No. 20-1104

In The
Supreme Court of the United States

MAUMEE INDIAN NATION,

Petitioner,

v.

WENDAT BAND OF HURON INDIANS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Thirteenth Circuit

PETITION FOR WRIT OF CERTIORARI

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Counsel for the Petitioner

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QUESTIONS PRESENTED

I. Whether the Thirteenth Circuit erred in finding that the Topanga Cession was not located in the Maumee Reservation when the Treaty of Wauseon has not been abrogated by the Treaty with the Wendat, when the Maumee Allotment Act did not diminish the Maumee reservation, and when the Wendat Reservation was diminished thereby placing the Topanga cession off the Wendat Reservation?

II. Whether the Thirteenth Circuit erred in finding that the State of New Dakota's Transaction Privilege Tax infringed upon tribal sovereignty and should therefore be subject to Indian preemption under *Bracker* when the state has a legitimate interest in applying the tax, when the economic burden does not fall on the tribe, and when the tax does not undermine tribal self-determination?

STATEMENT OF THE CASE

I. Statement of the Proceedings

The Maumee Indian Nation ("Maumee") originally brought suit against the Wendat Band of Huron Indians ("Wendat") in the United States District Court for the District of New Dakota. R. at 8. The Maumee sought a Declaration that any development by the Wendat Band of Commercial Development ("WCDC") in the Topanga Cession would require the procurement of a TPT license and payment of the tax because it is located on the Maumee Reservation. *Id*. The District Court ultimately agreed with the Maumee and issued the Maumee's requested Declaration. *Id*. at 9.

The Wendat appealed the District Court's Declaration in the United States Court of Appeals for the Thirteenth Circuit. R. at 10. The Circuit Court reversed the District Court's decision and held that Maumee's claim to the Topanga Cession has been abrogated and the Topanga Cession is located within the Wendat Reservation. Additionally, the Circuit Court held that the State of New Dakota is prohibited from requiring the Wendat Band or the WCDC from procuring a TPT license and that the State's tax infringes on tribal sovereignty and should be preempted. R. at 11.

The Maumee appealed and this Court granted its petition for writ of certiorari on November 6, 2020. R. at 1.

II. Statement of the Facts

This case presents a nearly 200-year-old conflict between two federally recognized tribes whose traditional land claims overlap, and whose present reservations share a common border. R. at 4. Both tribes have a treaty relationship with the United States, and both were subject to the United States' policies of allotment and assimilation. *Id*. The Maumee trace their

rights to the Treaty of Wauseon, which was ratified by Congress in 1802. R. at 5. The Wendat trace their rights to the Treaty with the Wendat, which was ratified by Congress in 1859. *Id*. Each tribes' respective treaty set forth the boundaries of their respective reservations. *Id*. To the west of the Wapakoneta River lies the lands of the Maumee and to the east of the Wapakoneta River lies the Wendat. *Id*.

Interestingly, at some point in the 1830s the Wapakoneta River moved three miles to the west of its original location thereby creating an ownership conflict over a small tract of land. *Id*. This small tract of land was west of the River in 1802 but moved east of the River after 1859. *Id*. Both tribes maintain that they have an exclusive right to the land by pointing to their respective treaties. *Id*.

Both the Maumee and the Wendat agree that the Topanga Cession does indeed consist of land that was declared surplus by the federal government. *Id*. at 7. The tribes, however, disagree entirely about which allotment act deemed the Topanga Cession surplus. *Id*. The exact records of allotment were either lost or spoilt but the Federal Government, thereby forcing the tribes into this disagreement. *Id*.

For nearly 200 years the conflict has gone legally unresolved but the catalyst for this case occurred when the Wendat purchased a 1,400-acre parcel of land from non-Indian owners located on the Topanga Cession. *Id*. The Wendat announced that it would use the newly purchased parcel of land for commercial development. *Id*. at 8.

However, soon after the Wendat purchased the land, Maumee representatives informed the WCDC that the Topanga Cession was considered to be within the boundaries of the Maumee reservation as a result of diminishment and allotment of the Wendat's reservation. *Id*.

The two allotment acts also presented a strong hurdle in this case. While the Maumee were also subjected to allotment by Congress, the Maumee Allotment Act stipulated that any unsold lands would remain Maumee territory. *Id*. at 13. The eastern quarter, however, would move into limbo. *Id*.

It is a similar story for the Wendat. The Wendat Band Allotment Act surveyed the reservation and transformed roughly 650,000 acres into allotments. Further, the Wendat Band Allotment Act also stipulated that all lands not selected for allotment within one year would be declared surplus land and opened to settlement by non-Indians. R. at 15. During the legislative hearings, it was clear that Congress wanted to quickly open up Wendat land for settlement. R. at 15, 20.

The Maumee had no intention of stopping the Wendat from undertaking its commercial endeavors and stated that the commercial development would direct improve the Maumee's life on the reservation. R. at 8. Because the WCDC would be a non-member business operation on the Maumee reservation, the Maumee would be entitled to the 3.0% Transaction Privilege Tax ("TPT"). *Id*.

The Maumee explained that the tax that would be remitted to the tribe would directly contribute the income of its citizens, thus making them avid consumers when the development was complete. *Id*.

Unfortunately, the Wendat replied with a stern argument that the Topanga Cession has been part of the Wendat reservation since its treaty in 1859. *Id*. The Wendat then turned their attention to the State of New Dakota and argued that the State has no authority to collect a tax because a tax would either be preempted by federal law, or it infringe upon the Wendat's sovereignty. *Id*.

SUMMARY OF THE ARGUMENT

This Court should reverse the Thirteenth Circuit Court of Appeals decision and remand the case back to the Circuit Court with instructions to reissue a Declaration in favor of the Petitioner. First and foremost, Congress has the power to ratify treaties with Indian tribes and in 1801, the United States entered into a treaty with the Maumee to set aside land for the Maumee to reside on. Treaties represent government to government relationships, and they continue to remain enforceable unless Congress abrogates the treaty. Congress has the power to unilaterally abrogate treaties with Indian tribes but in order to do so, Congress must clearly express its intent to do so. In this case, Congress has not done so. Nothing in the Treaty with the Wendat evidences a clear congressional intent to abrogate the Treaty of Wauseon. The Maumee's treaty rights are not mentioned, nor has Congress shown that that it considered the rights of the Maumee when it ratified the Treaty with the Wendat. Because congressional intent is not clearly evident, the Maumee's original reservation boundaries have not been abrogated.

Congress has plenary power over Indian affairs, and it is well established that only Congress can diminish a reservation's boundary. Unfortunately, there are no magic words that clearly and accurately show the diminishment of a reservation. Instead, Courts utilize the framework set forth in *Solem* and affirmed in *Parker*. To assess whether a reservation has been diminished, the Court begins by examining the statutory text. Next, the Court examines the circumstances surrounding the opening of the reservation. Lastly, the Court examines the subsequent treatment of the land. Under this analysis, the Maumee Allotment Act does not contain clear and explicit references to cession or diminishment. Further, the legislative history does not support a finding of congressional intent to diminish the reservation. Lastly, while the Indian character of the Topanga Cession may be declining, that reason alone is not enough to establish a clear expression of intent to diminish.

Alternatively, under the *Solem* and *Parker* framework, the Wendat reservation has been diminished. The language of the Wendat Allotment Act contains clear cession language and evidences a payment of a lump sum to the Wendat. Legislative history also supports the finding of congressional intent to diminish. Lastly, the Indian character of the Topanga Cession is declining. Each factor culminates a finding of clear and express congressional intent to diminish the Wendat reservation. Thus, the Topanga Cessions is not located within the Wendat reservation and lies outside of Indian country.

Furthermore, the Thirteenth Circuit Court erred in finding that the State of New Dakota's TPT infringed upon tribal sovereignty and should therefore be subject to Indian preemption under Supreme Court precedent. First, the doctrine of Indian preemption does not prohibit the State of New Dakota from imposing its TPT on the non-member WCDC because the tax does not conflict with any federal regulatory regime, the state has a legitimate interest in applying the tax, and the economic burden of the tax does not fall on the tribe. When assessing the question of whether a state may impose a tax on a non-Indian or a non-member conducting business on a reservation courts generally use the *Bracker* balancing test to determine whether the state tax was preempted by federal or tribal law by weighing the federal, state, and tribal interests. Since the WCDC is a non-member company conducting business within the Maumee reservation, the court must analyze whether the state may impose the TPT on the non-member corporation.

Second, while preemption and infringement claims are often brought together in an attempt to undermine state authority to tax non-member Indians conducting business on the reservation, they are two separate doctrines. The infringement test, established in *Williams*, aids the court in determining whether a state law infringes on the reservation Indians to enact

their own laws and be governed by them. In this case, the infringement test concludes that the State of New Dakota's TPT does not infringe upon the rights of the Maumee because the tax does not challenge federal policies created to help Indians and the tax does not undermine the self-determination of the tribe. Therefore, the Thirteenth Circuit improperly found that the State of New Dakota's TPT infringed upon tribal sovereignty and should therefore be subject to Indian preemption under Supreme Court precedent.

ARGUMENT

Standard of Review

The United States Court of Appeals for the Thirteenth Circuit reversed the United States District Court for the District of New Dakota Declaration on both issues in favor of the Petitioners. R. at 9. As in other reservation diminishment cases, statutory text and treaties decide this case. Thus, appellate courts review a district court's interpretation of a statute *de novo*. *Energy Intelligence Grp., Inc. v. Kanye Anderson Capital Advisors, L.P.*, 948 F.3d 261, 277 (5th Cir. 2020). Further, treaty interpretation is a legal question that is review *de novo*. *Chi. Title Ins. Co. v. Office of Ins. Comm'r.*, 309 P.3d 372 (9th Cir. 2013). Lastly, questions regarding preemption and infringement fall under issues of law, and issues of law are reviewed *de novo*. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 984 (Fed. Cir. 1995). No deference is given to the lower court's decision on de novo review. *United States v. Ornelas*, 517 U.S. 630, 639 (1996).

I. THE WENDAT COMMERCIAL DEVELOPMENT SITS ON LAND IN THE TOPANGA CESSION, WHICH LIES WITHIN THE MAUMEE INDIAN NATION BECAUSE CONGRESS HAS NOT EXPLICITLY INDICATED THAT IT SOUGHT TO DIMINISH THE MAUMEE RESERVATION, OR, ALTERNATIVELY, THE TOPANGA CESSION IS NOT CONSIDERED TO BE IN INDIAN COUNTRY BECAUSE CONGRESS CLEARLY AND EXPLICITLY DIMINISHED THE WENDAT RESERVATION.

This Court has asked the parties to consider whether the Wendat's commercial development is within the Maumee Reservation, or if the development lies outside of Indian country for purposes of taxation by the State of New Dakota. Typically, questions that concern the status of reservation boundaries are matters of Congress. *See generally Hagan v. Utah*, 510 U.S. 399 (1998); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998). That is because this Court has continually recognized that Congress has plenary and exclusive power to regulate matters concerning Indian affairs. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903); *United States v. Lara*., 541 U.S. 193, 200 (2004).

Among the powers of Congress is the ability to ratify treaties with Indian tribes. *Worcester v. Georgia*, 31 U.S. 515, 559 (1832). In addition to the power to enter into treaties, Congress also has the power to unilaterally abrogate treaties. *Lone Wolf*, 187 U.S. at 566. However, any tribal property rights and aspects of sovereignty will remain intact unless Congress's intent to abrogate those rights is clear and unambiguous. *Nebraska v. Parker*, 136 S. Ct. 1072, 1079 (2016); *Michigan Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014).

Further, the plenary powers of Congress are broad, and this court has recognized that Congress can unilaterally alter the reservation boundaries of a tribe. *Lone Wolf*, 187 U.S. at 567-568. However, in a similar fashion to the abrogation of treaties, Congress's intent to alter reservations boundaries must be clear. *Parker*, 136 S. Ct. at 1079. In other words, "once a block of land is set aside for a reservation, and no matter what happens to the title of the

individual plots, the area retains its reservation status until Congress explicitly indicates otherwise. *Solem v. Bartlett*, 465 U.S. 463, 470 (1984).

A. The Boundaries of the Maumee Reservation That Were Set Forth in the Treaty of Wauseon Have Not Been Abrogated by the Treaty With the Wendat.

Treaties entered into between Indian Tribes and the United States constitute a contract between two sovereign nations in a government-to-government relationship. *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979). Treaties entered into by the United States are the supreme law of the land. U.S. Const. art. VI, § 2, cl. 2. Generally, resolving questions that pertain to Indian treaties begins with the treaty language itself. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 206 (1999). This Court has also utilized the Indian canons of construction, which state that treaty language should be liberally interpreted in favor of the Indians, and the language must be interpreted as they would be understood by the Indians. *Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992); *Fishing Vessel*, 443 U.S. at 676. Lastly, the courts may also examine the history of the negotiations to deduce its meaning. *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943).

Treaties are generally self-executing, and they continue to remain enforceable unless there is clear evidence that Congress intended to abrogate the treaty. In other words, "Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so." *Mille Lacs*, 526 U.S. at 202. One of the methods that Congress can use to terminate a treaty is by ratifying a new treaty or statute that supersedes a prior treaty or statute. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888). This method also requires that Congress clearly express its intent to supersede an older treaty or statute. *Cook v. United States*, 288 U.S. 102, 120 (1933).

In this case, both tribes have a treaty that reserves a set of lands for them. For the Maumee, the Treaty of the Wauseon reserves land for their reservation. Treaty of Wauseon, Oct. 4, 1801, 7 State. 1404 [hereinafter Wauseon Treaty]. For the Wendat, the Treaty with the Wendat reserves land for their reservation. Treaty with the Wendat, March 26, 1859, 35 Stat. 7749. [Hereinafter Wendat Treaty]. Most relevant to this issue are the rules regarding interpretation of treaty provisions that seek to establish land ownership within a tribe. If a treaty purports to recognize Indian title or rights to certain land, that treaty creates recognized Indian title. *See Menominee Tribe v. United States*, 391 U.S. 404 (1968). Recognized Indian title is further supported by language such as "use and occupancy", or "as Indian lands are held." *Id*. at 405-06.

This question of Indian title and treaty abrogation appeared in a case concerning the State of Wyoming and Crow Tribe's treaty rights. *Herrera v. Wyoming,* 139 S. Ct. 1686, 1694 (2019). In that case, the State of Wyoming argued that the Crow's 1868 Treaty rights expired when Wyoming became a state. *Id*. Specifically, Wyoming argued that Congress intended to end the 1868 Crow Treaty by enacting the Wyoming Statehood Act. *Id*. at 1698. The Court relied on the well-established clear expression rule and stated that if "Congress seeks to abrogate treaty rights, it must clearly express its intent to do so." *Id*. The Court went on to state that there "must be clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other and chose to resolve that conflict by abrogating the treaty." *Id*. The Court ultimately found no reference to the Crow's treaty rights and held that the Statehood Act did not abrogate the Crow's 1868 Treaty. *Id*. at 1699.

Here, the Treaty with the Wendat did not abrogate the Treaty of Wauseon nor is there any indication that Congress intended to abrogate the treaty. The Treaty with the Wendat states that the Wendat "agree to cede to the United States their title, and interests to lands in New Dakota Territory, excepting those lands East of the Wapakoneta River." Wendat Treaty. The language in the treaty makes no mention of Maumee treaty rights. Further, the absence of any reference to Maumee treaty rights provides no indication that Congress even considered the rights of the Maumee. As a result, there is no clear indication that Congress chose to resolve the Wendat's land claim by abrogating the Maumee's treaty land.

Additionally, if there is any ambiguity, the Court should read the Wauseon Treaty in favor of the Maumee. The Treaty of Wauseon uses clear language that indicates Indian title. Specifically, the Wauseon Treaty states that "land contained within the lines to the Maumee, to live and to hunt on, and such of the Maumee Nation as now live thereon." Wauseon Treaty.

If Congress truly sought to abrogate the Treaty of Wauseon by ratifying the Treaty with the Wendat, it would have done so through language that showed a clear and express intention. Congress, however, did not. This Court has consistently followed and applied the well-established canons of constructions to Indian treaties. The decision by the Thirteenth Circuit Court of Appeals breaks from the canons of construction and applies an analysis that is wholly inconsistent with judicial precedent. As a result, this Court should reverse the decision of the Court of Appeals for the Thirteenth Circuit.

B. The Maumee Allotment Act Did Not Diminish the Maumee's Reservation Because Congress Did Not Clearly and Explicitly Express an Intent to do so.

It is well established that only Congress can divest a reservation of its land and diminish its boundaries. *Solem*, 465 U.S. at 470. Specifically, plenary authority gives Congress the unilateral power to alter or change the Indian country status of land. *South Dakota v. Yankton*

Sioux Tribe, 522 U.S. 329, 343 (1998). This established precedent was recently upheld in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). Diminishment, however, will not be lightly inferred. *Solem*, 465 U.S. at 470. More precisely, Congress's intent to diminish must be clearly expressed. *Yankton Sioux Tribe*, 522 U.S. at 343. There is also a presumption in favor of the continued existence of a reservation. *Solem*, 465 U.S. at 472.

Much like this Court's previous decisions, the appropriate test is the three-part test found in *Solem* to determine if a reservation has been diminished or disestablished. Under the *Solem* test, the key determination is congressional intent. *Solem*, 465 U.S. at 470. In determining congressional intent, the three-part test includes examining: (1) statutory language, (2) surrounding circumstances, and (3) subsequent treatment. *Id*. The third factor, alone, is the weakest. Additionally, this Court has often found that if the first and second factors fail, then the third factor is set to fail.

Indeed, under the first factor of *Solem*, this Court stated, "once a block of land is set aside for an Indian Reservation and no matter what happens to the title of the individual plots within the area, the entire block retains its reservation status." *Id*. at 470. As such, *Solem* indicated that:

> The most probative evidence of congressional intent is the statutory language used to open the Indian lands. Explicit references to cession or other language evidencing the present and total surrender of all tribal interests strongly suggest that Congress meant to divest from the reservation all unallotted open lands.

Id. It should be noted, however, that there is no particular form of words required when it comes to diminishing a reservation. *McGirt*, 140 S. Ct. at 2475. Additionally, if language suggests that the Tribe will be compensated for any unallotted land, there is a general

presumption that suggests Congress mean to disestablish the reservation. *Solem*. 465 U.S. at 470.

Under the second *Solem* factor, the Court examines evidence of the surrounding circumstances and whether there is a contemporaneous understanding that the reservation would be diminished. *Id*. at 471. This factor emerged from the fact that the majority of the surplus land Acts did not clearly convey whether opened lands retained reservation status or were divested. *Parker*, 136 S. Ct. at 1079.

The satisfaction of the last factor of the *Solem* test considers events that occur "after the passage of a surplus land act. *Id*. This factor includes evidence such as "Congress's own treatment of the affected areas." *Id*. It also includes evidence of the manner in which the Bureau of Indian Affairs and local judicial authorities dealt with unallotted open areas." *Id*. The Court also looks at the demographics of the affected area "where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian characters . . . de factor, if not de jure, diminishment may have occurred." *Id*.

In practice this Court has embraced *Solem* as the correct test in a multitude of diminishment/disestablishment cases. Most aptly, this Court applied the *Solem* test in *Nebraska v. Parker*, 136 S. Ct. 1072 (2016) and *Hagan v. Utah*, 510 U.S. 399 (1994).

In *Parker*, this Court held that the Omaha Reservation was intact due to a lack of any congressional intent to diminish or disestablish. 136 S. Ct. at 1082. Because there was no congressional intent to diminish or disestablish, the case failed the first factor of the *Solem* test. *Id*. at 1079-80. Most importantly, because the case failed the first factor of the test, this Court did not allow the second and third factors to be dispositive. *Id*. at 1080-82.

Additionally, in *Parker*, this Court refused to allow the third factor of the test to be dispositive even though evidence overwhelmingly showed that there was a lack of an Omaha presence. *Id*. at 1081. The judiciary understood that it was not their position to re-write an Act or jurisdictional boundaries on the basis of subsequent demographic history. *Id*. at 1082.

In contrast, this Court held that Congress diminished the Uintah Indian Reservation by again focusing the analysis on the first *Solem* factor. *Hagan*, 510 U.S. at 411. The court found that the relevant Acts put forth sufficient evidence that showed congressional intent because Congress stated that Uintah Reservation lands would be restored to the public domain for a lump compensatory sum. *Id*. at 414.

1. The Application Of The First Solem Factor Yields No Indication That Congress Intended To Diminish The Maumee Reservation.

In this case, the Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908) does not point to any express language of cessions, diminishment, or any lump compensatory payment. Common textual indicators can include explicit references to cession or any other language that shows the surrender of tribal interests. *Parker*, 136 S. Ct. at 1079. The Maumee Allotment does not include either of those indicators. The relevant provision instead states that unclaimed lands shall continue to be reserved to the Maumee. R. at 13. Further, no other section of the Act can be read to clearly show that Congress intended to diminish the reservation.

Language evidencing the surrender of tribal claims in exchange for a fixed payment often satisfies and shows Congress' clear intention to diminish a reservation. Parker, 136 S. Ct. at 1079. The presence of a fixed payment also usually creates a strong presumption that Congress meant for the tribe's reservation to be diminished. *Id*. Again, the Maumee Allotment Act does not include this type of language. R. at 13-14. Instead, section four states that "nothing in this law provides for the unconditional payment of any sum to the Indians." R. at 14.

Rather, the Maumee Allotment Act empowers the Secretary of the Interior to survey and appraise the land. R. at 13. This land could then be sold to non-members, which further indicates that there is no fixed sum for the land.

Lastly, language that indicates portions of an Indian reservation will be restored to the "public domain" could be significant step in showing the intent of Congress. *Id*. at 1079. Here, the Maumee Allotment Act does mention that surplus land may be returned to the public domain. R. at 13. However, isolated phrases such as those found in the Maumee Allotment Act are hardly dispositive. *Solem*, 465 U.S. at 475. When that phrase is balanced against the Maumee Allotment Act's goal of selling land to non-members, the isolated phrase cannot clearly express a Congressional intent to diminish.

2. The Surrounding Circumstances of the Maumee Allotment Act Also Fails To Satisfy Solem's Second Factor.

In reviewing the second *Solem* factor, the Court examines the contemporaneous historical evidence. *Solem*, 465 U.S. at 470. The legislative history of the Maumee Allotment Act also only serves to show that reservation land was to be surveyed, and slowly sold to non-Indian settlers. R. at 24. Nothing in the debate and record show a clear statement that Congress interpreted these interactions to fully diminish the reservation. R. at 23. The House Representatives did not speak in terms of cession, but rather they spoke about the individual price of land. *Id*. Further, there was no mention of how the Maumee Allotment Act would impact the reservation boundaries. R. at 23-24.

3. The Post-Enactment History Of The Maumee Reservation May Show A Change In Demographics But This Factor Alone Fails To Satisfy Diminishment.

The last *Solem* factor examines evidence of subsequent federal and local treatment of the land as well as the local demographic history. This subsequent demographic history of the

land can also serve as a method to determine whether Congress intended to diminish a reservation. *Parker*, 136 S. Ct. at 1079. While evidence of a different demographic history may lend itself to a finding of diminishment, this Court should not rely solely on this factor in making its determination. *Parker*, 136 S. Ct. at 1081. In other worse, the last factor is the least persuasive.

The Indian population of the Topanga Cession has steadily declined since 1880. R. at 7. The Maumee Allotment Act was the last to be adopted, and since 1908 the Topanga Cession saw a sharp decrease in Indian presence. *Id*. Specifically, the percentage of Indians dropped dramatically from 80.4% to 20.3%. in the 1920's. R. at 7.

However, the subsequent demographic history is not enough to satisfy a clear expression of congressional intent. This factor is the least compelling, and it is not the job of the Court to rethink the Maumee Allotment Act in light of the changed demographic.

When "both an act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, the Court bound by traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening." *Solem*, 465 U.S. at 47. As this Court did in *Parker*, even if the area does not retain an "Indian" character, the court should not allow the third factor to be dispositive of the issue. Thus, the Maumee Reservation has not been diminished.

C. Alternatively, the Wendat Commercial Development is Not Located Within Indian Country Because Congress Also Explicitly Diminished the Wendat Reservation.

If this Court disagrees and finds that the Maumee reservation has been diminished, the Wendat reservation has also been diminished, which means the Wendat commercial development is not in Indian country. In the same fashion as the Maumee diminishment

analysis, the proper test for determining whether the Wendat Reservation has been diminished is the three-part *Solem* test. *Solem*, 465 U.S. at 470. The *Solem* test examines three different factors in order to determine whether Congress clearly expressed its intention to diminish the Wendat Band reservation. In determining congressional intent, the three-part test includes examining: (1) statutory language, (2) surrounding circumstances, and (3) subsequent treatment. Solem, 465 U.S. at 470.

The first factor of the Solem test requires the Court to examine the Wendat Band Allotment Act, P.L. 52-8222 (Jan. 14, 1892), for any clear express language of cession, any lump compensatory payments, or any reference to returning the Indian land to the public domain. Unlike the Maumee Allotment Act, the Wendat Band Allotment Act clearly indicates that "any unclaimed land shall be declared surplus lands and open to settlement." R. at 25. Further, the Wendat Band Allotment Act also clearly pays a compensatory lump sum to the Wendat. *Id*. The United States agrees to pay the Wendat three dollars and forty cents for every acre declared surplus. *Id*. This scheme differs from the Maumee Allotment Act because it is clear that the Wendat will not continue to make money as land is sold to non-member settlers. Rather, it is clear the United States will pay the Wendat on lump sum. Lastly, the Wendat Band Allotment Act also apportions an additional $40,000 to move the Wendat "onto their allotment as quickly as possible and to open the surplus land to settlement." Taking each section, and the language used in the Wendat Band Allotment Act, it is clear that Congress wanted to quickly open Wendat land to settlement and pay the Wendat a one-time sum for their land. This creates a strong presumption that Congress clearly intended to diminish the Wendat reservation.

The second factor of the *Solem* test requires the Court to examine the surrounding circumstances and contemporaneous historical evidence. *Solem*, 465 U.S. at 471. First, the

legislative history of the Wendat Band Allotment Act clearly shows a Congressional intent to return Indian land to the public domain and a clear intent to reduce the reservation. R. at 19-20. Specifically, a report from the Secretary of Interior stated that more than 2,000,000 acres of land will be added to the public domain. R. at 19. Comments about adding land back to the public domain were also expressed by Mr. Harvey. R. at 20. Further, Mr. Ullrich explicitly stated that there were ongoing negotiations with the Indians for the "reduction of the reservation." *Id*. Lastly, the legislative history does not speak at all about preserving the Wendat Band character, or Wendat Band land. R. 20-21. Rather, it is clear that each House Representative wants to open the land to settlement as quickly as possible so that settlers could get to their new homesteads as fast as possible. *Id*.

Lastly, the Court must examine the third *Solem* factor by examining evidence of subsequent federal and local treatment of the land as well as the local demographic history. *Solem*, 465 U.S. at 471. As was stated previously, since the enactment of the Maumee Allotment Act, the Indian population living within the Topanga Cession has dramatically decreased. In the 1920's the Indian population has dropped from 80.4% to 20.3%. R. at 7. Normally, local demographic history is not enough to prove diminishment. Indeed, the last factor is rarely dispositive. However, in the case of the Wendat Band Allotment Act, the third *Solem* factor, in conjunction with the other two factors speaks to a reservation that was quickly opened up by Congress to non-member settlement. It is clear that Congress sought to quickly return large portions of the surplus Wendat land back to the public domain. In looking at all three *Solem* factors, it is clear that Congress intentional sought to diminish the Wendat reservation.

Because the Wendat reservation was diminished, the Wendat commercial development does not lie on any tribal nation territory. Thus, the Wendat commercial development is not within Indian country.

II. THE STATE OF NEW DAKOTA IS PERMITTED TO LEVY ITS TRANSACTION PRIVILEGE TAX AGAINST A WENDAT TRIBAL CORPORATION LOCATED IN THE TOPANGA CESSION BECAUSE ITS ACTIONS ARE NOT PROHIBITED BY THE DOCTRINE OF INDIAN PREEMPTION AND ITS ACTIONS DO NOT INFRINGE UPON TRIBAL SOVEREIGNTY.

This Court has asked the parties to determine whether the State of New Dakota is permitted to impose its TPT against WCDC. The legal relationship between Indian tribes and states has been unclear since the establishment of the republic. Frank Pommersheim, *Braid of Feathers: American Indian Law and Contemporary Tribal Life*, 141 (1995). In 1832, the Supreme Court first attempted to speak to the nature of tribal-state relations. *See generally Worcester v. Georgia*, 31 U.S. 515 (1832). In an opinion authored by Chief Justice Marshall, the court found that "'the laws of [a state] can have no force' within reservation boundaries." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980) (quoting *Worcester*, 31 U.S. at 561). However, the court has since departed from this view, but has been left to grapple with the question of "whether a particular state law may be applied to an Indian reservation or to tribal members." *Bracker*, 448 U.S. at 142. Generally, the Indian Commerce Clause provides Congress the broad power to "regulate Commerce . . . among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.

> This congressional authority and the "semi-independent position" of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law. Second, it may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them." The two barriers are independent because either,

> standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members.

Bracker, 448 U.S. at 142.

In the present case, the Thirteenth Circuit improperly decided that the State of New Dakota's TPT infringed on tribal sovereignty and should therefore be subject to Indian preemption under Supreme Court precedent. First, the doctrine of Indian preemption does not prohibit the State of New Dakota from imposing its TPT against a non-member Wendat Tribal Corporation because the TPT does not conflict with the federal regulatory regime, the state has a legitimate interest in applying the TPT, and the economic burden does not fall on the tribe. Secondly, the state of New Dakota's TPT does not infringe upon tribal sovereignty because the tax does not undermine federal policies created to help Indians and the tax does not hinder the self-determination of the tribe. Therefore, the decision of the Thirteenth Circuit should be reversed.

A. The Doctrine of Indian Preemption Does Not Prohibit the State of New Dakota From Collecting its Transaction Privilege Tax (TPT) Against The Non-Member Wendat Tribal Corporation Because The TPT Does Not Conflict With Any Federal Regulatory Regimes, The State Has a Legitimate Interest In Applying the TPT, And The Economic Burden Of The TPT Does Not Fall On The Tribe.

The doctrine of Indian preemption was first introduced in the 1965 Supreme Court decision *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S 685 (1965), and has since been expanded upon in subsequent Supreme Court precedent. Charley Carpenter, *Preempting Indian Preemption: Cotton Petroleum Corp. v. New Mexico*, 39 Cath. U. L. Rev. 639, 649, 655-57 (1990). The doctrine of Indian preemption is distinct from federal standards of preemption often found in other areas of the law. *Bracker*, 448 U.S. at 143. Indian preemption "differs from other preemption primarily because of the unique, somewhat

fiduciary, relationship between the distinctly sovereign Indian tribes and the Federal Government." Carpenter, *supra*, at 639.

1. *While States Generally Do Not Have Authority to Tax Non-Indians And Non-Member Indians Conducting Business on Their Own Reservation, States May Have the Authority to Tax Non-Indians And Non-Member Indians Businesses Conducting Business on A Reservation.*

Determining "who bears the legal incidence of the tax" is one of the first questions that should be addressed in any Indian tax case. *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 458 (1995). While state law generally has no force over issues concerning conduct involving Indians on the reservation, "[m]ore difficult questions arise where, as here, a State asserts authority over the conduct of non-Indians [or non-member Indians] engaging in activity on the reservation." *Bracker*, 448 U.S. at 144. Often these questions are analyzed under the "*Bracker* interest-balancing test." *See generally Wagnon v. Prarie Band Potawatomi Nation,* 546 U.S. 95 (2005).

If the burden of a state tax falls on a non-Indian or a non-Indian company conducting business on the reservation, the tax will likely be permitted if it is not contrary to federal or tribal interests. *Oklahoma Tax Commission*, 515 U.S. at 459. In *Oklahoma Tax Commission*, the court analyzed the question of whether Oklahoma had authority to impose a motor fuel tax on a tribally owned retail store on trust land and an income tax on Indians who were employed by the tribe but lived outside of Indian country. *Id.* at 452, 453. The court held that "[i]f the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization." *Id.* at 459. However, the court also stated that "if the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal

interests favors the State, and federal law is not to the contrary, the State may impose its levy." *Id.*

Non-member Indians "stand on the same footing as non-Indian[] resident[s] on the reservation." *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 161 (1980). One issue in *Colville* was whether the state had the power to tax Indians on the reservation who were not enrolled in the governing tribe. *Id.* at 160. The court mentioned that "the mere fact that non-members resident on the reservation come within the definition of 'Indian' for purposes of the Indian Reorganization Act of 1934, does not demonstrate a congressional intent to exempt such Indians from state taxation." *Id.* at 161. (citations omitted). Additionally, the court noted that "Federal statutes, even given the broadest reading to which they are reasonably susceptible, cannot be said to pre-empt Washington's power to impose its taxes on Indians not members of the Tribe." *Id.* at 160. The court held that the state may impose a tax on non-member Indians on the reservation. *Id.* at 164.

The first question that must be assessed in the present case is who bears the burden of the state tax. Here, the state's TPT is designed to apply to "every person who receives gross proceeds of sales or gross income of more than $5,000 on transactions commenced in this state." R. at 5. WCDC, a tribal corporation owned wholly by the Wendat, announced its plans to construct a residential and commercial development on the land in fee purchased within the Topanga Cession. R. at 7-8. Based on its projected gross annual sales of over $80 million the WCDC would be subject to the State of New Dakota's TPT. R. at 8. Since the lands held in fee are within the Maumee reservation, the WCDC would be considered a non-member business operating on Maumee lands. R. at 8. As stated in *Colville*, non-member Indians "stand on the same footing as non-Indian[] resident[s] on the reservation," and therefore "the mere

fact that non-members resident on the reservation come within the definition of 'Indian' . . . does not demonstrate a congressional intent to exempt such Indians from state taxation." 447 U.S. at 161. Therefore, since the legal incidence of the state tax falls on the WCDC, a non-member business operating on the Maumee reservation, the state may impose its tax if it is found that the federal, state, and tribal interests favor the state.

Contrarily, if the legal incidence of the tax were to fall on the Maumee, the state tax would likely be void. It may be argued that the legal incidence of the TPT falls on the Maumee, however, this would be likely be unfounded. There is no evidence in the record indicating that the burden of the tax would fall upon the Maumee. If the Maumee where tasked with the responsibility of collecting the tax for the state or if the Maumee or its businesses were required to pay the tax on their own lands, the legal incidence would likely fall on the Maumee. However, this case does not support this contention. Instead, the State of New Dakota is collecting and enforcing the TPT. R. at 6. Additionally, the Maumee, or any tribe conducting business on their own reservation, on lands held in trust by the United States, are exempt from paying the tax or obtaining a license. R. at 6. Based on the facts presented in this case, it is unlikely that the legal incidence of the TPT would fall on the Maumee. Thus, the legal incidence of the tax would likely fall on the WCDC, a non-member business conducting business on the Maumee reservation, therefore subjecting the Wendat to the TPT as long as the tax does not oppose federal or tribal interests.

2. *When Assessing Whether A State Has the Authority to Tax Non-Indians or Non-Member Indians Conducting Business on The Reservation Courts Often Use the Bracker Balancing Test to Weigh the Federal, State, And Tribal Interests.*

The *Bracker* balancing test ultimately aims to assess whether the "exercise of state authority would violate federal [or tribal] law." *Bracker*, 448 U.S. at 145. Instead of relying on

"mechanical or absolute conceptions of state or tribal sovereignty" this test calls for "a particularized inquiry into the nature of the state, federal, and tribal interests at stake." *Id.* Essentially, the *Bracker* balancing test is an Indian preemption analysis that resolves whether state authority over non-Indian activity on the reservation is preempted by federal law or tribal interests. *Id.*

If a federal regulatory scheme is not found to be comprehensive and pervasive, a state may have the authority to impose a tax on non-member Indians on the reservation. *Bracker*, 448 U.S. at 148. In *Bracker*, the state of Arizona sought to impose a tax on Pinetop Logging Co., a company comprised of two non-Indian corporations that engaged in business on the Fort Apache Reservation. *Id.* at 137-38. In its analysis the court called for a "particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Id.* at 145. While assessing the federal interests, the court noted that the "Federal Governments regulation of the harvesting of Indian timber [was] comprehensive" because the Secretary of the Interior regulated the sales of timber and had "daily supervision over the harvesting and management of tribal timber." *Id.* at 145-46. The court also found that "the federal regulatory scheme [was] so pervasive as to preclude the additional burdens sought to be imposed in th[e] case." *Id.* at 148. Additionally, the court was unable to find "any regulatory function or service performed by the State that would justify the assessment of taxes for activities on Bureau and tribal roads within the reservation." *Id.* at 148-49. The court asserted that the state tax would threaten the federal government's ability to ensure that the tribe received all the benefits that its timber company had to offer. *Id.* at 149. Ultimately, the court held that the state tax was preempted by federal law. *Id.* at 138.

A state may be permitted to impose a tax on non-member Indians if the state has a legitimate interest to justify the imposition of the tax and if the state is provided with duties or responsibilities with regard to the burden of its tax. *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 843 (1982). In *Ramah*, the issue was whether federal law preempted "a state tax imposed on the gross receipts that a non-Indian construction company receive[d] from a tribal school board for the construction of a school for Indian children on the reservation." *Id.* at 834. The school board contracted with the Bureau of Indian Affairs (BIA) and secured most of its funding for educational facilities from "congressional appropriations earmarked for this purpose." *Id.* at 835. The court found that the federal regulation of the Indian educational institution was both "comprehensive and pervasive" because concerns regarding the education of Indian children could be tracked back to several treaties between the United States and the tribe and because numerous statutes surrounding Indian education. *Id.* at 839-40. The court noted that

> the State does not seek to assess its tax in return for the governmental functions it provides to those who must bear the burden of paying this tax. Having declined to take any responsibility for the education of these Indian children, the State is precluded from imposing an additional burden on the comprehensive federal scheme intended to provide this education-a scheme which has "left the State with no duties or responsibilities." Nor has the State asserted any specific, legitimate regulatory interest to justify the imposition of its gross receipts tax.

Id. at 843-44. The court concluded that the state gross receipts tax was impermissible. *Id.* at 834.

A state may impose a tax on non-Indian companies on the reservation in situations where the state provides considerable services to the tribe and company, and where the economic burden does not fall on the tribe. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 186 (1989). In *Cotton Petroleum*, a non-Indian company, Cotton Petroleum Corporation,

extracted and marketed oil and gas under the 1938 Indian Mineral Leasing Act which authorized the company to lease property from the Jicarilla Apache Reservation and the United States. *Id.* at 168. The company paid taxes to both the tribe and the state, but argued that the states taxes were preempted by federal law. *Id.* at 169, 170. The court noted that this case was distinguishable from *Bracker* and *Ramah* because the state provided "substantial services to both the Jicarilla Tribe and Cotton." *Id.* 185. Additionally, the court found that unlike *Bracker* and *Ramah,* "[n]o economic burden [fell] on the tribe by virtue of the state taxes." *Id.* The court thus concluded that federal law did not preempt the state tax. *Id.* at 186.

Now shifting focus to the heart of the Indian preemption analysis, the facts of this case must be applied to the *Bracker* balancing test, which calls for a "particularized inquiry into the nature of the state, federal, and tribal interests at stake." *Bracker*, 448 U.S. at 145. Here, there are several competing interests involved. Unlike other cases involving Indian preemption and the *Bracker* test, this case involves an Indian tribe, the Maumee, residing on their own reservation and a non-member tribal business, the WCDC, conducting business within the Maumee reservation. R. at 7-8.

First, under the *Bracker* test, federal interests must be considered. Unlike in other Indian preemption cases, the present case does not involve any federal statutes or regulations. For example, *Bracker* involved the federal regulation of harvesting Indian timber, 448 U.S. at 145, *Ramah* involved the federal regulation of the financing and assembly of Indian educational facilities, 485 U.S. at 839, and *Cotton Petroleum* involved the 1938 Indian Mineral Leasing Act. 490 U.S. at 168. However, "[t]he right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an

important 'backdrop' against which vague or ambiguous federal enactments must always be measured." *Bracker*, 448 U.S. at 143 (quoting *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973)).

In the current case, while there are no explicit references to federal interests, it could be inferred that the federal government has an interest in promoting tribal self-governance and economic development. There have been a "number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development" such as the Indian Financing Act of 1974, 25 U.S.C. § 1451 *et seq.,* the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 *et seq.,* and the Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq.* Therefore, it could be inferred that the federal government has an interest in promoting tribal self-governance and economic development of both the Maumee and the Wendat. However, if the federal interest in this case are found to be general interests of promoting tribal self-governance and economic development, this federal regulatory scheme would not be comprehensive, nor pervasive, unlike in *Bracker* and *Ramah*.

In *Bracker*, the BIA regulated and monitored numerous aspects of the harvesting of timber. *Bracker,* 448 U.S. at 145-46. For example, the BIA was involved in all of the day-to-day operations, such as how much timber was to be cut, which roads were to be used, and what equipment should be used and in what way. *Id.* at 147. Additionally, in *Ramah*, the court found the federal regulation of the Indian educational institution was both "comprehensive and pervasive" because concerns regarding the education of Indian children could be tracked back to several treaties between the United States and the tribe and because numerous statutes surrounding Indian education. *Id.* at 839-40. However, in the present case, there is no explicit

federal regulatory scheme mentioned with regard to a non-member corporation conducting business on the reservation. Additionally, if the court did apply a general federal Indian law regulatory scheme to this case it would not likely be found comprehensive or pervasive because if the federal scheme were comprehensive it would have been mentioned in the facts of this case.

Second, under the *Bracker* balancing test, "any applicable regulatory interest of the State must be given weight." *Bracker*, 448 U.S. at 144 (citing *McClanahan*, 411 U.S. at 171). In the present case, one of the main tools used in assessing the State of New Dakota's interests is its state statute. *See* 4 N.D.C. § 12; R. at 5. Section one of the state statute illustrates the general applicability of the statute and specifies that it is applicable to "[e]very person" who fits the criteria. R. at 5. Section two of the state statute discusses the 3.0% remittance on gross proceeds and the physical location of the licensees. *Id.* Section three specifies where the proceeds of the TPT will be allocated. R. at 6. Specifically, the proceeds of the TPT will be

> 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.

Id. Section four recognizes the states relationship with its twelve Indian tribes and asserts that "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." *Id.* Additionally, section five states that "the State of New Dakota will remit to each tribe the proceeds of the TPT collected from all entities operating on their respective reservations that do not fall within the exemption of §212(4)." *Id.* Furthermore, the state "recognizes that each Tribe could collect this tax itself, [but asserts that] the centralization of collection and enforcement by the State of New Dakota

is the most efficient means of providing these funds to tribes." *Id.* Section six contains a unique clause recognizing the mineral interest that were given up by the Maumee and states that "half of the TPT collected from all businesses in Door Prairie County that are not located in Indian country (1.5%) will be remitted to that tribe." *Id.* Lastly, section seven lists the penalty for failing to obtain a license or pay the required tax. *Id.*

Through utilization of its state statute the State of New Dakota has clearly articulated its interests with regards to the TPT. Unlike in *Bracker* and *Ramah*, the State of New Dakota is performing services and regulatory functions that justify the imposition of the tax on its citizens. In *Bracker*, the court asserted that the state tax would threaten the federal government's ability to ensure that the tribe received all the benefits that its timber company had to offer. 448 U.S. at 149. Also, in *Ramah*, the state did not "seek to assess its tax in return for the governmental functions it provides to those who must bear the burden of paying this tax" and "declined to take any responsibility for the education of the[] Indian children." 458 U.S. at 843-44. However, the present case is more closely related to *Cotton Petroleum*, where a state was permitted to impose a tax on non-Indian companies on the reservation because the state provided substantial services to the tribe and company, and because the economic burden did not fall on the tribe. 490 U.S. at 163.

In the present case, the TPT does not pose a threat to the Maumee or its economic ventures and instead provides substantial services to both the tribe and the WCDC. The state recognizes the presence of the Maumee and other tribes within its borders and does not require tribes or tribal businesses operating within their own reservation to obtain a license or collect a tax. R. at 6. Additionally, the state has not only agreed to remit "to each tribe the proceeds of the TPT collected from all entities operating on their respective reservations that do not fall

within the exemption of § 212(4)," but it also has agreed to collect and enforce this tax for the tribes. *Id.* By collecting and enforcing the tax for the Maumee, the State of New Dakota is decreasing the economic burden that would be placed on tribes and ensuring efficiency.

Moreover, the state is also aiding the Maumee and non-member WCDC by providing "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." *Id.* This funding would further help the state collect and enforce taxes which would then expedite those funds to the Maumee. Additionally, this funding would aid the WCDC by increasing the accessibility of patrons to its business, which in turn would help fund the Wendat's tribal services. Since WCDC is wholly owned by the Wendat, 100% of corporate profits are remitted to the tribal government and used to fund tribal services such as public housing and a nursing care facility. R. at 8. Unlike in *Bracker* and *Ramah*, the State of New Dakota is performing services and regulatory functions that justify the imposition of the tax on individuals within its borders and therefore, like *Cotton Petroleum*, the state should be permitted to impose a tax on non-Indian companies on the reservation because the state provides substantial services to the Maumee and WCDC.

The third interest to be assessed under the *Bracker* balancing test is the tribe's interest. Here, the Maumee's interests are uniquely aligned with the states interest. The Maumee has expressed that it desperately needs the funds that would be produced by the TPT because its sustainable timber harvesting is being threatened by climate change causing its revenue to decline by 12% annually. R. at 8. The Maumee has also explained that its "average citizen's income is 25% lower than the average income of a Wendat tribal member." R. at 8.

Furthermore, the Maumee expressed that it would use the remitted monies to help fund "tribal scholarships and invest in renewable energy and other forms of sustainable economic development to diversify the tribal economy so that it could continue to provide basic services and jobs for Maumee tribal members." *Id.* Thus, the Maumee has an expressed interest in supporting the states TPT tax.

Therefore, after analyzing the facts of this case under the *Bracker* balancing test to assess whether the "exercise of state authority would violate federal [or tribal] law," *Bracker*, 448 U.S. at 145, it has been determined that the doctrine of Indian preemption does not prohibit the State of New Dakota from imposing its TPT against a non-member Wendat Tribal Corporation because the TPT does not conflict with the federal regulatory regime, the state has a legitimate interest in applying the TPT, the economic burden does not fall on the tribe, and the Maumee has a vested interest in supporting the state TPT.

B. The State of New Dakota's Transaction Privilege Tax Does Not Infringe Upon Tribal Sovereignty Because The Tax Does Not Undermine Federal Policies Created to Help Indians And The TPT Does Not Hinder The Self-Determination Of The Tribe.

While preemption and infringement are often coupled when a challenge is brought against a state's authority to impose a tax on the reservation, "either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members." *Bracker*, 448 U.S. at 142. Generally, when engaging in an infringement analysis, "absent governing Acts of Congress, the question 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 v. Lee*, 358 U.S. 217, 220 (1959). In *Williams*, a non-Indian who operated a general store on the Navajo Indian Reservation brought an action against a Navajo Indian and his wife seeking to collect for items that were sold to them on credit. *Id.* at 217. The court held

that "to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." *Id.* at 223.

A state tax may be found to infringe upon the self-determination of a tribe if the tax would undermine well established Acts of Congress established to protect Indians and help foster their self-determination. *See generally Warren Trading Post Co. v. Arizona State Tax Commission*, 380 U.S. 685 (1965). In *Warren Trading Post*, Arizona imposed a 2% tax on the "gross proceeds of sales, or gross income" on the non-member Warren Trading Post Company, a retail trading business that conducted business on the Navajo Indian Reservation, under a license issued by the United States Commission of Indian Affairs. *Id.* The court held that "since federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax." *Id.* at 691. In reaching its conclusion, the court assessed the federal regulation of Indian traders and found that the collection of the state tax would "frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress or by valid regulations promulgated under those Acts." *Id.* The court was concerned that the state tax would "disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner." *Id.*

A state may impose a tax on a reservation, "unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973). In *Mescalero Apache Tribe*, New Mexico sought to impose a tax on the gross receipts of a tribally operated ski resort off the

reservation. *Id.* at 146. The court discussed the difference between the tax implications of Indian lands on and off the reservation and asserted, "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Id.* at 148–49. Additionally, the court rejected the claim that "the Indian Reorganization Act of 1934 rendered the Tribe's off-reservation ski resort a federal instrumentality constitutionally immune from state taxes of all sorts." *Id.* at 150. The court noted that "absent clear statutory guidance, courts ordinarily will not imply tax exemptions and will not exempt off-reservation income from tax simply because the land from which it is derived, or its other source, is itself exempt from tax." *Id.* at 156. The court ultimately concluded that the state was permitted to tax the tribally owned ski resort located off the reservation, but was prohibited from taxing the improvements upon the land. *Id.* at 157.

In the present case, under the infringement analysis, it must be determined whether the state of New Dakota's TPT infringes upon the rights of the Maumee and the Wendat "to make their own laws and be ruled by them." *Williams*, 358 U.S. at 220. The facts of this case are distinguishable from *Warren Trading Post Co.* because the State of New Dakota's TPT does not undermine well-known Acts of Congress established to protect Indians and help foster their self-determination. Here, the Maumee has explicitly expressed its support for the State of New Dakota's TPT. R. at 8. Additionally, the Maumee disclosed its desperate need for the TPT remittance and shared how it would use the funding to not only pay for tribal scholarships but also invest in diverse economic ventures to help support its members. R. at 8. Unlike in *Warren Trading Post Co.*, the TPT would actually aid in the protection of Indians and further their self-determination. With the TPT remittance funding the Maumee would be able to help fund the

programs and services at their discretion. This is not a situation where the state is attempting to undermine tribal sovereignty for its own benefit. Instead this is an opportunity for the Maumee to expand its programs, services, and invest in diverse business ventures. Additionally, to further support the Maumee in expanding its business endeavors, if the tribe were to establish new businesses on the reservation, they would be exempt from having to obtain a license or paying the TPT.

Contrarily, it may be argued that the State of New Dakota's TPT undermines the self-determination of the Maumee and therefore infringes on tribal sovereignty. If the state tax impinged on the right of the Maumee to enforce and collect its own taxes, the TPT would likely be determined to undermine the self-determination of the tribe. R. at 6. However, this argument would likely fail. The Maumee would retain its right to tax and in order to decrease the economic burden involved with collecting and enforcing taxes would support the state's authority to collect and enforce the TPT.

Additionally, it may be argued that the Maumee would be restricted in its ability to expand its businesses off the reservation if the TPT was upheld, which would undermine the tribe's self-determination and therefore infringe on tribal sovereignty. Under the State of New Dakota's TPT, only tribes and tribal businesses conducting business within their own reservation may be exempt from obtaining a license and pay the tax. R. at 6. Therefore, if the Maumee were to conduct business off the reservation it may be subjected to the TPT and this would hinder their ability of tribal self-government. However, this assertion would likely fail. As *Mescalero Apache Tribe* demonstrates, "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." 411 U.S. at 148.

Since this Court has already determined that Indians engaging in business off the reservation may be subject to state tax, the Maumee would not be restricted in its ability to expand its potential business ventures off the reservation. Instead this would reinforce the tribe's self-determination and allow the tribe to weigh the risks and benefits involved when making determinations about where to conduct its business.

Therefore, the State of New Dakota's TPT does not infringe upon the tribal sovereignty of the Maumee because the tax does not undermine federal policies created to help Indians and the tax does not hinder the self-determination of the tribe.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, the Petitioner respectfully requests that this Court REVERSE the decision of the United States Court of Appeals for the Thirteenth Circuit.

Respectfully submitted,

January 4, 2021

T1009
Counsel for the Petitioner