCDC. To the extent that non-Indian consumer activities are implicated in the TPT regime, both the Wendat Band's interests in maintaining its sovereign powers and the federal government's regulatory regime in the area of Indian economic development preclude the State of New Dakota from effectuating its TPT.

1. The TPT should be found to be unenforceable with regard to the WCDC because the legal incidence of the TPT rests on Wendat tribal activities, infringing upon its tribal sovereignty, and Congress has made no clear authorization of New Dakota's power to tax the Wendat Tribe.

The initial and frequently dispositive question in Indian tax cases is who bears the legal incidence of the tax in question. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. at 458. Where the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, as a categorical matter "the tax cannot be enforced absent clear congressional authorization." *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. at 459 (citing *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S.

263, 475-481 (1976)); *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) (holding that state taxation of Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation is not permissible absent congressional consent (citing *McClanahan*, 411 U.S. at 164)). Here, the legal incidence of the TPT would rest on the WCDC, a Section 17 IRA Corporation wholly owned by the Wendat Band.[1] R. at 7. If the WCDC is found to be within the Wendat Reservation, the TPT is unenforceable against the WCDC because the State has received no clear or express congressional authorization.

i. The legal incidence of the TPT as levied on the WCDC rests on the WCDC, a Wendat tribal corporation.

The test to determine the legal incidence of a state tax in federal Indian law cases is "nothing more than a fair interpretation of the taxing statute as written and applied." *California Bd. of Equalization v. Chemehuevi Tribe*, 474 U.S. 9, 106 (1985). The Court has expressly declined to take the "more venturesome approach" of attempting to ascertain the "economic reality" of the situation. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. at 18 (citing *County of Yakima*, 502 U.S. at 267*)*.[2] In this case the taxing statute is 4 N.D.C. §212, New Dakota's transaction privilege tax. R. at 5-6. Although the question is not dispositive, 4 N.D.C. § 212 contains no explicit "pass-through provision" requiring retailers to pass on the

[1] "Tribal Corporations formed under section 17 of the Indian Reorganization Act have the same status as tribes for the purpose of federal and state taxation." Felix Cohen, Cohen's Handbook of Federal Indian Law § 8.06 (Nell Jessup Newton ed., 2017) (citing Rev. Rul. 94-16, 1994-1 C.B. 19).

[2] "If we were to make 'economic reality' our guide, we might be obliged to consider, for example, how completely retailers can pass along tax increases without sacrificing sales volume--a complicated matter dependent on the characteristics of the market for the relevant product. Cf. Yakima, 502 U.S. at 267-268 (categorical approach safeguards against risk of litigation that could 'engulf the States' annual assessment and taxation process, with the validity of each levy dependent upon a multiplicity of factors that vary from year to year, and from parcel to parcel')." *Okla. Tax Comm'n v. Chickasaw Nation*, 18-19.

cost of the tax to consumers. *California Bd. Of Equalization v. Chemehuevi Tribe*, 474 U.S. at 106. Instead, the structure of 4 N.D.C. §212 aims the TPT directly at licensees.

By virtue of this structure, rather than levying a sales tax on particular goods or transactions, 4 N.D.C. §212 levies a tax on particular retailers. Per § 212(1), persons who receive "gross proceeds of sales or gross income of more than $5,000 on transactions commenced in this state" must pay a $25 fee to obtain a license to operate. 4 N.D.C. § 212(1). Every "licensee" must then pay a 3.0% tax on gross proceeds of sales or gross income from all transactions commenced in New Dakota. 4 N.D.C. § 212(2). Throughout the statute, the text focuses on the "licensee" rather than on purchasers or wholesalers, and per the finding of the District Court, transaction privilege taxes in general are "paid to the state for the 'privilege' of doing business in that state." R. at 5-6; *See Cent. Mach. Co. v. Ariz. State Tax Comm'n*, 448 U.S. 160 (1980) (finding that the State of Arizona's analogous transaction privilege tax was imposed "on the privilege of doing business in the State" and is "assessed against the seller of goods, not against the purchaser"). Rather than aiming at particular transactions, goods, or purchasers, 4 N.D.C. §212 levies a tax against particular licensees for the privilege of continuing to do business in New Dakota. As such, the legal incidence of the TPT rests on the licensee – here, the WCDC.

ii. Congress has made no clear authorization of New Dakota's power to tax Wendat tribal activities inside the Wendat reservation.

A State may not levy a tax on tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply. *McClanahan*, 411 U.S. at 170-171 (citing U.S. Dept. of the Interior, Federal Indian Law 845 (1958)); *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. at 458; *Montana v. Blackfeet Tribe*, 471 U.S. at 764. There is no

evidence that Congress has made any such express or clear authorization of New Dakota's ability to enforce 4 N.D.C. §212 against the Wendat Band, and absent such evidence New Dakota lacks the requisite authority.[3] In such situations, the Court has consistently held that states generally remain "free to amend [their] law to shift the tax's legal incidence" and in fact some states have done just that. *See Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 48 (2005) (citing *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. at 460).

2. Even to the extent that the Court finds that the TPT aims to tax non-Indians transacting with the WCDC, New Dakota's interest in levying the tax cannot overcome the tribal and federal interests at hand given that any proceeds from the tax would be returned directly to the Wendat Band under 4 N.D.C. § 212(5), serving exclusively to create administrative bloat.

In cases where a sales tax has been found to be a direct tax on non-Indian consumers, this Court has sometimes allowed states to require on-reservation Indian sellers to collect the tax on behalf of the state. *See Moe*, 425 U.S. at 482. *Moe* simultaneously allows states to prevent non-Indian buyers from skirting a lawful sales tax by traveling to an on-reservation business while minimizing the frustration of tribal self-government and federal regulations by simply allowing the state to collect the tax itself. *Id*. at 483. This finding should not be read to allow New Dakota to require the WCDC to "collect and remit taxes actually imposed on non-Indians" and in fact militates directly against such a result. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. at 458 (citing *Moe*, 425 U.S. at 483).

As an initial matter, the holding in *Moe* applies exclusively to contexts where a tax's "legal incidence fell on the non-Indian purchaser." *Wash. v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 151 (1980) (citing *Moe*, 425 U.S. at 482). As discussed

[3] For a comprehensive overview of the various acts of Congress failing to authorize general state taxation of Indian activities on tribal land, *see generally* Cohen at § 8.03[1][c].

above, the language of the TPT makes inescapable the conclusion that it is levied against licensees for the privilege of continuing to operate in New Dakota. For that reason alone, New Dakota should not be permitted to collect its TPT from the WCDC or require that such collection be made on its behalf.

Regardless, the logic of *Moe* does not apply in this case due to the text of 4 N.D.C. § 212(5). The state statute creating the TPT at issue explicitly acknowledges that "the State of New Dakota will remit to each tribe the proceedings of the Transaction Privilege Tax collected from all entities operating on their respective reservations that do not fall within the exemption of §212(4)." 4 N.D.C. § 212(5). The statute claims that "the centralization of collection and enforcement by the State of New Dakota is the most efficient means of providing these funds to tribes." *Id*. In consideration of § 212(5), were this Court to require the WCDC to "collect and remit" the TPT in the style of *Moe*, the State would simply return all proceeds back to the pocket of the Wendat Band in an administratively inefficient manner, with no benefit to the State, and with unfruitful intrusion into the taxation powers of sovereign Indian nations.

i. The tribal and federal interests in Indian sovereignty and economic development outweigh the minor state interests at stake.

In cases where this Court has found that a state tax falls on non-Indian reservation activities, it has found the tax to be unenforceable when a "particularized examination," *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 838 (1982), into the balance of federal, state, and tribal interests at stake favors the Tribe. *See Colville*, 447 U.S. at 154-157 (1980); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980);

Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 691 (1965); *Williams v. Lee*, 358 U.S. at 220.

Here, the State has no plausible interest in enforcing the TPT. The entirety of the TPT as levied against the WCDC would immediately be returned to the Wendat Band, which retains 100% ownership of the WCDC. *See* 4 N.D.C. §212(5); R. at 8. The statute claims that "the centralization of enforcement and collection by the State of New Dakota is the most efficient means of providing these funds to tribes." 4 N.D.C. §212(5). Not only is this patently untrue, as the funds would surely be more "efficiently" provided to the Wendat simply be allowing them to remain with the Wendat, it is both preempted by the Indian Reorganization Act (the IRA) and infringes upon rights generally reserved to sovereign Indian tribes.

The IRA, signed into law in 1934, permits tribes to incorporate, thus "equip[ping] themselves with the devices of modern business organization, through forming themselves into business corporations." 25 U.S.C. § 5124; S. Rept. No. 1080, 73d Cong., 2d Sess. 1 (1934). This comports with the general federal policy of "encouraging tribes to 'revitalize their self-government' and to assume control over their 'business and economic affairs'" as recognized by this Court. *White Mountain Apache Tribe*, 448 U.S. at 149 (citing *Mescalero*, 411 U.S., at 151). The primarily result of levying the TPT against the WCDC's transactions with non-Indians would be to take profits from the Wendat Band's federally authorized vehicle for economic development and give them to the Wendat tribal government, thus undermining the ability of the WCDC to operate effectively and efficiently by introducing unnecessary administrative costs, thereby jeopardizing profits intended for the benefit of the tribe.

This federal interest is buttressed by the important "backdrop" of "traditional notions of Indian self-government" upon which the TPT infringes. *White Mountain Apache* Tribe, 448 U.S. at 143 (citing *McClanahan*, 411 U.S. at 172). The federal government has acknowledged that "chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation" and that "this power may be exercised over members of the tribe *and over nonmembers.*" *Colville*, 447 U.S. at 153 (citing Powers of Indian Tribes, 55 I.D. 14, 46 (1934)) (emphasis added). While some state taxes have been applied successfully to the activities of nonmembers on the reservation concurrent with Indian powers, the balance of the particularized interests at stake on each occasion frequently tilts in the opposite direction. *See Buster v. Wright*, 135 F. 947, 950 (CA8 1905), appeal dism'd, 203 U.S. 599 (1906) (upholding the Creek Nation's right to subject nonmembers trading within its borders to a "permit" tax for the privilege of engaging in on-reservation economic activities); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (CA8 1956) (affirming the power of the Oglala Sioux to levy taxes as preserved by the Indian Reorganization Act).

New Dakota's interest in imposing a burden upon tribal economic development sanctioned and encouraged by federal regulations is minimal. At best, New Dakota may assert that this Court's holding in *Moe* recognizes a state's interest in preventing non-Indians purchasing from tribal sellers from avoiding a lawful tax. Moe, 425 U.S. at 483. But this interest is not at stake in the case today, given that the TPT is levied against licensees and not consumers. Non-Indians might similarly avoid the TPT by shopping at any entity not required to obtain a license by 4 N.D.C. § 212, such as any tribal business operating within its own reservation on land held in trust. 4 N.D.C. § 212(4). This "avoidance" is made perfectly lawful by the statute because the aim of the TPT is to tax licensees – not purchasers.

Ultimately, it would confer no real benefit to the State of New Dakota for the WCDC to collect sales taxes from transactions with non-Indians and remit them to the State, given that the State would simply collect and remit them to the Wendat in turn. All this circular process would accomplish is to frustrate the intent of the federal government to allow Indian tribes to fruitfully develop their on-reservation economic interests through the use of modern corporate entities such as the WCDC. As such, this Court should find the TPT inapplicable to the WCDC if it operates within the Wendat Reservation.

B. If the Court holds that the WCDC sits inside the Maumee Reservation and thus is squarely presented with the question of whether a nonmember Indian is subject to state taxes for activities inside another Tribe's reservation, it should return to the pre-*Colville* lower court treatment of nonmember Indians based on the congressional statutory intent exhibited by the *Duro*-Fix.

Prior to this Court's opinion in *Colville*, "lower federal courts and state courts uniformly treated nonmember Indians the same as Indians for tax purposes." Cohen at § 8.06, n. 2, citing *e.g., Confederated Salish & Kootenai Tribes v. Moe*, 392 F. Supp. 1297, 1311-1312 (D. Mont. 1974); *Topash v. Comm'r of Revenue*, 291 N.W.2d 679 (Minn. 1980); *White Eagle v. Dorgan*, 209 N.W.2d 621 (N.D. 1973). The Court in *Colville* held otherwise on the basis that no federal law explicitly preempted state taxation of nonmembers, and that nonmembers are not protected by Indian sovereignty interests because they are not involved in tribal affairs. *Colville*, 447 U.S. at 160-161. Congress has since explicitly disapproved an analogous holding in the criminal context. *See* 25 U.S.C. § 1301(2), (4) (overturning *Duro v. Reina*, 495 U.S. 676 (1990)). Given the congressional intent underlying the *Duro*-fix and the general rule to resolve ambiguities in federal law in favor of tribal independence from state interference, the time is ripe for this Court to find that the narrow holding of section IV(D) of *Colville* has been rendered inapplicable by congressional action.

1. A broad reading of the Duro-fix which resolves ambiguities in favor of tribes should acknowledge congressional intent to set aside the assumptions held in common by Duro and Colville.

The Court in *Duro* found that Indian tribal courts do not have criminal jurisdiction over nonmember Indians because such jurisdiction was "implicitly surrendered" when the tribes became dependent on the Federal Government. *Duro*, 495 U.S. at 698 (Brennan, J., dissenting). The Court's finding in *Duro* was based on the federal common law practice of, in the absence of clear statutory rules, attempting to ascertain congressional intent. *See generally* Martha Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv. L. Rev. 881 (1986). Following *Duro*, Congress modified the language of the Indian Civil Rights Act (the ICRA) to explicitly acknowledge Indian tribal jurisdiction over nonmember Indians in the criminal context, thus clarifying its intent. 25 U.S.C. § 1301. The mechanism used by Congress to acknowledge this sovereign power should point the Court towards a broader application including the context of taxation.

Congress could have chosen to enact new laws delegating federal power to tribes to try nonmember Indians. *See United States v. Mazurie*, 419 U.S. 544 (1975) (upholding congressional delegation of power to regulate commerce to Indian tribes). However, such a delegation would have implied that tribes did not *already have* jurisdiction over nonmember Indians and must therefore borrow the power of the federal government. Instead, Congress amended the extant ICRA to "make clear to the federal courts that Congress recognizes tribal court jurisdiction is broad enough to include nonmember Indians." Nell J. Newton, *Permanent Legislation to Correct Duro v. Reina*, 17 Am. Ind. L. Rev. 109, 113 (1992). The legislative history of the *Duro*-fix strongly supports this reading. The relevant Conference Committee Report notes that "Throughout the history of this country, the Congress has never

questioned the power of tribal courts to exercise misdemeanor jurisdiction over nontribal member Indians in the same manner that such courts exercise misdemeanor jurisdiction over tribal members." H.R. Rep. No. 938, 101st Cong., 2d Sess. 133 (1990). Rather than delegating new powers to tribes, the *Duro*-fix simply "clarifies and reaffirms…the inherent right which tribal governments have always held and was never questioned until [*Duro*]." H.R. 972, H.R. Rep. No. 261, 102d Cong., 1st Sess. (1991).[4] As such, the Court should reexamine its holding in *Colville* in light of its now-corrected misunderstanding of congressional intent in the manner demonstrated by *United States v. Lara*. 541 U.S. 193, 206-207 (2004) ("the Court in these cases based its descriptions of inherent tribal authority upon the sources as they existed at the time the Court issued its decisions. Congressional legislation constituted one such important source. And that source was subject to change").

2. There is no reason why the inherent jurisdiction of Indian tribes over nonmembers would extent farther with regard to criminal matters than with regard to taxation.

As a general rule, tribal court jurisdiction may not exceed tribal legislative jurisdiction. *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997). Criminal jurisdiction, the species of jurisdiction at issue in *Duro*, is a form of legislative jurisdiction. Cohen at § 4.03, n. 94. The *Duro*-fix therefore acknowledges a fairly expansive legislative jurisdiction reserved to tribal governments within which both civil and criminal jurisdiction are housed. As it currently stands, *Colville* restricts tribal civil jurisdiction more strictly than tribal criminal jurisdiction by excluding civil jurisdiction over nonmember Indians. This is unusual. As the leading treatise on Indian law notes, "tribe's civil jurisdiction generally is broader than its criminal jurisdiction." Cohen at § 4.03, n. 94 (citing *Nat'l Farmers Union Ins. Cos. v.*

[4] *See* Newton, *Permanent Legislation to Correct Duro v. Reina*, 17 Am. Ind. L. Rev. 109 (1992) for thorough review of the legislative history of the *Duro*-fix.

Crow Tribe, 471 U.S. 845, 854-855 & nn. 16 & 17 (1985) (noting that Congress has systematically reserved for itself jurisdiction over tribal criminal matters and allowed tribes to retain jurisdiction in civil matters)). Given the legislative intent behind the *Duro*-fix, as analyzed above, there is little reason to think Congress was abandoning its otherwise consistent position of ensuring that tribes retain access to greater portions of their inherent civil powers than their criminal jurisdiction.

3. On balance, the Maumee Tribe's interest in taxing on-reservation activities combined with the Federal Government's expansive regulatory regime governing Indian Traders outweighs any State interests at issue.

Absent the exception provided by section IV(D) of *Colville*, an analysis of New Dakota's ability to levy state sales taxes on an on-reservation Indian business may proceed along the usual lines. *See Colville*, 447 U.S. at 154-157. As such, the Court looks to the balance of tribal, federal, and state interests at stake.

New Dakota's interests are moderately greater if the WCDC is found to operate on Maumee land. If the WCDC is found to operate on the Maumee Reservation, any taxes collected by New Dakota under 4 N.D.C. §212 would be sent directly to the Maumee Tribe due to the stipulations of §212(5). 4 N.D.C. §212(5). This is unlike the circumstance where the State would remit the tax back to the Wendat Band because the Wendat Band is the entity subject to the tax to begin with. Here, New Dakota may assert an interest in taxing the WCDC in order to efficiently provide "these funds to tribes" – in this case the Maumee Tribe. 4 N.D.C. §212(5). Notably, however, New Dakota maintains scarce interest in taxing the WCDC on its own behalf – outside of the tax remitted to the Maumee Tribe, the State would retain no benefits and obtain no funding for services provided to its citizens. It's interest in providing for the Maumee Nation is similarly scant: given the federally reserved

tribal power to "run the reservation and its affairs without state control", states have been "automatically relieved" of all burdens to carry out those same responsibilities. *Warren Trading Post Co.*, 380 U.S at 690; *White Mountain Apache* Tribe, 448 U.S. at 152.

The State's interest becomes even less compelling given that it is served only by infringing upon one of the Maumee Tribe's chief powers of sovereignty: the power of taxation of members and nonmembers on the reservation. *Colville*, 447 U.S. at 153 (citing Powers of Indian Tribes, supra). If the WCDC sits on Maumee land, the Maumee are perfectly capable of exercising their own sovereign powers to institute a tax carefully tailored to their own needs and requirements. For example, this would allow the Maumee to raise the tax on the WCDC if it needs to generate more revenue – a power of the Maumee tribe that would be infringed upon if the sales tax were solely collected via New Dakota legislation over which the tribe has little influence. Conversely, the Maumee are free to lower levels of taxation in order to retain the much-needed grocery store and café provided by the WCDC. R. at 8. The ability to make these determinations for itself are hallmarks of the economic independence the Federal Government has consistently recognized as a primary goal of tribal sovereignty. *White Mountain Apache Tribe*, 448 U.S. at 144.

Furthermore, the Federal Government has imposed a comprehensive regulatory structure upon non-reservation traders entering an Indian Reservation to conduct retail trading. In *Warren Trading Post Co.*, this Court held that this comprehensive federal regulation preempted the State of Arizona from imposing a "gross proceeds tax" (analogous to the TPT at issue in this case) on a non-Indian company trading on the Navajo Indian Reservation. *Warren Trading Post Co*, 380 U.S. at 686. Although *Warren Trading Post Co.* only applied the analysis to federally licensed Indian traders, this Court has found the same

argument persuasive in cases where the non-reservation trader was not federally licensed on the basis that "Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." *Warren Trading Post Co.*, 380 U.S. at 690; *Cent. Mach. Co. v. Ariz. State Tax. Comm'n*, 448 U.S. (extending the analysis in *Warren Trading Post* to a corporation selling tractors to an Indian tribe despite that the corporation was not a licensed Indian trader).

Given that New Dakota's interest in taxing the WCDC is slight, that the Maumee Tribe is perfectly capable of imposing their own sales taxes upon the WCDC, and that the Federal Government has comprehensively regulated non-reservation retailers' activities on Indian reservations, the TPT should be found to be inapplicable to the WCDC even should it be found to operate within the Maumee Reservation.

CONCLUSION

For the foregoing reasons, this Court should uphold the decision of the United States Court of Appeals for the Thirteenth Circuit and rule that 1) the "Topanga Cession" is within the Wendat Band Reservation and New Dakota may not levy a tax on on-reservation tribal activities, or alternatively that 2) New Dakota may not infringe upon the sovereign right of the Maumee Tribe to tax Indian activities on its reservation absent substantial State interests, which are absent in this case.

Respectfully Submitted,

January 2021 *Counsel for Respondent*