No. 20-1104

IN THE

Supreme Court of the United States

_____

MAUMEE INDIAN NATION,

Petitioners,

v.

WENDAT BAND OF HURON INDIANS,

Respondent.

_____

ON WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE THIRTEENTH CIRCUIT

_____

BRIEF FOR THE RESPONDENT

_____

Attorneys for the Respondent:

Team T1008

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QUESTIONS PRESENTED

1. Did the Treaty with the Wendat abrogate the Treaty of Wauseon and/or did the Maumee Allotment Act diminish the Maumee Reservation?
2. If yes, did the Wendat Allotment Act diminish the Wendat Reservation or is the Topanga Cession outside of Indian Country?
3. With the assumption that the Topanga Cession is still in Indian country, does the doctrine of Indian preemption and/or infringement prevent the State of New Dakota from collection the Transaction Privilege Tax against the Wendat tribal corporation?

STATEMENT OF THE CASE

I. STATEMENT OF THE PROCEEDINGS

The Maumee Nation filed a complaint against the Wendat Band on November 18, 2015, in the District Court for the District of New Dakota. *Maumee Indian Nation v. Wendat Band of Huron Indians*, 305 F. Supp. 3d 44, 48 (D. New Dak. 2018). In this complaint, the Maumee asked the federal court for a Declaration that any development by the Wendat Commercial Development Corporation (WCDC) in the Topanga Cession would require acquisition of a Transaction Privilege Tax and payment of the tax because the development is located on the Maumee Reservation. *Id.* Alternatively, the Maumee Nation also asked for a Declaration that the Topanga Cession was not in Indian country, so that one-half of the Transaction Privilege Tax would be remitted to the Maumee Nation pursuant to §212(6). *Id.*

The Wendat Band rightfully argued that the State of New Dakota is prohibited from imposing this tax on the basis of the doctrines of infringement and preemption. Alternatively,

the Wendat Band argues that the development is located on the Wendat Reservation, where any tax would be remitted back to the Wendat Band. *Id* at 44.

The District Court sided with the Maumee Nation, holding that the Topanga Cession is a part of the lands reserved by the Maumee Nation by the Treaty of Wauseon. *Id* at 49. The court concluded that neither the Treaty with the Wendat nor the Maumee Allotment Act diminished the Maumee Reservation. *Id.* Further, the District Court held that the State of New Dakota may levy this tax on the WCDC and did not find infringement upon the Wendat Band's rights. *Id.*

The Court of Appeals for the Thirteenth Circuit correctly reversed the decision of the lower court, on September 11, 2020. The appeal was originally submitted in September of 2018, but the case was held pending the U.S. Supreme Court's decision in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020). *Wendat Band of Huron Indians v. Maumee Indian Nation*, 933 F.3d 1088 (13th Cir. 2020). The Appellate Court rightfully held that the Treaty with the Wendat abrogated the Maumee Reservation and that the Wendat Reservation had not been diminished due to allotment. *Id*. Further, the Appellate Court held that the State of New Dakota was prohibited from levying the tax because the tax would infringe on tribal sovereignty. *Id* at 1089.

The Maumee Nation now brings this petition, and the U.S. Supreme Court granted Certiorari on November 6, 2020.

II. STATEMENT OF THE FACTS

The Wendat Band of Huron Indians (hereafter 'the Wendat Band' or 'the Wendat Tribe') and the Maumee Indian Nation (hereafter 'the Maumee Nation' or 'the Maumee

Tribe') are two culturally district and federally recognized tribes with traditional lands in what is now the State of New Dakota. *Maumee Indian Nation v. Wendat Band of Huron Indians,* 305 F. Supp. 3d at 44. These traditional land claims overlap, and their current reservations share a border. The heart of the issue in this case is whether the State of New Dakota can enforce a taxation, the Transaction Privilege Tax, on a commercial development by the Wendat Band on land referred to as the "Topanga Cession", land that both tribes lay claim to. *Id.*

Both the Wendat Band and the Maumee Nation have lands reserved to them by treaties with the United States. The Maumee Nation dates their rights to the Treaty of Wauseon, ratified in 1802, which initially reserved the Maumee Nation those lands west of the Wapakoneta River. *Id* at 45. Nearly fifty years later, the Wendat Band and the United States signed the Treaty with the Wendat in 1859, which reserved them those lands east of the Wapakoneta River. *Id.*

Over twenty years prior to the Treaty with the Wendat, in the 1830s, the Wapakoneta River had moved approximately three miles to the west. Despite the Wapakoneta River existing in its current position for at least twenty years by the time the Treaty with the Wendat was signed and ratified, the Maumee Nation also claims exclusive rights to these lands. *Id*. Over the last eighty year, both the Wendat Band and the Maumee Nation have referred to this land as the "Topanga Cession", although the origins of this name have been lost to history. *Id*.

Both the Wendat Band and the Maumee Nation were subject to allotment by Congress after the passage of the General Allotment Act in 1887. *Id.* The exact accounting is uncertain, however the Wendat Band was paid $2,200,00 for about 650,000 acres of land, while the

Maumee Nation was paid $2,000,000 for about 400,000 acres of land. *Id.* The Topanga Cession consists mostly of lands that were declared surplus, and both the Wendat Band and the Maumee Nation have stipulated that none of their members selected allotment within the Topanga Cession. *Id* at 46-47.

The State of New Dakota has a Transaction and Privilege Tax. This tax is levied on the gross proceeds of sales or gross income of a business paid to the state for the privilege of doing business in the state. *Id* at 45.

On December 7, 2013, the Wendat Band purchased 1,400-acre parcel of land in fee from non-Indian owners located in the Topanga Cession. *Id* at 47. Two years later, on June 6, 2015, the Wendat Band announced their intention to building a combination residential and commercial development which include low-income housing for tribal members, a nursing care facility for elders, a tribal cultural center, a tribal museum, and a shopping complex. *Id* at 46. This shopping complex would include a café that serves traditional Wendat foods, a grocery store with fresh and traditional foods to prevent a food desert, a salon/spa, a bookstore, and a pharmacy. *Id* at 48. This shopping center would be owned by the Wendat Commercial Development Corporation (WCDC) and not only will 100% of the corporate profits be remitted back to the tribal government, but the shopping center will support at minimum 350 jobs and the gross sales will be used to fund tribal public housing and the nursing care facility. *Id*.

On November 4, 2015, the Maumee Nation approached the WCDC, arguing that the Maumee Nation considered the Topanga Cession to be on their land. *Id.* They further argued that the shopping complex needed to pay the State of New Dakota the 3.0% Transaction Privilege Tax and that the tax would be remitted to the Maumee Nation. *Id.* The Wendat

Band disagreed, reminding the Maumee Nation that the Topanga Cession was a part of the Wendat Reservation and that the state of New Dakota had no authority to collect the Transaction Privilege Tax. *Id*

SUMMARY OF ARGUMENT

The U.S. Court of Appeals for the Thirteenth Circuit correctly held that the Treaty with the Wendat made it clear that Congress intended to abrogate the Maumee Nation's claim to the Topanga Cession. The Appellate Court was also correct in finding that the Wendat Reservation was not diminished by allotment, and that the Topanga Cession remains on Wendat land. Because of this, the Transaction Privilege Tax infringes on tribal sovereignty and should be subject to Indian preemption.

ARGUMENT

I. The Treaty with the Wendat did abrogate the Treaty of Wauseon and the Maumee Allotment Act of 1908 did diminish the Maumee Reservation.

It has long been held that Congress has the power to abrogate an Indian treaty. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903). The legislature holds significant authority when it comes to matters of tribal relations, and this power belongs to Congress alone. *McGirt v. Oklahoma*, 140 S.Ct. 2452, 2461 (2020). However, in order for Congress to abrogate a treaty or diminish the boundaries of a reservation, there must be clear and express intent to do so, whether that be through the language in the legislative text or by surrounding circumstances. *Id* at 2463.

a. The Treaty with the Wendat abrogated the Treaty of Wauseon.

The most indicative way that Congress can show intent to diminish a reservation boundary is through "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). Moreover, a treaty between the United States and Indians may be abrogated or changed by a subsequent treaty.[1] 42 C.J.S. Indians §27. When determining whether a treaty abrogated the rights previously guaranteed, it requires looking beyond the written words and to the larger context that framed the treaty. *Id.*

In the present case, the Treaty with the Wendat was signed over 50 years after the Treaty of Wauseon and in that time, the Wapakoneta River moved approximately three miles to the west. *Maumee Indian Nation v. Wendat Band of Huron Indians,* 305 F. Supp. 3d 44, 45 (D. New Dak. 2018). This movement occurred over twenty years prior to the signing of the Treaty with the Wendat, so it is more than likely that Congress was aware of this movement when the treaty was signed. The Treaty with the Wendat explicitly states that the Wendat Tribe agreed to cede their title and interest to the land, except for those east to the Wapakoneta River. Treaty with the Wendat, March 26, 1859, 35 Stat. 7749.

Even if this Court were to find this language ambiguous, we can look to the surrounding circumstances and legislative history to find more clarity. This Court has held that explicit language of cession or unconditional compensation are not necessarily required for a finding of diminishment of a reservation. *Solem*, 465 U.S. at 471. Further, Courts can

[1] See also *Kansas or Kaw Tribe of Indians v. U.S.*, 80 Ct.Cl. 264, 304 (1934) (stating that the provisions of a treaty between the United States and a tribe of Indians may be modified or abrogated at any time by a subsequent treaty or act of Congress).

look to the events surrounding the legislative act, including reviewing legislative reports, to find a "widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Id*.

Here, legislative history is available for when Congress signed the Treaty with the Wendat. In this legislative history, it is clear that the members of Congress considered the area now known as the Topanga Cession, a part of the Wendat Reservation. In a speech from Senator Solomon Foot of Vermont, he stated that the neighboring Maumee Tribe has "slowly yielded their claims to the bulk of [their] territory" and that the Maumee Tribe "have been reduced in number and no longer inhabit parts of their territory." Cong. Glob, 35th Cong., 2nd Sess. 5411-5412 (1859). Most illuminating however, is the speech from Senator Lazarus W. Powell of Kentucky. In his speech, Senator Powell questions whether the Indian agent could have secured more cessions from the Wendat. *Id*. He goes on to further state that few Indians live near the Wapakoneta river and that these lands should be opened to settlement. *Id*. This indicates that the Topanga Cession, which by the river, was included in the reservation with the signing of the Treaty with the Wendat. Senator Powell believed that this land should have been ceded to the U.S. so that it maybe be cultivated by white settlers, but ultimately it was not.

Through explicit language in the treaty in addition to surrounding events, the Treaty with the Wendat abrogated the Treaty of Wauseon and diminished the Maumee's reservation.

b. The Maumee Allotment Act of 1908 did diminish the Maumee Reservation.

As cited in the previous section, clear and explicit Congressional language is required to diminish a reservation. *McGirt*, 140 S.Ct., at 2463. This language can take the form of

"restoring to the public domain", or explicit reference to cession, among other language. *Id.* The Maumee Allotment Act has clear and explicit language that signified Congressional intent to diminish the Maumee Reservation. In Section 1 of the Allotment Act, the text states that "[t]he Indians have agree 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." Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908). This is clear and explicit language that not only makes reference to cession, but also states that this surplus land would be restored to the public domain.

The Petitioners of this case may argue that the Maumee Reservation has not been diminished because the Maumee Tribe were not paid a fixed sum as compensation for their opened land. This is true, to a degree. In *Nebraska v. Pender*, the Court held that the 1882 Allotment Act did not bare any signs of diminishment in regard to the Omaha Indian Reservation. *Nebraska v. Pender*, 136 S.Ct. 1072, 1076 (2016). In addition to not including explicit and clear language regard cession, the 1882 Act did not give the Omaha Indian Tribe a fix sum for the disputed lands, but rather the tribe was "entirely dependent upon many nonmembers purchased the appraised tracts of land." *Id* at 1079.

The present case bears a resemblance to the *Nebraska* case, in that the Maumee Allotment Act similarly makes the Maumee dependent on how many nonmembers purchase their land for compensation. The Maumee Allotment Act states that "the price of said land entered as homesteads...shall be fixed by appraisement as herein provided..." Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908). There is an important distinction here, however, between the Maumee Allotment Act and the 1882 Allotment Act in the *Nebraska* case. That is, the Maumee Allotment Act *does* in fact have explicitly language regard the

cession of the surplus land, unlike in the *Nebraska* case. Further "[d]isestablishment has never required any particular form of words." *McGirt*, 140 S.Ct., at 2463. Thus, having a fixed sum for compensation is not necessarily required for the diminishment of the reservation, especially where other clear and explicit language exists.

Further, we can also see in the Maumee Allotment Act that sections sixteen and thirty-six of the appraised land were held from the allotment. Section 7 describes that these sections "...will not be subject to entry but shall be reserved for the use of common schools, paid for by the United States at a rate of five dollars and five cents per acre." Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908). Even if this Court should find this language ambiguous, the legislative history shows, from a speech by a Mr. Pray, that the only payments that were not reimbursable was the $5.05 an acre for the sections sixteen and thirty-six, which were granted to the State of New Dakota for school purposes. Representative Pray. "Maumee Allotment Act." *Congressional Record* 42 (May 29, 1908) H2345. This is clearly a fixed sum payment for certain sections of the surplus land on the Maumee Reservation, and therefore constitutes a diminishment.

Additionally, because this eastern quarter of the reservation had been ceded, the Maumee would have then likely lost the land of the Topanga Cession, assuming the Maumee had retained their right to that portion of the land. However, as previously argued, the Treaty with the Wendat abrogated the Treaty of Wauseon, making the Topanga Cession a part of the Wendat Reservation. This diminishment cause by the Maumee Allotment Act was there for in addition to the diminishment that occurred with the signing of the Treaty with the Wendat.

II. The Wendat Allotment Act did not diminish the Wendat Reservation, making the Topanga Cession within Indian Country.

The Wendat Allotment Act is missing much of the explicit and clear language that signified Congressional intent to diminish the reservation. In the Allotment Act, Section 1 states that any land that had not been selected within one year of the survey's completion would be considered surplus land and open to settlement. Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892). Further, Section 1 also states that "[t]he eastern half of the lands reserved by the Wendat Band in the 1859 Treaty hall continue to be held in trust by the United States for the use and benefit of the Band." *Id.*

In determining Congressional intent, "we are cautioned to follow 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). The first part of Section 1 is ambiguous at best. There is neither explicit language indicating that the Wendat would "cede" these surplus lands nor does it indicate that these surplus lands would return to the "public domain". Furthermore, from the legislative history, there does not appear to be good faith on the part of Congress with regards to this Allotment Act. One Mr. Pickler refer to the Wendat Tribe as "very little civilized". "Wendat Allotment Act." *Congressional Record* 23 (Jan. 14, 1892) p. H1777. Mr. Mansur seemingly indicates that the Wendat should be treated differently in terms of allotment because he perceived them as uncivilized, stating "...when it comes to allotment, you cannot bring the same influences to bear upon them that you can bring to bear upon other Indians more civilized." *Id.*

Additionally, the Wendat were not given a "fixed sum" for the surplus land. Section 2 of the Allotment Act agrees to pay the Wendat Band the sum of three dollars and forty cents per acre of surplus land, up to two-million and two-hundred-thousand dollars in total. This may seem like a fixed sum at first glance, but Section 3 of this Allotment Act is more telling. In Section 3, the money from these surplus lands "...shall be placed in the Treasury of the United States to the credit of all the Wendat Band of Indians as a permanent fund..." *Id.* This wording directly parallels the 1906 Act at issue in the case *Seymour v. Superintendent of Washington State Penitentiary*. In that case, the petitioner filed a writ of habeas corpus, arguing that his state conviction for burglary was void because the State of Washington did not have jurisdiction on the grounds that he was an enrolled member of the Colville Indian Tribe and the crime occurred in 'Indian Country'. *Seymour v. Superintendent of Washington State Penitentiary,* 368 U.S. 351, 352 (1962). The Court looked to the 1906 Act to see if there was diminishment of the Colville Indian Reservation. The 1906 Act had almost near identical language as the Wendat Allotment Act, also stating that the proceeds of the surplus lands would be deposited 'in the Treasury of the United States to the credit of the Colville and confederated tribe of Indians..." *Id* at 355. The Court held in the *Seymour* case that this language made it clear that Congress intended for the reservation to continue to exist. *Id*. Further, the Court held that the purpose of the 1906 Act was neither to destroy or diminish the Colville Indian Reservation. *Id* at 356. With similar language, it is clear then that Congress intended for the Wendat Reservation to continue as such, and that the reservation had not been diminished.

"Indian Country" is defined by the U.S. code and refers to:

> "[A]ll land within the limits of any Indian reservation under the jurisdiction of the United States Government...[and] all dependent Indian communities within the

> borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and all Indian allotments, the Indian titles to which have not been extinguished..." 18 U.S.C. §1151.

The Treaty with the Wendat abrogated the Treaty of Wauseon and the land known as the Topanga Cession is a part of the Wendat Reservation. The Wendat Reservation was diminished during allotment, therefore the Topanga Cession is within Indian Country, as it is within the limits of the Wendat Reservation.

III. Both the doctrine of preemption and infringement prevent the State of New Dakota from collecting its Transaction Privilege Tax against a Wendat tribal corporation.

State laws, including taxes, are generally not applicable to tribal Indians on Indian land. *Williams v. Lee*, 358 U.S. 217, 220 (1959). There are two independent barriers that a state law must overcome in order to be applied to tribal Indians on Indian land: preemption by federal law and unlawful infringement on the right of reservation Indians to make their own laws and be ruled by them. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). Either barrier is enough to prevent State law from being applied to tribal Indians or Indian land. *Id.* In the preemption analysis, courts must look at treaties and federal statues to determine if federal law preempts the state's authority to impose laws on Indians or Indian land. *Id.,* while the infringement analysis questions whether the application of the state law violates a tribe's ability to self-govern. *Lee*, 358 U.S. at 220.

a. The doctrine of Indian preemption prevents the State of New Dakota from collecting its Transaction Privilege Tax against a Wendat tribal corporation.

"Preemption" prevents a state from having the authority to impose laws on tribal Indians or Indian land. *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 173 (1973). Federal preemption can be determined by balancing the state, federal and tribe's interests under the "backdrop" of Indian sovereignty. *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1171 (10th Cir. 2012) . The *McClanahan* court began its analysis by looking to the treaty in which the Navajo Nation entered into with the United States Government. The court held that although the treaty did not expressly state that the tribe was exempt from state taxes, the spirit of the treaty was to establish a space in which the Navajo have exclusive sovereignty to self-govern under general federal supervision. *McClanahan*, 411 U.S. at 174. Since the treaty's intent is to create a semi-independent reservation, with only congressional supervision, the court interpreted the treaty as weighing in favor of federal tax preemption. *Id* at 176.

Similarly, the Wendat Band treaty also suggests that the tribe is exempt from state tax. Like the Navajo whose treaty prescribed a reservation for the exclusive occupation of the Navajo and the exclusion of all others, including state authority, *Id,* the Wendat Band's treaty also creates and reservation territory for their exclusive occupation. Cong. Globe, 35th Cong., 2nd Sess. 5411-5412 (1859)**.** Although the Wendat Band treaty does not expressly state that the tribe is preempted from state authority, the consideration of the treaty with the Wendat Band makes clear that the reservation was created to provide the Wendat Band an area of land for which they have exclusive sovereignty, in order to completely separate them

from white settlers moving onto the territory. *Id*. While the settlers were subject to the territory's authority, Congress wanted to separate the Wendat Band and leave them to their own governance. *Id*. Because of this, the spirit of the treaty weighs in favor of Federal preemption.

Federal preemption can also be determined by looking to Congress for statutes or intent to limit the state's authority. *Bracker*, 448 U.S. at 151. The Buck Act provides federal guidance for state taxation for those living within federal areas, and expressly revokes a state's authority to "levy or collect any tax on for from any Indian not otherwise taxed." 44 U.S.C.A. § 109. After reviewing the treaty language, the *McClanahan* court looked to federal statutes for language that narrowed the state's authority. *McClanahan*, 411 U.S. at 176. The court held that the legislative history of the Buck Act makes obvious Congress's intent to withhold a state's authority to impose tax by reserving that power solely to the federal government. *Id* at 177. The court also recognized that there are narrower statutes that grant states the power to assert taxes in special situations where Congress explicitly grants them the power to do so. *Id.*

Equally, the Buck Act can also be applied to the Wendat Band reservation and the legislative history was meant to exempt reservation Indians from cover of the Buck Act. Like *McClanahan* when the court held that Congress's intent to maintain tax-exempt status of reservation Indians can be seen by its express language in the Buck Act which prohibits states from implementing income tax on Indians working on an Indian reservation, *Id,* the Buck Act also prevents a state from implementing Transaction Privilege Tax on Indian businesses operating on Indian land. The state levying taxes on business operated by Indians on Indian land would be equivalent to implementing income tax on Indians working on

Indian land, as exhibited in *McClanahan*—an exercise congress has not explicitly granted authority to the state to implement. *Id.* The state lacks jurisdiction over both the people and the land it seeks to tax. *Id* at 180, Thus, statutes also weigh in favor of federal tax preemption.

The final step in the preemption analysis is to balance the state, federal, and Indian interests with the tradition of maintaining Indian sovereignty. *Bracker*, 448 U.S. at 143-145. A state's authority will be preempted by federal law if it, "interferes or is incompatible with federal and tribal interests … unless the [s]tate interests at stake are sufficient to justify the assertion of [s]tate authority." *New Mexico v. Mescalero Apache Tribe*, 464 U.S. 324, 334 (1983). The *Mescalero* court held that allowing state authority to regulate hunting and fishing on tribal land was contrary to federal and tribal interests because federal law already gave authority to the tribe, through the Indian Reorganization Act, to regulate, "wildlife and natural resources of the tribe." *Id* at 326. The court reasoned that the state's law, even if only appliable to non-tribal members, could "severely hinder" the tribe's ability to maintain the optimal level of wildlife on their land because the state law's considerations are, "not necessarily relevant to, and possible hostile to, the needs of the reservation." *Id* at 339. Because the state's interests were inconsistent with the interests of the tribe and federal government, the state did not have jurisdiction over the tribe. *Id* at 344. Thus, the federal and tribal interests weigh in favor of preemption.

Comparably, the New Dakota's Transaction Privilege Tax equally cannot be applied to the Wendat Band's businesses because New Dakota's interests' conflict with federal and tribal interests. First, like the *Mescalero Apache Tribe* who had a vested interest in maintaining the ability to regulate fishing and hunting on their land in order to regulate their

sources, *Id* at 339, the Wendat Band also have a vested interest in regulating their resources by using the tribal business profits to fund community projects like public housing and nursing care. *Maumee Indian Nation v. Wendat Band of Huron Indians*, 305 F. Supp. 3d 44, 47-48 (D. New Dak. 2018)**.** New Dakota's interests are in direct conflict with the tribes, because the state intends to take a portion of the revenue out of the community, while the tribe requires that money to fully fund tribal social programs. Second, the federal government in *Mescalero Apache Tribe* made clear that it has an interest in maintain the tradition of tribal sovereignty because Congress has, "overriding objective of encouraging tribal self-government and economic development." *Mescalero,* 464 U.S. at 341. Likewise, the federal government has the same interest in the Wendat Band maintaining their sovereignty because the profits made from the Wendat Band businesses will fund the tribe's public housing and nursing care, as well as encourage job creation and stimulate economic growth. *Wendat Band*, 305 F. Supp. 3d at 47-48. Balancing the state's interest against the federal and tribal interests, the state's interests directly conflict with both the federal and tribal interests, and therefore cannot be applied to the reservation.

Even if the court found that the federal government did not preempt the state to collect taxes on the reservation, New Dakota would still not be able to collect the Transaction Privilege Tac because the state statute exempts the reservation from tax collection. The State of New Dakota's Transaction Privilege Tax states, "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." 4 N.D.C. § 212 (4). Here, the Wendat Band plan to build businesses within their own reservation territory owned and operated by reservation Indians. Thus, the

state statute would prevent the state from collecting taxes, regardless of the federal preemption which prohibit the state from imposing state law on reservations.

When looking at the treaty and statutes, it is clear that Congress intended the Wendat Band tribe to have sovereignty over their reservation without state interference. Because of this, the businesses that operate on Wendat Band territory are exempt from New Dakota's Transaction Privilege Tax.

b. The doctrine of Indian infringement prevents the State of New Dakota from collecting its Transaction Privilege Tax against a Wendat tribal corporation.

The infringement test requires courts to consider if a state's-imposed law on reservations would "undermine the authority of the tribal courts over reservation affairs and hence would infringe on the rights of the Indians to govern themselves." *Lee*, 358 U.S. at 220. While the *McClanahan* court clarified that the *Williams* test should only be applied to attempted exercises of state jurisdiction over non-Indians in Indian Country, *McClanahan*, 411 U.S. at 179, it is still applicable to the Wendat Band because stores within the complex, like the café, cultural center and museum, will attract non-Indian consumers, and therefore a portion of the profits made with be comprised of sales made by non-Indians.

State taxes will not infringe on the rights of Indians to govern themselves if tribe markets the exemption to nonmembers who do not receive significant tribal service. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 156 (1980). The *Colville* court held that nonmembers could be taxed for cigarettes sold in smoke shops on the Colville Indian Reservation because the tribe was marketing the tax-exemption as a scheme to attract more customers. *Id* at 157. The non-Indian customers however were not

benefiting from the social and welfare programs on the reservation funded by the tax credit, but instead relied on services outside of the reservation. *Id.* Therefore, the State had a vested interest in ensuring the nonmembers needed to contribute to the funding of non-Indian services through state tax. *Id*. Since the state tax was not imposed on Indian customers or the Indian business, the court ruled that the tax did not deprive the tribe from governing its own people. *Id* at 161. The court also reasoned that because cigarettes were available off reservation at a similar price point, imposing a tax on the reservation did not infringe on the tribes right to self-govern as the tax was unlikely to reduce the number of customers purchasing cigarettes in the smoke shops. *Id* at 157.

By contrast, New Dakota's Transaction Privilege Tax does infringe upon the Wendat Band's ability to self-govern. First, unlike *Coville* who marketed the tax exemption as a way to attract customers, *Colville,* 447 U.S. at 157, the Wendat Band is marketing the shopping complex as an educational learning center and an essential food market. While *Coville* marketed cigarettes to customers by boasting that it was a cheaper way to purchase readily available products, the Wendat Band plan to open stores that sell traditional food, a cultural center, and museum to attract customers to learn about the Wendat culture—products not available outside of the reservation. Second, unlike *Coville* whose cigarette sales did not significantly add to the tribe's overall revenue, *Colville,* 447 U.S. at 158, the non-Indian attractions in the Wendat Band complex are expected to raise the most amount of revenue. *Wendat Band*, 305 F. Supp. 3d at 47-48. The Wendat Band plan to use this revenue to fund public housing and nursing care facilities. *Id.* Reducing the amount of money available to the Wendat Band have to fund these programs directly infringes on the tribe's ability to govern

itself. Thus, the state tax cannot be implemented because of the New Dakota's tax infringes on the Wendat Band's ability to self-govern.

The state could require tribal retailers to collect a tax of sale of cigarettes from non-Indian members, so long as the collection does not exceed "minimal burdens." *Colville,* 447 *U.S.* at 162. The *Moe* court held that keeping record of non-Indian sales of cigarettes is not so burdensome that it impedes the tribe to govern itself or outweighs the benefit to the state to prevent the consumer from avoiding payment of a concededly lawful tax. *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 483 (1976). The court reasoned that since the Indian proprietor could easily add the tax to the sales price and only impacted non-Indians, who do not have a voting right in the Indian community, the burden did not inhibit the tribe to govern itself. *Id*.

Conversely, the New Dakota's Transaction Privilege Tax is excessively burdensome and impedes the Wendat Band's ability to self-govern. The Transaction Privilege Tax is a tax to the business revenue, rather than the individual customers. The burden, therefore, is shifted to the Indian business owner to pay the tax instead of the customer. In this way, the New Dakota Transaction Privilege Tax is not concerned with the profits made from just non-Indian transactions, but rather all transaction exceeding $5,000. 4 N.D.C. § 212 (1). Unlike *Moe* which only required the collection of tax from non-Indian purchases, *Moe,* 425 U.S. at 483, the New Dakota tax requires an Indian business to pay a 3% tax based on revenues exceeding $5,000, irrespective of profits made from Indian consumers. 4 N.D.C. § 212 (1). This creates a financial burden that drastically limits the tribe's ability to fund social programs like public housing and nursing home care, and thus impedes on the tribe's ability to self-govern.

Additionally, the *Potawatomi* court held that tribal sovereign immunity, "does not excuse a tribe from all obligations to assist in the collection of validly imposed state sales taxes." *Oklahoma tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 512 (1991). The court reasoned that cigarette sales to non-Indian customers is a valid tax because of the state's interest in assuring the payment of these concededly lawful taxes. *Id* (quoting *Moe,* 425 U.S. at 463). By contrast, the New Dakota Transaction Privilege Tax is not a validly imposed state sales tax. As mentioned above, the tax applies to business profits of over $5,000, not individual consumers. 4 N.D.C. § 212 (1). Imposing the obligation on Indian businesses to pay taxes is not a valid state sales tax because it directly impedes the tribe's ability to self-govern.

When looking to the state's-imposed law and its interference with tribal sovereignty, it is clear that the New Dakota's Transaction Privilege Tax grossly impedes on the Wendat Band's ability to self-govern because it requires Indian-own businesses to pay taxes for sales conducted on Indian land. This tax drastically reduces the ability the tribe has to fund programs like public housing and nursing care, and therefore limiting the tribe's ability to govern themselves as they see fit.

CONCLUSION

There is well established history that the Topanga Cession is a part of the Wendat Reservation. The Appellate Court correctly held that the Treaty of Wauseon was abrogated by the Treaty with the Wendat, therefore diminishing the Maumee Reservation. They also correctly held that the imposition of the New Dakota's Transaction Privilege Tax infringes on tribal sovereignty and is subject to Indian preemption. This court should uphold the

Wendat Band's land rights over the Topanga Cession and subsequently find that New Dakota does not have authority to impose its state tax over profits made in Indian country.

Respectfully Summited,

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