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 from the United States Court of Appeals for the Thirteenth Circuit

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BRIEF FOR THE 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 or whether the Topanga Cession is outside Indian Country?
2. Given that the Topanga Cession is still in Indian country, whether the doctrines of Indian preemption or infringement prevent the State of New Dakota from collecting its nondiscriminatory Transaction Privilege Tax against a tribal corporation created by the Wendat Band?

Statement of the Case

a. Statement of the Proceedings

The Maumee Indian Nation instituted civil proceedings against the Wendat Band of Huron Indians in order to resolve the competing claims over the Topanga Cession and to determine whether the State of New Dakota may impose its Transaction Privilege Tax on a commercial development by the Wendat Band on fee land within the disputed territory. ROA at 8. In *Maumee Indian Nation v. Wendat Band of Huron Indians*, 305 F. Supp. 3d 44 (D. New Dak. 2018), the District Court correctly concluded that the Maumee Reservation was not diminished and that the Topanga Cession remained within its territory. ROA at 1. As a result, the court found that New Dakota was permitted to levy its Transaction Privilege Tax on the Wendat Commercial Development Corporation, a nonmember tribal entity. *Id.*

The Court of Appeals for the Thirteenth Circuit reversed in *Wendat Band of Huron Indians v. Maumee Indian Nation*, 933 F.3d 1088 (13th Cir. 2020), and improperly held that

the Maumee Reservation had been diminished, while the Wendat Reservation remained intact. *Id.* It further concluded with no analysis that the State of New Dakota was prohibited from levying its tax on the Wendat tribal corporation. *Id.*

In response, the Maumee Indian Nation petitioned for and was granted a writ of certiorari from this Court to review the lower court's rulings. *Id.*

b. Statement of the Facts

In the 1830s, the natural movement of the Wapakoneta River altered the boundaries of treaty-guaranteed reservations for the Maumee Indian Nation ("Maumee" or "Nation") and the Wendat Band of Huron Indians ("Wendat" or "Band"). ROA at 5. The plain language of the Treaty of Wauseon, made with the Maumee Nation in 1802, reserved land to the west of the Wapakoneta River at the time for the Maumee. *Id.*; Treaty of Wauseon, Oct. 4, 1801, 7 Stat. 1404. After the river's movement approximately three miles to the west, the federal government guaranteed the land to the east of the River to the Wendat in the Treaty of 1859. Treaty with the Wendat, March 26, 1859, 35 Stat. 7749. The overlapping claims in both treaties bound the disputed area, dubbed the Topanga Cession, and these claims are further complicated by the passage of the General Allotment Act. ROA at 5. Both tribes, the Maumee and the Wendat, were subject to individual allotment acts. Appendix A. Both tribes were paid a sum certain for over one million acres of land, some of which was located in the Topanga Cession. *Id.*

Nowadays, the Topanga Cession contains a dearth of American Indian residents within its boundaries, and even the two reservations have significantly lower tribal populations compared with the late nineteenth century. ROA at 6-7. Only 17.9% of residents

in the Topanga Cession are categorized as American Indian or Native Alaskan in the census records. *Id.* Additionally, during the allotment period, very few members of either tribe chose an allotment inside the Topanga Cession—most Indian residents today own their land in fee. *Id.*

For many years, the two tribes privately disputed ownership over the Topanga Cession, but never tried their claims in court in order to minimize inter-tribal conflict. ROA at 7. The Wendat Band's purchase of 1,400 acres in the Topanga Cession for the creation of a tribal commercial development instantiated the instant dispute. *Id.* Through the Wendat Commercial Development Corporation ("WCDC"), a section 17 Indian Reorganization Act Corporation wholly owned by the Wendat Band with 100% of corporate profits remitted quarterly to the tribal government as dividend distributions, the Band intended to construct a shopping complex filled with general and tribe-specific store offerings. ROA at 8.

Businesses operating in the State of New Dakota are required to pay a Transaction Privilege Tax ("TPT"), levied on the gross proceeds of sales or gross income of a business. ROA at 5. The tax is paid to the State for the privilege of doing business in the State and funds various state services such as civil courts, transportation infrastructure, and other commercial programs. 4 N.D.C. § 212(3) (Appendix B). Significantly, the Transaction Privilege Tax is novel as a state tax due to its express recognition of "the unique relationship between New Dakota and its twelve constituent Indian tribes." 4 N.D.C. § 212(4). Indian tribes or businesses operating on trust lands on-reservation are exempt from the tax and are remitted the proceeds of the tax for all other commercial activity on their respective reservations. *Id.* The Maumee Nation informed the Wendat Band that, due to its claims over

the Topanga Cession, it expected the WCDC to pay New Dakota's Transaction Privilege Tax in order to receive its remittance. ROA at 8.

Summary of Argument

The Maumee Reservation has control over the Topanga Cession, there was no congressional intent that says otherwise. The abrogation or diminishment of an entire reservation, or in part, needs to have clear congressional intent through either statutory text or congressional testimony. In *McGirt v. Oklahoma*, the United States Supreme Court found that Congressional intent could be shown through the Treaty or allotment agreements or within the congressional testimonies after the legislation passed. *McGirt v. Oklahoma,* 140 S.Ct., 2452 (2020). The Treaty with the Wendat does not specify any intent to diminish the Maumee Reservation land that was set when the river was located three miles East. Treaty with the Wendat, March 26, 1859, 35 Stat. 7749. The Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908) or the Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892) do not have statutory language that is needed to abolish or diminish reservation lands, such as "hereby abolished." *McGirt*, 140 S.Ct. at 2465. None of the Congressional testimonies or Congressional Globe records show any type of Congressional intent to abolish this land from the Maumee Reservation and given to the Wendat Band of Huron Indians (Wendat). Nowhere in any of the Treaty's, Allotment Agreements, or Congressional is there an unambiguous and express intent to abolish the land from the Maumee reservation.

The State of New Dakota can collect its transaction privilege tax against a Wendat tribal corporation because it is not subject to Indian preemption and the tax bolsters, rather than infringes on, tribal self-government. States may exercise regulatory authority over Indian tribes or their members as long as the state action is not preempted by federal Indian

law and does not infringe, "on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980). Under these doctrines, while states are limited in how they exercise regulatory authority over Indian tribes or tribal members on their respective reservations due to well-established principles, nonmember Indians do not enjoy the same level of regulatory immunity. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) (permitting the taxation of the gross profits of an off-reservation, Indian-owned ski resort).

The Maumee Nation maintains that the Topanga Cession, where the Wendat tribal corporation operates, is contained within the Maumee Reservation boundaries; but even if this Court decides otherwise, the Transaction Privilege Tax still constitutes an appropriate exercise of state regulatory authority in Indian country. If the Topanga Cession is considered to be Maumee territory, the Wendat tribal corporation has no authority to object to the TPT on preemption or infringement grounds because it is operating on fee lands off-reservation. If the Topanga Cession is instead classified as within the boundaries of the Wendat Reservation, the TPT is still valid over businesses on fee land because the legal incidence of the tax does not fall on the tribe and the tax bolsters tribal self-government rather than infringing on tribal sovereignty. Independently, granting the Wendat tribal corporation an exemption from the state tax would allow the corporation to impermissibly gain an economic advantage over similarly situated businesses.

Argument

A. DIMINISHMENT OF RESERVATION LAND REQUIRES CLEAR CONGRESSIONAL INTENT THROUGH STATUTORY TEXT OR LEGISLATIVE HISTORY

The land given to Tribes has been fought for deliberately through years of genocide and historical policy that continued to diminish promises. Land abolishment and diminishment are not taken lightly, with abolishment comes potential loss of economic activity, development, and settlement for Tribal people. Treaties are the Supreme law of the Land. Art. I, § 8; Art. VI, cl. 2. Speculation and assumptions are not a foundation of law to rely on when dealing with land diminishment given to a Tribe through a Treaty, instead, using Congressional intent is critical. In *McGirt*, the court found that Congressional intent to abolish land needs to be clear because looking at the past, Congress has actively taken away land and Reservations without having to rely on Allotment agreements. *McGirt*, 140 S. Ct. at 2465. The three-mile Topanga Cession has historically belonged to the Maumee and has not been taken away by Congressional intent through the creation of the Treaty of Wendat. The overlapping area has caused confusion for years, this confusion based on the movement of the river. The language does not say in the Treaty of Wauseon, that upon the river moving will be the change of property. Instead, it should be looked at as a snapshot in time, so future movements of the river will not continue to cause chaos for future development. Even if the court finds that the Allotment Agreements will affect the abolishment of the Maumee reservation over the Topanga Cession, the Maumee Allotment Act of 1908, P.L. 60-8107 would most suit the Congressional intent for the Maumee compared to the Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892). The Maumee Allotment Act of 1908 statutory language shows more intent to the land, whereas the Wendat Allotment Act is focused more on selling the land.

i. The statutory language within the Treaty With the Wendat and the congressional record do not show an unambiguous intent to diminish land the Maumee Nation historically owned.

There was no clear congressional intent to abolish the Maumee Reservation lands through statutory interpretation of the actual Treaties, Allotment agreements, or congressional testimony supporting the abolishment. A clear intent from Congress is needed to abrogate or diminish any Reservation, or in part, through statutory text or congressional history when the allotment agreements or Treaties are passed. *McGirt*, 140 S. Ct. at 2465. The Treaty with the Wendat did not abrogate the Treaty of Wauseon with any language specifying the diminishment of land for the Maumee reservation. *Treaty with the Wendat*, March 26, 1859, 35 Stat. 7749. There was no language present that had a clear abrogation or diminishment of Maumee lands when the Treaty of Wendat was created through the Congressional Globe, instead, it talked about how the surplus of lands released would empower the State of New Dakota and expand lands for settler uses. *Cong. Globe*, 35th Cong., 2nd Sess. 5411-5412(1859).

In *McGirt v. Oklahoma*, the United States Supreme Court found large areas of Oklahoma are considered reservation land. *McGirt v. Oklahoma*, 140 S. Ct. at 2452 (2020). Jimcy McGirt, a member of the Seminole Nation of Oklahoma, was convicted on several criminal offenses through the Oklahoma state court. *Id*. at 2459. Mr. McGirt argued that the State of Oklahoma did not have criminal jurisdiction because of his enrollment status through a federally recognized Tribe and committed his crimes on the Creek Reservation located in Oklahoma. *Id*. The Major Crimes Act allows the federal government to have jurisdiction over tribal members for crimes committed on reservation lands. *Id*. Generally, when the Major Crimes Act applies states do not have jurisdiction. *Id*. The court found that Congress never

disestablished the Creek Reservation; therefore, Oklahoma had no jurisdiction over Mr. McGirt. *Id*.

In *Solem v. Bartlett*, the Supreme Court determined that Congress can pass acts that diminish the boundaries of Indian reservations. 465 U.S. 463, 467-69 (1984). At the time of allotment, there was confusion as to whether the lands opened up diminished the boundaries of the reservations. *Id.* Jurisdictional questions arose between the State and federal government. *Id.* Bartlett was convicted of a state crime on the Cheyenne River Sioux Reservation. *Id.* The issue was whether the allotment act diminished the areas that contained surplus land. *Id.* The Court found that Allotment did not diminish the land, and instead, "Congress [must] clearly evince an intent to change boundaries before diminishment will be found". *Id*.

McGirt is a landmark Supreme Court case because of the potential ramifications in federal Indian law it has. The Court did not rely on anything other than straightforward statutory interpretation, something that cannot be said in prior cases. In *Johnson v. McIntosh*, the Supreme Court determined Tribal Nations could not fully possess land because they were "fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest". *Johnson v. McIntosh*, 21 U.S. 543 (1823). It is not needed to be said that the Indigenous people back in those times were not in fact fierce savages.

The Treaty with the Wendat of 1859 does not specify the abolishment of the land that the Maumee were given before the river moved, since there was no statutory language that shows the support of transferring the land and abolishing the land from the Maumee shows that the Maumee still retain the land in question.

During the Indian Removal Act, in 1830, the Muscogee Creek people were forced from Alabama, Georgia, and Florida to what is now known as Oklahoma. *McGirt*, 140 S. Ct. at 2459. President Jackson insisted at the time, the Removal Act was taken to protect Tribal Nations of racial "inferiority." President Andrew Jackson, Fifth Annual Message (Dec. 3, 1833), in AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/node/200846 [https://perma.cc/9FTJ-P29U]. This was false, the underlying motivation was to secure additional resources from the cotton. *See* Adam Rothman, *Slave Country: American Expansion and the Origins of the Deep South*, 221-22 (2005).

Typical allotments were set up in the following formula: 160-acre parcels to head of households and each single person would receive 80 acres. *McGirt*, 140 S. Ct. at 2463. Title to the land would be held in trust by the government for 25 years. After 25 years each individual would receive United States citizenship with a fee simple title to the land. *Id*.

The allotment policy was imposed from the top down with no tribal consultation, consent, or input. Charles F. Wilkinson, *American Indians, Time, and the Law 4*, 20 (1986). The national Indian land was reduced from 138 million acres in 1887 to 26 million acres in 1934. *Id*. The allotted land went from the the tribe, to individual Indian allottees, then eventually to non-Indians through purchases, mortgage failures, and fraud. *Id*. The "surplus of land" caused Tribal Nations to lose 68 million acres. *Id*. The underlying reasoning was to help the Indians become accustomed to society by becoming farmers.

The argument in *M'Intosh*, the Indian Removal Act, and the Dawes Act reduced the amount of jurisdiction and oversight Tribes had over lands originally promised to them. The issue here isn't a moral one, Congress is allowed to break promises. It is critical to view the similarities in all three, none of them abolished the reservation. In *McGirt*, Justice Gorsuch

wrote, "[t]oday we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word." *McGirt*, 140 S. Ct. at 2459.

The Supreme Court in *McGirt* analyzed three arguments raised on review: 1) whether the creek reservation was disestablished 2) whether Congress had established a reservation for the Creek Nation 3) whether the MCA applied to Northeastern Oklahoma. *Id*. at 2459. In order for a reservation to be abolished, Congress alone has the power to breach its own promises or treaties which means Congress can only disestablish a reservation. *Id*. at 2462. The court found that Congress must explicitly express its intent to disestablish in the legislation it has done in the past. *Id.*

There have been distinctions of how a reservation is abolished by congressional intent through statutory text or congressional history. The reason why there is so much emphasis on intent, is so there is no confusion, speculation, or assumptions made that could be detrimental based on non-statutory text. The emphasis on making the diminishing in clear terms is solely for the benefit of Tribes because it takes into consideration how important land abolishment is through a Treaty. In *McGirt*, the court gave specific examples of what congressional intent looks like. Before allotment was passed, Congress did not need the allotment to disestablish any reservation. 140 S. Ct. at 2465. When allotment did abolish reservations, the language expressly said so. *Id.* In 1904, Congress allotted the Ponca and Otoe Tribes located in Oklahoma with specific language that said "further, that the reservation lines of the said… reservations… are hereby abolished". *Id.* There is no language found in the 1901 Creek Allotment Agreement or the 1908 Act. *Id.* Similarly here, there was no express language in the Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908). Since there was no

express language that gave the weight of disestablishment, when Congress had the power to do so, they chose not to abolish the reservation. The same events happened in *Bartlett*, there was no language that insisted on the abolishment of the land. *Bartlett*, 465 U.S. at 470. In *Bartlett*, the Court said: "The most probative evidence of Congressional intent is the statutory language used to open the Indian lands. Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation…". *Id*. Here, they did not abolish the eastern part of the Maumee reservation. No words such as abolish, diminish, or disestablish are found in the Allotment agreements for the Maumee or Wendat, such as that in the Creek Allotment agreement.

Since there is no statutory language diminishing or abrogating the land Maumee historically owned, the Treaty with the Wendat of 1859 did not suffice for taking away the neighboring Tribes land.

ii. The statutory language within the Allotment Acts and the congressional testimony do not contain an intent to diminish land the Maumee Nation historically owned.

Tribes have resisted encroachment of State interests for years. States have sought to suggest allotments automatically ended reservations, and the courts have rejected this argument, time and time again. *McGirt*, 140 S. Ct. at 2462. Congress does not disestablish a reservation by allowing the transfer of individual plots to Indian or non-Indian people. *Id*. Here, a Tribe is trying to encroach on an already established reservation that has not been disestablished. Unless the Wendat or Maumee Allotment Agreements stated the abolishment of the Maumee reservation in the Topanga Cession, then the land would not be abolished and potentially given to the Wendat reservation.

Although the Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892), does not contain any statutory text to abolish the areas located in the Topanga Cession, it was never a part of the Wendat reservation. Here, a natural environmental occurrence of a river moving west has caused confusion on whether this is now disestablished from the Maumee reservation. The Treaty of Wauseon does state from the Wapakoneta River west, is reserved to the Maumee Indian Nations and the Wendat Band of Huron Indians dates its rights to the Treaty with the Wendat in 1859, east of the river. In a hypothetical trajectory, if the river moved west twenty miles to make the Maumee reservation completely diminished, would this be sound law or just another justification to undermine a Tribe to fit the needs of another Sovereign entity? Justice Gorsuch in *McGirt* stated that "the magnitude of the legal wrong is no reason to perpetuate it." 140 S. Ct. at 2480. If the simple reason for coinciding a natural river movement to diminish property of a Tribal reservation would significantly undermine the *McGirt* case. The disestablishment of part of a reservation should not be taken lightly.

Justice Gorsch in *McGirt* did not find the Creek allotment agreement critical in determining if it abolished the reservation because it did not have the statutory language in the allotment to abolish the reservation. In *McGirt*, the Creek Allotment similarly laid out the procedures for allocating the land parcels to individual members who could not sell, transfer, or otherwise encumber their allotments for a number of years. *Id*. at 2464. The court noted that there was no statute that had "present and total surrender of all tribal interests" in the affet lands. *Id*. There was no portion indicating complete eradication of the reservation. From this, the court said "...but because there exists no equivalent law terminating what remained, the Creek Reservation survived allotment". *Id*. In comparison here, there is no statutory language in either the Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908) nor the

Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892) agreements that establishes abolishment or diminishment of land to the Treaty of Wauseon, Oct. 4, 1801, 7 Stat. 1404. Since the court in *McGirt* found that since the allotment did not contain the necessary statutory language or interpretation, the allotment agreement was not in comparison of intent.

Neither of the Allotment Acts are clear in essence to the Topanga Cession. The fairest outcome for both Tribes would be to not make assumptions about missing information that is needed that would potentially show that the Topanga Cession was the surplus land resulting from either of the Allotment agreements. The Maumee Allotment Act says that the western three-quarters of the reservation shall continue to be reserved to the Maumee. *Maumee Allotment Act of 1908*, P.L. 60 - 8107, Sec. 1 (May 29, 1908). On its face it would be easy to make assumptions that the Topanga Cession would be part of the surplus lands as planned from the allotment agreement, but there are no land parcels that show which land parcels Maumee were actually compensated for.

Similarly, for the Wendat Allotment Act, it would also be easy to make assumptions that the summed amount of pay will cover the amount of surplus land within the Topanga Cession since there is no information on which areas are opened and not opened. Neither Tribe has a strong historical tie to the area, both Tribes agree that no member of either Tribe selected an allotment within the Topanga Cession. The Indians that currently reside in the Topanga Cession purchased from non-Indian homesteaders, the State of New Dakota, and/or the United States.

If the court does find that the allotments are a significant factor, then the Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892) did not diminish the Wendat Reservation but did not extend jurisdiction over the Topanga Cession. The Maumee Allotment Agreement is

dependent more on focusing on protecting the rights of the Maumee's land and talks about the ability for them to manage land and how to protect, Dep't of the Interior. "Legislative History of the Allotment Acts", *Congressional Record* 23, 1777 (Jan. 14, 1892), whereas, the Wendat was generally more focused on opening the land for settlement.

B. NEITHER THE DOCTRINE OF INDIAN PREEMPTION NOR INFRINGEMENT PRECLUDE NEW DAKOTA'S IMPOSITION OF A TRANSACTION PRIVILEGE TAX ON A WENDAT TRIBAL CORPORATION IN INDIAN COUNTRY BECAUSE THE TAX IS CONSISTENT WITH FEDERAL LAW AND PROMOTES TRIBAL SELF-DEVELOPMENT.

Originally, federal Indian law categorically barred states from exercising regulatory authority over Indians residing in Indian country. *See Worcester v. Georgia*, 31 U.S. 515, 520 (1832) ("[State laws] can have no force … but with the assent of the [tribe] themselves, or in conformity with treaties, and with the acts of Congress."). However, federal statutes and recent Supreme Court decisions have opened Indian reservations to state regulatory authority in certain circumstances. "[W]hile they are sovereign for some purposes, it is now clear that Indian reservations do not partake of the full territorial sovereignty of States or foreign countries." *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 165 (1980). States can exercise regulatory authority over tribal reservations and members as long as they are not barred by "two independent but related barriers[.]" *Bracker*, 448 U.S. at 142. State regulatory authority may either be preempted by federal law or unlawfully infringe on tribal self-government. *Id.*

To determine whether a state tax specifically violates either of these principles, courts examine two factors: first, *who* is being regulated by the exercise of state authority and, second, *where* the regulated activity takes place. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 101 (2005). Under this framework, the state's regulatory interest exists

in flux with the federal and tribal interest in promoting tribal self-government. *Id.* Where the activity of Indians on their own reservations is concerned, the state regulatory interest is generally low while the federal and tribal interests are high. *Bracker*, 448 U.S. at 144. On the other hand, when Indians leave their respective reservations, they become "subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Jones*, 411 U.S. at 148-49. Thus, analyzing whether the Transaction Privilege Tax is preempted by federal law or infringes on tribal self-government turns on the classification of the Wendat tribal corporation and whether the WCDC complex is located on the Maumee or Wendat reservation.

Here, the State of New Dakota seeks to impose its Transaction Privilege Tax on a Wendat tribal corporation operating in the disputed Topanga Cession. Given that the Topanga Cession qualifies as Indian country, the New Dakota tax is valid regardless of which tribe retains jurisdiction over the area. Not only do both the Wendat Band and the federal government have a limited interest in protecting the WCDC from state taxation, but the state's interest in levying the tax substantially outweighs. Furthermore, New Dakota's efforts to accord the Transaction Privilege Tax with principles of tribal sovereignty bolster a conclusion that the tax promotes both Wendat and Maumee self-development.

i. The legal incidence of the Transaction Privilege Tax does not fall on the Wendat Band and New Dakota's interest in levying its tax on fee land in the Topanga Cession outweighs.

The two most important questions in determining whether an entity enjoys immunity from state taxation in Indian country are the "who" and the "where" of the challenged tax. *Wagnon*, 546 U.S. at 101. First, a court must determine who bears the legal incidence of the tax. If a state tax does not place the legal responsibility directly on a tribe or tribal member,

the tax is not preempted. In order to determine the legal incidence of a state tax, courts look to "dispositive language" in statutory text, crafting a "fair interpretation of the taxing statute as written and applied." *Wagnon*, 546 U.S. at 103. Second, if the conduct being taxed occurred on the reservation, federal law does not preempt state authority as long as the state can articulate a reasonable interest in enforcing the tax that is not outweighed by federal or tribal interests. *Id.* at 102.

Federal courts have upheld state transaction privilege taxes specifically on Indian reservations. *See Gila River Indian Community v. Waddell*, 91 F.3d 1232, 1239 (1996) (holding that a state transaction privilege tax did not "substantially affect [the tribe's] ability to regulate the development of tribal resources, and that the balance of state and tribal interests" did not render state taxing authority unreasonable); *Ariz. Dep't of Revenue v. Blaze Constr. Co.*, 526 U.S. 32, 33 (1999) (allowing state imposition of a transaction privilege tax on a company's proceeds from contracts on an Indian reservation). Not only do these decisions highlight the nondiscriminatory effects of a transaction privilege tax in general, but they also noted the separate policies of efficient tax administration and the desire to avoid litigation as independent reasons for upholding this type of state tax on commercial activities taking place on Indian reservations. *Blaze*, 526 U.S. at 33.

New Dakota law prohibits anyone, "who receives gross proceeds of sales or gross income of more than $5,000 on transactions," from conducting business in the state without a Transaction Privilege Tax license. 4 N.D.C. § 212(1). Unlike in *Wagnon*, where the Court found express language in a Kansas tax law specifying the legal incidence of the tax, the New Dakota law is not as clear-cut. 546 U.S. at 102-03. Section 212 places the legal obligation of remitting the 3% tax on the "licensee" as defined by the statute. A licensee

under the New Dakota law is defined as the "person" with the capacity to consolidate proceeds and income generated from business transactions conducted in the state. 4 N.D.C § 212(2). This implies that the entity being taxed by Section 212 is the business itself, which "receives" the money generated by its commercial activities under normal circumstances. Thus, a reasonable interpretation of the statutory text suggests that the legal incidence of the TPT falls on the business entity, in this case, the WCDC. *Nken v. Holder*, 556 U.S. 418, 426 (2009).

Indian tribes and tribal businesses operating within their own reservations on trust land are statutorily exempt from obtaining a TPT license or paying the tax. 4 N.D.C. § 212(4). However, the statute does not exempt tribal entities operating outside of their respective reservations. If the Topanga Cession is not Wendat territory, then New Dakota can clearly collect the tax from the WCDC. Since the Cession would be within the Maumee Reservation, permission from the Maumee Nation to impose the tax would eliminate any preemption or infringement concerns. *See New York v. UPS*, 160 F. Supp. 3d 629, 663 (S.D.N.Y. 2016) (finding that a tax exemption "geared toward on-reservation sales to tribe members purchasing cigarettes on their own reservations" did not extend to tribal sales of cigarettes outside of "their own reservations.").

Furthermore, nothing changes if the Topanga Cession is within the Wendat Reservation instead. The TPT only exempts tribal businesses operating on "trust lands" inside their own reservations—tribal corporations operating on fee land, like the WCDC, are not statutorily exempt. Under federal law, states cannot tax Indian tribes directly, but they can tax private entities engaging in business with a tribe on-reservation. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175 (1989). Therefore, the validity of collecting the TPT

against the Wendat tribal corporation turns on whether the corporation is considered equivalent to the Wendat Band in its sovereign capacity.

Tribal corporations organized under section 17 of the Indian Reorganization Act are oftentimes operated by the same individuals who make up the tribal government. However, courts have consistently ruled that despite the similarities between tribal governments and tribal corporations, they are nonetheless distinct legal entities with differing rights and responsibilities. *Big Sandy Rancheria Enters. v. Becerra*, 395 F. Supp. 3d 1314, 1323 (E.D. Ca. 2019). The Department of the Interior's own views on the status of section 17 tribal corporations solidifies the conclusion that these business entities have differing "powers, privileges and responsibilities." *Id.* at 1324. Therefore, while the legal incidence of New Dakota's Transaction Privilege Tax falls on the WCDC as a tribal corporation, this is not the same as directly enacting a tax on the Wendat Band itself. In fact, the Band only receives profits from the WCDC in quarterly dividend payments, meaning control over the business funds does not continually vest in the Band. Even if the Wendat do end up shouldering the financial burden of this tax, the proper analysis focuses solely on the bearer of the legal burden for the "who" prong within the tax immunity framework. *See Cotton Petroleum Corp.*, 490 U.S. at 175 ("Under current doctrine, however, a State can impose a nondiscriminatory tax on private parties with whom the United States or an Indian tribe does business, even though the financial burden of the tax may fall on the United States or tribe.").

Similar to other state transaction privilege taxes, the New Dakota tax is facially nondiscriminatory. It applies universally to business entities across the State and promotes the State's interest in "maintaining a robust and viable commercial market" by providing numerous administrative and infrastructural services. 4 N.D.C. § 212(3). The procedures of

the Transaction Privilege Tax also allow for the "most efficient means of providing these funds to tribes" under the § 212(5) remittance of the tax back to the relevant tribe on whose reservation the taxed activity is taking place. As a result, New Dakota has more than a mere "generalized interest in revenue" by enforcing its Transaction Privilege Tax. *Bracker*, 448 U.S. at 150.

If the Topanga Cession is considered part of the undiminished Maumee Reservation, then there are no issues with the exercise of state regulatory authority over a Wendat tribal corporation. Permission from the Maumee Nation to collect the tax against nonmember individuals and businesses within the reservation boundaries would override any concerns over federal preemption and would make any analysis of infringement on Maumee self-government irrelevant. In this situation, the tax would not problematically affect the Wendat Band either because the tribe is legally distinct from the WCDC. If the Topanga Cession is instead considered part of the Wendat Reservation, the tax would still be valid because New Dakota assesses the tax in return for "governmental function[s] it performs for those on whom the taxes fall." *Bracker*, 448 U.S. at 150.

Tribal businesses in general, and the WCDC specifically, undoubtedly take advantage of the services created through the funds collected by the Transaction Privilege Tax. Since states have concurrent civil adjudicatory authority over disputes involving non-Indian defendants, many disputes between the WCDC and non-tribal customers or commercial entities would go through the state courts. *See Montana v. United States*, 450 U.S. 544, 565 (1981) (limiting tribal adjudicatory authority over nonmembers). The tax also funds roads and other transport infrastructure used by businesses across the state, including the WCDC. In contrast, the Wendat Band has a minimal interest in preventing the collection

of the Transaction Privilege Tax against the WCDC in light of the substantial legitimate regulatory interests served by the regulation New Dakota seeks to impose. Finally, the fact that the Wendat Band would be remitted the 3% tax on the WCDC's profits mitigates any economic impact the tax may have on the Band's activities and could actually lead to them receiving funds from their businesses faster than through quarterly dividend payments.

In sum, analyzing the "who" and the "where" of the Transaction Privilege Tax reveals no conflicts with federal law and no direct exercise of state regulatory authority over the tribe, supported by the State of New Dakota's substantial interests in levying the tax against the WCDC.

ii. Consistent application of New Dakota's tax promotes Wendat and Maumee self-government, avoids economic upheaval, and does not infringe on the rights reserved by both tribes in their respective treaties.

New Dakota artfully crafted its Transaction Privilege Tax to uphold principles of tribal sovereignty while at the same time providing for the State's revenue-generating needs. Along with the tax immunity preemption analysis, a separate barrier to state regulatory authority, "has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Williams*, 358 U.S. at 220. This inquiry examines the practical effects of the attempted state regulation in light of congressional enactments and the purposes for which the Indian reservations were created. *Id.* "The principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." *Washington*, 447 U.S. at 156.

For example, in *Williams*, the treaty with the Navajo Nation contained specific language that "set apart" reservation land for the tribe's "permanent home." 358 U.S. at 221. The treaty also provided that non-Indians were prohibited from entering the reservation. *Id.* Combined with the federal policy of tribal self-government expressed in modern congressional Indian statutes and policy statements from executive branch agencies, the court found this language sufficient to preclude superseding state jurisdiction over tribal affairs, particularly since the Navajo had already developed a robust tribal governmental infrastructure of their own. *Id.* at 222. Thus, the states interest in *Williams* did not outweigh the strong tribal interests catalyzed by the treaty language and federal Indian policy.

The language of both treaties at issue here is nowhere near as strong or absolute in protecting the Wendat or Maumee right to self-government compared with the treaty in *Williams*. Furthermore, neither tribe is as established in the region compared with the Navajo Tribe's developments. Instead, the text of the treaties read more like receipts of sale rather than permanent guarantees of an exclusive homeland for either tribe. Tribal jurisdiction is not expressly mentioned anywhere, and no provisions address whether the boundaries of either reservation are opened or closed.[1] Article IV of the Treaty of Wauseon merely provides that the Maumee Reservation is created for the tribe, "to live and to hunt on," whereas the Treaty With the Wendat of 1859 mentions no specific purpose for creating the Wendat Reservation. Congress therefore did not include any substantial, unambiguous guarantees of tribal independence free from outside influence, even though it clearly knew how to do so at the time given its treaties with other Indian tribes like the Navajo. *Williams*, 358 U.S. at 221.

[1] The Treaty of Wauseon expressly provides for nonmember settlement on the Maumee Reservation.

Consistent with the lack of any treaty language evidencing an intent to protect either tribe from nondiscriminatory state taxes, the demographics of the Topanga Cession independently support a conclusion that the Transaction Privilege Tax does not infringe on tribal self-government or economic development. At bottom, subjecting the entire Cession to the Transaction Privilege Tax regardless of Wendat or Maumee jurisdiction would have a minimized effect on the tribes or tribal members since Indians constitute less than one-fifth of the territory's population. *Maumee Indian Nation v. Wendat Band of Huron Indians,* 305 F. Supp. 3d 44, 47 (D. New Dak. 2018).

It is true that the WCDC complex provides residential housing and facilities for Wendat tribal members. However, the primary purpose of the WCDC complex involves "raising revenue by attracting non-Indian consumers who may live outside the reservation." *Id.* at 48. This revenue is then used to fund the rest of the tribally oriented facilities in the complex. *Id.* Although the Band has shown a certain level of involvement in the WCDC complex, this role is not "active … in generating activities of value on its reservation," since the Band, "simply allow[s] the sale of items … to take place." *Waddell,* 91 F.3d at 1238. In addition, because the Wendat Band plans to rely primarily on revenue generated from non-Indian consumers at its shopping complex, granting the WCDC an exemption from the New Dakota tax would create an artificial incentive for "persons who would normally do their business elsewhere" concerning transactions, "in personalty with no substantial connection to reservation lands." *Washington*, 447 U.S. at 155.

Washington v. Confederated Tribes of Colville describes the creation of an artificially imbalanced economic field by exempting a tribal business that provides services to nonmembers from state taxation as contrary to the federal statutes and policies undergirding

tribal self-government. 447 U.S. at 135-36. There, tribal smokeshops selling to nonmembers on-reservation could not be exempted from a Washington tax because doing so would result in a slippery slope of tribal businesses marketing these exemptions to increase profits. *Id.* at 155. An exempt tribal business could, "open chains of discount stores at reservation borders, selling goods of all descriptions at deep discounts and drawing custom from surrounding areas." *Id.* Where two tribes' reservations border each other as with the Maumee and the Wendat, such anti-competitive business activity could end up hurting one tribe at the behest of another by siphoning customers away from non-exempt businesses. Therefore, if exempting the WCDC from New Dakota's tax would create a significant incentive for nonmember customers to shop at those businesses in lieu of other state businesses, no principle of federal Indian law, be it preemption or infringement, protects the Wendat Band from the tax. *Id.*

In fact—unlike many other state laws hostile to Indian interests—provisions in the Transaction Privilege Tax for remitting taxed funds back to tribes represents an express recognition by the State of tribal self-government and sovereignty. The Transaction Privilege Tax has no "discernible effect" on the economic prospects of the Wendat commercial complex because the Wendat Band is reimbursed. It also allows the State to provide beneficial services to tribal corporations like the WCDC using monies from non-tribal business tax payments. *Washington*, 447 U.S. at 157 ("State … interest is likewise strongest … when the taxpayer is the recipient of state services."). Particularly because the tax is nondiscriminatory, consumers would not be any more discouraged from utilizing the Wendat businesses than any other business across the state. Furthermore, the tax does not prevent the Wendat from governing its reservation or tribal members generally, especially because the

tax is not levied against the Band itself whatsoever. The burden thus shifts to Respondents to prove that imposing the Transaction Privilege Tax would substantially impair the tribe's self-government and economic development. If anything, the New Dakota tax creates more opportunities for tribal-state cooperation with regards to the field of civil regulation and represents a novel state tax law that is friendly, rather than opposed, to Indian interests.

Conclusion

The Thirteenth Circuit's decision for the Respondents should be reversed, and this Court should conclude that both the Maumee Reservation is still intact, granting jurisdiction over the Topanga Cession to the Maumee Nation. As a result, the State of New Dakota may impose its Transaction Privilege Tax because it does not violate Indian preemption or infringement.

Appendix A

CHAP. 818. An Act To authorize the allotment, sale, and disposition of the eastern quarter of the Maumee Indian Reservation in the State of New Dakota, and making appropriation and provision to carry the same into effect.

SEC. 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is hereby authorized and directed, to first survey the entire Maumee Indian Reservation into townships. After the survey is complete the Secretary shall permit the Indians to select their individual allotments in the western threequarters of the reservation under the following formula: 160 acres for each head of household, 80 acres for each single adult, and 40 acres for each child under eighteen years of age as of the time of this enactment. Unclaimed lands in the western three quarters of the reservation shall continue to be reserved to the Maumee. The Indians have agreed to consider the entire eastern quarter surplus and to cede their interest in the surplus lands to the United States where it may be returned the public domain by way of this act.

SEC. 2. That the lands shall be disposed of by proclamation under the general provisions of the homestead and townsite laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which the lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed in such proclamation: Provided, That prior to the said proclamation the Secretary of the Interior, in his discretion, may permit Indians who have an allotment within

the area described in section one of this Act to relinquish such allotment and to receive in lieu thereof a sum of eight-hundred dollars. Provided further, That the Secretary of the Interior be, and he is hereby, authorized and directed to cause to be surveyed all the lands embraced within said reservation, and to cause an examination to made of the lands by experts of the Geological Survey, and if there be found any lands bearing coal, the said Secretary is hereby authorized to reserve them from allotment or disposition.

SEC. 3. That the price of said lands entered as homesteads under the provisions of this Act shall be fixed by appraisement as herein provided, the full price being due to the local agent at Fort Crosby at time of entry. The President of the United States shall appoint a commission to inspect, appraise, and value all of said lands that shall not have been allotted in severalty to said Indians, or reserved by the Secretary of the Interior or otherwise disposed of, excepting sections sixteen and thirty-six in each of said township. That said commissioners shall then proceed to personally inspect, classify, and appraise, in one hundred and sixty acre tracts each, all of the remaining lands embraced within each reservation as described in section one of this Act. In making such classification and appraisement said lands shall be divided into the following classes: Division of lands. First, agricultural land of the first class; second, agricultural land of the second class; third, grazing land; fourth, timber land; fifth, mineral land, if any, the mineral land not to be appraised.

SEC. 4. That nothing in this law provides for the unconditional payment of any sum to the Indians but that the price of said lands actually sold shall be deposited with the United States treasury to the credit of the Indians. The money deposited will earn interest at three per cent

per annum and expended for their benefit at the direction of the Secretary of the Interior.

SEC. 5. That the Secretary of the Interior is authorized to reserve from said lands such tracts for townsite purposes as in his opinion may be required for the future public interests, and he may cause the same to be surveyed into blocks and lots and disposed of under such regulations as he may prescribe.

SEC. 7. That sections sixteen and thirty-six of the land in each township within the tract described in section one of this Act shall not be subject to entry, but shall be reserved for the use of the common schools and paid for by the United States at the rate of five dollars and five cents per acre, and the same are hereby granted to the State of New Dakota for such purpose. All other sections are subject to either allotment to Indians or sale in accordance with this Act.

SEC. 8. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the funds necessary to meet the United States commitment under Section 7 of this Act.

SEC. 9. That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of

this Act that the United States shall act as trustee for said Indians to dispose of the said lands and to expend and pay over the proceeds received from the sale thereof as herein provided.

Approved, May 29, 1908.

CHAP. 42. An act for the relief and civilization of the Wendat Band of Huron Indians in the State of New Dakota.

SEC. 1 Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Indian Agent at Fort Crosby shall, as soon as practicable, formally continue the surveying of the western half of the lands reserved by the Wendat Band in the 1859 Treaty. After the survey is complete the Commissioners shall give every adult reservation Indian one year from which to pick an allotment of 160 acres for themselves; and one parent or guardian may select an allotment of their choosing of 40 acres for each minor not yet an adult. All lands not selected within one year of the survey's completion shall be declared surplus lands and open to settlement. The eastern half of the lands reserved by the Wendat Band in the 1859 Treaty shall continue to be held in trust by the United States for the use and benefit of the Band.

SEC. 2. The United States hereby agrees to pay into the Treasury, in the name of the Wendat Band, the sum of three dollars and forty cents for every acre declared surplus, provided that no matter how much land is ultimately surplus the Wendat Band shall not be entitled to a

payment of more than two-million and two hundred-thousands dollars in total and complete compensation.

SEC. 3. That all money accruing from the disposal of said lands in conformity with the provisions of this act shall be placed in the Treasury of the United States to the credit of all the Wendat Band of Indians as a permanent fund, which shall draw interest at the rate of five per centum per annum, payable annually for the period of fifty years. Provided, That Congress may, in its discretion, from time to time, during the said period of fifty years, appropriate, for the purpose of promoting civilization and self-support among the said Indians, a portion of said principal sum, not exceeding five per centum thereof.

SEC. 4. The United States hereby apportions an additional $40,000 to the Secretary of Interior to pay for the final costs of the survey and allotment, to move the Indians unto their allotments as quickly as possible, and to open the surplus lands to settlement.

Approved, January 14, 1892.

Appendix B

4 N.D.C. § 212 Provides:

(1). Every person who receives gross proceeds of sales or gross income of more than $5,000 on transactions commenced in this state and who desires to engage or continue in business shall apply to the department for an annual Transaction Privilege Tax license accompanied by a fee of $25. A person shall not engage or continue in business until the person has obtained a Transaction Privilege Tax license.

(2). Every licensee is obligated to remit to the state 3.0% of their gross proceeds of sales or gross income on transactions commenced in this state. Licensees with more than one physical location must report which tax came from which location so the proceeds can be appropriately parceled out to local partners.

(3). The proceeds of the Transaction Privilege Tax are paid into the state's general revenue fund for the purpose of maintaining a robust and viable commercial market within the state including funding for the Department of Commerce, funding for civil courts which allow for the expedient enforcement of contracts and collection of debts, maintaining roads and other transport infrastructure which facilitate commerce, and other commercial purposes.

(4). In recognition of the unique relationship between New Dakota and its twelve constituent Indian tribes, no Indian tribe or tribal business operating within its own reservation on land held in trust by the United States must obtain a license or collect a tax.

(5). In further recognition of this relationship, the State of New Dakota will remit to each tribe the proceeds of the Transaction Privilege Tax collected from all entities operating on their respective reservations that do not fall within the exemption of §212(4). 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 tribes.

(6). Door Prairie County. In recognition of the valuable mineral interests given up by the Maumee Indian Nation, half of the Transaction Privilege Tax collected from all businesses in Door Prairie County that are not located in Indian country (1.5%) will be remitted to that tribe.

(7). The failure to obtain a license or pay the required tax is a class 1 misdemeanor.