No. 20-1104.

IN THE

Supreme Court of the United States

MAUMEE INDIAN NATION,

Petitioner,

v.

WENDAT BAND OF HURON INDIANS.

Respondent.

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

BRIEF FOR THE RESPONDENT

Team No. T1014

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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 of 1908, P.L. 60-8107 (May 29, 1908) diminish the Maumee Reservation? If so, did the Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892) also diminish the Wendat Reservation or is the Topanga Cession outside of Indian country?

2. Assuming the Topanga Cession is still in Indian country, does either the doctrine of Indian preemption or infringement prevent the State of New Dakota from collecting its Transaction Privilege Tax against a Wendat tribal corporation?

STATEMENT OF THE CASE

I. STATEMENT OF THE PROCEEDINGS

On November 18, 2015 the Maumee filed a complaint against the Wendat in federal court requesting a Declaration that any development by the WCDC in the Topanga Cession would require a TPT license and payment of the tax because it was located within the Maumee Reservation. ROA at 8.[1] In the complaint, the Maumee alternatively asked for a Declaration that the Topanga Cession be deemed outside of Indian country and one-half of that the TPT tax would be remitted to the Maumee under §212(6). *Id.* The Wendat responded to the complaint asserting that the Topanga Cession has continuously been a part of the Wendat reservation since 1859. *Id.* Additionally, the Wendat argued that the state of New Dakota had no authority to collect the TPT in Indian country because the state's power to collect the tax is either preempted by federal law or infringes upon the Wendat's own sovereign powers. *Id.*

The Federal District Court of New Dakota held that it was unable to find any intent to diminish the Maumee Reservation, while the Wendat Allotment Act clearly diminished any claim the Wendat had to the Topanga Cession. *Id.* at 9. Thus, the Court held that the Topanga Cession was within the Maumee Reservation and that any development by the WCDC of any commercial enterprise with more than $5,000 in gross sales is required to obtain the TPT license and pay the tax. *Id.* Moreover, the Court explained that it could not find anything in *Williams* nor *Bracker* that would justify denying the right of New Dakota to impose the TPT to any commercial enterprise the WCDC constructed in the Topanga Cession. *Id.* The Wendat Band then appealed. *Id.* at 10.

[1]"ROA" refers to the record of appeal.

Upon being held for almost two years, on the United States Court of Appeals for the Thirteenth Circuit reversed the District Court's opinion. *Id.* The Appellate Court held that the Treaty With the Wendat of 1859 abrogated the Maumee Nation's claim to the Topanga Cession and the Wendat Allotment Act failed to diminish the Wendat Reservation. *Id.* Additionally, the Court held that the imposition of the TPT infringes on tribal sovereignty and should be subject to Indian preemption under Supreme Court precedent. *Id.* at 11. The Maumee Nation petitioned for certiorari to the United States Supreme Court. Certiorari was granted on November 6, 2020. *Id.* at 1.

II. STATEMENT OF FACTS

Both the Maumee Indian Nation (hereafter "Maumee") and the Wendat Band of Huron Indians (hereafter "Wendat") are distinct federally recognized tribes with reservation lands located in the state of New Dakota. *Id.* at 4. The Treaty of Wauseon in 1802 reserved for the Maumee lands west of Wapakoneta River. *Id.* at 5. In 1859, The Treaty With the Wendat reserved for the Wendat lands east of the Wapakoneta River. *Id.* As a result, the tribes share a reservation border. At some point within the 1830's the Wapakoneta River migrated approximately three miles to the West. *Id.* Due to the river's movement, both tribes assert claim to the land commonly referred to as the "Topanga Cession." *Id.* Additionally, both tribes were subject to allotment acts upon the passage of the General Allotment Act, P.L. 49–105 (Feb. 8, 1887). *Id.* Both the river's movement and allotment have caused the longstanding dispute about the appropriate ownership of the Topanga Cession. *Id.*

The Wendat Commercial Development Corporation (hereafter WCDC), a Section 17 IRA Corporation wholly owned by the Wendat, bought a 1,400- acre parcel of land in fee from non-Indians in the Topanga Cession on December 7 of 2013. *Id.* at 7. Two years later, the WCDC set

forth its intention to build a new facility on the land. *Id.* The facility would consist of a combination residential – commercial development which would include public housing for tribal members, a nursing care facility, a tribal cultural center, a tribal museum, and a shopping complex. *Id.* The shopping complex would help subsidize the public housing and nursing care facility. *Id.* at 8.

Under 4 N.D.C. §212 the state of New Dakota levies a Transaction Privilege Tax (hereafter TPT) on the gross proceeds of sales or gross income of a business for the "privilege" of doing business in the state. *Id.* at 5. Section (5) of the TPT acknowledges the unique relationship between the state and its constituent tribes and holds that the state will remit to each tribe the proceeds of the TPT collected from all entities operating on their respective reservation. *Id.* at 6. In recognition of the valuable mineral interests ceded by the Maumee, under section (6) 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 the Maumee. *Id.*

SUMMARY OF ARGUMENT

The Maumee do not have claim to the Topanga Cession because the legislative history of the Treaty With the Wendat reveals that Congress acted with the intent to abrogate the Maumee's title to the land reserved to them under the Treaty of Wauseon. Furthermore, the explicit language of ceded interest and restoration to the public domain within the Maumee's Allotment Act provide a clear congressional intent to diminish the tribe's reservation. However, the ambiguous language and lack of clarity within the legislative history of Wendat Allotment Act fails to demonstrate a plain and explicit intent by Congress to diminish the Wendat's Reservation land. Therefore, the Topanga Cession is located within the Indian Country of the Wendat Reservation.

If it is found that the Topanga Cession is not within Wendat land but still in Indian country, then the doctrines of either Indian Preemption or Infringement should be sufficient to determine that the TPT tax is inappropriately applied to the potential WCDC facility. The federal interest involving tribal healthcare and housing in conjunction with the tribal interest in creating jobs, housing and healthcare through on tribal land generated resources outweighs the insignificant state interest of "efficiently regulating" tax collection. Concurrently, the doctrine of infringement also bars the State tax because it interferes with the tribe's ability to make its own laws and be governed by them. That being said, if either of these doctrines should be decided are in effect then we ask that this court upholds the lower court's decision.

ARGUMENT

I. THE TOPANGA CESSION IS NOT WITHIN THE MAUMEE RESERVATION BECAUSE THE TREATY WITH THE WENDAT ABROGATED THE TREATY OF WAUSEON AND THE MAUMEE ALLOTMENT ACT OF 1908 DIMINISHED THE MAUMEE RESERVATION.

In 1948, Congress resolved ensuing jurisdictional conflicts resulting from allotment and the passage of the Indian Reorganization Act by extending tribal jurisdiction to encompass lands owned by non-Indians within reservation boundaries. 18 U.S.C. § 1151. The Act defined "Indian country" as including "all land within the limits of any Indian reservation under the jurisdiction of the United States Government notwithstanding the issuance of any patent, including any rights-of way running through the reservation." *Id.* As a result, "reservation boundaries, rather than Indian title, thus became the measure of tribal jurisdiction." *Hagen v. Utah*, 510 U.S. 399, 425-26 (1994). It is under this definition of Indian County which determines what tribe shall have jurisdictional claim to the area of land in question, the Topanga Cession.

A. The Treaty With the Wendat Abrogated the Treaty of Wauseon.

Under the Treaty of Wauseon, the Maumee tribe established the boundaries of their reservation to extend toward the western bank of the Wapakoneta River. Treaty of Wauseon, Oct. 4, 1801, 7 Stat. 1404. Treaties of such kind are held as supreme law of the land. US Const. art. IV. However, in *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), the Court held that, due to their dependent status, agreements or treaties made with Indian nations are able to be unilaterally abrogated by Congress. In recognition of such power, the Court has specifically concluded that in order for Congress to abrogate such treaty conditions, Congress must make such effort through explicit statutory language or implicit intent in the legislative history and/or surrounding circumstances. *Washington v. Wash. Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979). To assess such implicit intent from legislative history, "[w]hat is essential is clear and convincing evidence that Congress considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve the conflict by abrogating the treaty." *United States v. Dion*, 476 U.S. 734, 739-40 (1986).

Following the Treaty of Wauseon, the United States entered into a treaty with the Wendat Band of Huron Indians. This treaty, the Treaty With the Wendat of 1859, reserved for the tribe lands extending to the eastern bank of the Wapakoneta River. Treaty With the Wendat, March 26, 1859, 35 Stat. 7749. At some point during the 1830's, the Wapakoneta River moved approximately three miles to the west. ROA at 5. Taking into context the movement of this river prior to the signing of this agreement, the Treaty With the Wendat effectively abrogated the Treaty of Wauseon.

The legislative history of the Treaty With the Wendat reveals that, in Congress's consideration of ratifying such an agreement, the respective legislators acknowledged the Indian

presence in the land intended to be reserved to the Wendat. Senator Lazarus W. Powell of Kentucky mentions "I am told that few Indians now live along the Zion tributary and even fewer are to be found near the river Wapakoneta." Cong. Globe, 35th Cong., 2nd Sess. 5411-5412 (1859) (Sen. Powell). The Senators additionally suggest that their placement alongside to the civilized Maumee in the area would benefit the Wendat. *Id.* Further, Senator Solomon Foot of Vermont references the previous treaty of Wauseon stating: "In the many years since the first treaty was made at Wauseon, the Maumee have been reduced in number and no longer inhabit parts of their territory." *Id.,* (Sen. Foot). Comments made by both senators express the legislature's awareness of the Maumee's dwindling presence in the area intended to be reserved for the Wendat as well as their past treaty compromises for such land.

The statements within the congressional consideration of this treaty taken alongside the timing of the Wapakoneta River's movement preceding its establishment, demonstrate a consideration of the conflict that would arise upon declaring the boundaries of the Wendat Reservation to expand up to the eastern edge of the recently migrated Wapakoneta River. These boundaries could potentially infringe upon the Maumee's treaty rights to the land, but Congress nevertheless chose to abrogate any rights the Maumee possessed of the land in in question, and in turn, grant the Wendat exclusive right to the land east of the Wapakoneta River, inclusive of the Topanga Cession. Therefore, the Treaty With the Wendat effectively abrogated the Maumee's claim to the Topanga Cession.

B. The Maumee Allotment Act of 1908 Diminished the Maumee Reservation.

Should the Court find that the Treaty With the Wendat did not abrogate the Maumee's claim to land within the Topanga cession, the Maumee Allotment Act of 1908 nevertheless

diminished the Maumee Reservation, and in turn, removed the tribe's claim to the Topanga cession.

Also rooted within Indian's unique dependent status, "only Congress can divest a reservation of its land and diminish its boundaries." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). Moreover, "once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Id.,* (citing *United States* v. *Celestine*, 215 U.S. 278, 285 (1909)). Within the late 19th century, the federal government implemented a policy of allotting portions of reservation lands to tribal members and, with tribal consent, opening up surplus lands for sale to settlers. *DeCoteau v. Dist. Cty. Court for Tenth Judicial Dist.,* 420 U.S. 425, 432 (1975). It is "settled law that some surplus land Acts diminished reservations." *Solem*, 465 U.S. at 469.

To determine if an act of Congress diminished a reservation this Court outlined in *Solem* three factors as probative of congressional intent. *Id.* at 470. The first and most indicative factor to consider involves the statutory text used to open the lands. *Id.* Second, the court may also examine the "events surrounding the passage of a[n] Act – particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress." *Id.*at 471. Such events might reveal "a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Id*. Finally, the precedents also look, to a lesser extent, upon events occurring after the passage of the Act for "any 'unequivocal evidence' of a contemporaneous and subsequent understanding of the diminished status of the reservation by members and nonmembers, as well as the United States." *Nebraska v. Parker,* 577 U. S. 481, ——, 136 S.Ct. 1072, 1082 (2016).

1. The Statutory Text of the Maumee Allotment Act Includes Explicit Language of Diminishment.

When looking at the statutory text for intent to diminish a reservation, "explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands." *Solem,* 465 U.S. at 470. Moreover, when such language of cession is "buttressed by an unconditional commitment from Congress to compensate the Indian tribe for its opened land, there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." *Id.* In other instances, Congress has been found to employ such language that tribal lands shall be "restored to the public domain." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462, (2020). This Court has emphasized the distinction between reservation and public domain lands: stating: "That the lands ceded in the other agreements were returned to the public domain, stripped of reservation status, can hardly be questioned . . . The sponsors of the legislation stated repeatedly that the ratified agreements would return the ceded lands to the 'public domain.'" *DeCoteau,* 420 U.S. at 446.

Here, the Maumee Allotment Act features practically all notable phrases within the statutory text that might be indicative of intent to diminish the reservation. The concluding sentence of the first section states: "The Indians have agreed to consider the entire eastern quarter surplus and to cede their interest in the surplus lands to the United States where it may be returned the public domain by way of this act." Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908). This single sentence not only references the explicit language regarding the tribe to "cede their interest in the surplus lands," but also asserts that the surplus land shall be "returned to the public domain." *Id.* This Court has found that language of this kind most

deliberately expresses the legislative purpose of the act to be the voluntary surrender of Indian lands and the diminishment of the reservation. Moreover, although the act does not include the recommended language regarding a sum certain payment to the tribe for lands ceded, this cannot overcome the undoubtable language of cession and relinquishment found within the operative language of the act.

2. The Legislative Records of the Maumee Allotment Act Demonstrates a Contemporaneous Understanding that Congress Intended to Diminish the Maumee Reservation.

The second factor to be considered in assessing whether an Act of Congress diminished a tribe's reservation is the history surrounding the passage of the Act. This includes the "the legislative history of the Act, reports on the negotiations surrounding the land sale, executive and presidential declarations, and other congressional enactments surrounding the passage of the Act." *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351 (1962).

The legislative history of the Act reveals strong evidence of diminishment. In *South Dakota v. Yankton Sioux*, the Court reinforced the position that vivid language within the Act's legislative history speaking of the tribe's inevitable assimilation and "entreaty to 'break down the barriers'" were "reminiscent of the 'picturesque' statement that Congress would 'pull up the nails' holding down the outside boundary of the Uintah Reservation" regarded as evidence of diminishment in *Hagen*. 522 U.S. 329, 353 (1998) (citing *Hagen*, 510 U.S. at 417). The congressional record of the Maumee Allotment Act includes very analogous language. Mr. Ferris of the House of Representatives declared of the Maumee that:

> They cannot have these advantages huddled together on an Indian reservation. They need to go onto an individual tract or onto an allotment to make it a home; they need to have the other vacant lands in that community occupied, and let

> homeowners and home builders come in with their influence and make the Indian citizen what we all hope for him and all expect him to be. I feel an interest in this bill. I believe it will aid the State of New Dakota. I believe it will aid the Indian.

42 Cong. Rec. 2345-2347 (May 29,1908) (House Debate). A statement greeted by applause by the House chamber, this assertion details a promise by Congress to remove boundaries between the tribe and settlers so that the Indians may be aided in their path to "civilization." *Id.* Mr. Stephens continues with this sentiment saying that this act is "on all fours with all of the bills of this character opening up Indian reservations," all in accordance with the policy "that in a few years there will not be a single Indian reservation left in the borders of this whole country." *Id.*

With regards to the negotiating history, this Court has explained the significance that the Act before the Court was "not a unilateral action by Congress but the ratification of a previously negotiated agreement, to which a tribal majority consented." *Rosebud*, 430 U.S. at 592; *see also DeCoteau*, 420 U.S. at 448. Here, the records demonstrate that the legislators believed the allotment to be highly supported by the members of the tribe. For example, Mr. Hackey explained that in the history of the creation of this Act, amendments were made before passage conforming to "a contract signed by over 95 per cent of the Indians on the reservation." *Id.* The same congressmen described that tribal members as intelligent and aware of the agreements to be made. *Id.* They negotiated amendments regarding the allotment acts and determined that disposal of the tribe's interest land was the most appropriate.

3. The Subsequent Jurisdiction and Demographic History of the Land Supports Diminishment.

The final factor to be considered in determining congressional intent to diminish a reservation involves "the subsequent treatment of the area and the pattern of settlement there." *Yankton Sioux*, 522 U.S. at 344. Such evidence centers upon the successive understanding of the

status of the land by the state and Congress as well as the demographic character. *Solem,* 465 U.S at 471. While Congress has never relied upon such evidence as purely indicative of congressional intent, they have been held to provide reinforcement to statutory text.

In this instance, the relevant ceded land has been labeled the Topanga cession. Both tribes, the Maumee and the Wendat, agree that virtually no member of either tribe selected an allotment within the Topanga Cession and that the Indians who live there now either live in rented accommodation or purchased their lands in fee from non-Indian homesteaders, the State of New Dakota, and/or the United States. ROA at 7. More specifically, census data compiled by collaborative work by both the Wendat and Maumee tribes detail the demographic records of the population of American Indians within both the Topanga Cession and the remaining Maumee reservation. *Id.* According to such records, between 1900 and 1920 (the time following the implementation of the Maumee Allotment Act), the population of American Indians within the Topanga Cession declined by 70%. *Id.* Comparatively, within the same time frame, the population of American Indians within the Maumee Reservation declined 30% and another 20% within the next twenty years. *Id.* The difference between such figures demonstrate that the effect of the Maumee Allotment Act most drastically fell upon the Topanga Cession and, as a result, illustrate the intended effect of diminishment.

C. The Topanga Cession is Within the Indian Country of the Wendat Reservation Because the Wendat Allotment Act of 1890 Did Not Diminish the Wendat Reservation.

The Topanga Cession is within the Indian Country of the Wendat reservation. As stated above, under 18 U.S.C. § 1151, Indian Country is defined as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government notwithstanding the

issuance of any patent." Under the analysis of interpretations outlined in *Solem*, the Wendat Allotment Act of 1890 cannot be deemed to have diminished the Wendat Reservation.

1. The Statutory Text of the Wendat Allotment Act Does Not Demonstrate Diminishment.

As stated above, the analysis of congressional intent to diminish an established reservation begins with the statutory text of the relevant act. Statutory language stands as the most probative and conclusive of evidence regarding congressional intent to diminish a reservation. *Solem,* 465 U.S at 470. Moreover, in reading the statutory text, any ambiguity in the language of the Act "must be construed broadly in favor of the tribe, due to vast inequities in the bargaining power of the government over the tribes and of the trust responsibility of the United States over the tribes." *DeCoteau*, 420 U.S. at 447.

This Court has previously held that specific language indicating explicit intent to diminish a reservation such as "cession,' 'abolish[ing]' the reservation, 'restor[ing]' land to the 'public domain,' or an 'unconditional commitment' to 'compensate' the Tribe," are a strong indication of a total surrender of all tribal interests strongly and that Congress meant to divest from the reservation all unallotted opened lands. *McGirt,* 140 S. Ct. 2452 at 2489. However, "Acts declaring surplus land 'subject to settlement, entry, and purchase,' without more, did not evince congressional intent." *Yankton Sioux*, 522 U.S. at 345 (quoting *Seymour,* 368 U.S. at 355). For example, the Court determined in *Seymour* that absent any explicit language of tribal cession of interest in the land: "[t]he Act did no more than open the way for non-Indian settlers to own land on the reservation in a manner in which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards." *Seymour,* 368 U.S. at 349. Moreover, in *Solem*, the Court ruled that authorizations to simply "sell and dispose"

of certain lands and their opening to future settlement suggests that intent was simply to "act as the Tribe's sales agent," in line with the federal government trustee's status. 465 U.S at 473.

The language of the Wendat Allotment Act of 1890 fails to present any explicit text signaling any intent for tribal land cession or relinquishment nor any intent of the legislature to remove the boundaries of the reservation and restore the lands to the public domain. Rather than feature any specific prose clearly detailing diminishment such as "cede," "relinquish," or "restore to the public domain," the operative language of the Wendat Allotment Act of 1890 merely states that the remaining unallotted lands shall be "declared surplus lands and open to settlement." Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892). While section 2 of Act describes that the U.S. "agrees to pay into the Treasury, in the name of the Wendat Band, the sum of three dollars and forty cents for every acre declared surplus," such language differs significantly to that of sum certain payments found to be indicative of diminishment in cases such as *DeCoteau,* 420 U.S. 425, and *Rosebud Souix*, 430 U.S. 584.

Additionally, the Act concludes by reiterating that the purpose of the act was to "open the surplus lands to settlement." *Id.* This language directly reflects that found in *Seymour* and *Solem* which this court has previously deemed insufficient for diminishment. This language merely illustrates that the surplus lands were open for sale by incoming settlers, not that the tribes wish to relinquish their interest to such land. As argued in *Mattz v. Arnett,* 412 U.S. 481, 497 (1973), allotment can be "completely consistent with continued reservation status." Much as the US federal government has historically issued its own land patents and transferred legal title to homesteaders throughout the West, so can be said of land within tribal reservations. *McGirt,* 140 S. Ct. 2452 at 2464. And, while no one would assume that the transfers made by the US would diminish the United States' claim to sovereignty over any land, so can be applied to the tribe's

ability to continue to exercise governmental functions over land even if they no longer own it communally. *Id.*

2. The Surrounding Circumstances of the Act Fail to Reveal an Intent to Diminish.

Following an investigation of the statutory text, the contemporaneous conditions are to be considered. The particular act's legislative history and manner in which the transaction was negotiated display a clear understanding as to the intent of whether the tribe's reservation was to be diminished. *Solem,* 465 U.S at 470.

Here, legislative records reveal statements explaining that through the allotment of the Wendat land would open the land to the approaching settlers. The message from the Secretary of the Interior explained that "valuable land will be added to the public domain, equal to 12,500 homesteads of 160 acres each." 23 Cong. Rec. 1777-1780 (Jan. 14. 1892) (House Debate). This message continues that such surplus land would "open the lands to settlement in the early spring." *Id.* Following this, the House opened up the floor to debate the merits of the Act. Much of the conversation concerned the desire to provide space for the eager homesteaders looking towards this land. The congressmen also explained that:

> … for a full month, when all these allotting agents with their equipment were on hand, the Indians stood silent, stubborn, and obstinate, and would not have anything to do with the matter, would not come in and take their allotments or make any selections, and this reluctance on their part had to be overcome before anything could be done.

Id. This recount displays the aversion of the Wendat tribe to ceding or relinquishing interest in their reserved lands.

While a few statements within the legislative records present an intent to add the surplus lands to the "public domain," such are not enough to constitute an unequivocal evidence of an

understanding of diminished status by the tribe or the US. As the Court held in *Solem*: "without evidence that Congress understood itself to be entering into an agreement under which the Tribe committed itself to cede and relinquish all interests in unallotted opened lands,[…], it is impossible to infer from a few isolated and ambiguous phrases a congressional purpose to diminish." 465 U.S at 478. Therefore, the few remarks made within the context of a legislative hearing are not substantive enough to overcome a clear lack of textual language of tribal cession or relinquishment.

3. The Subsequent Jurisdiction and Demographics of the Land Are Not Indicative of Diminishment.

With regard to the final factor of subsequent treatment of the land, the longstanding precedent has been that "[e]vidence of the subsequent treatment of the disputed land … has 'limited interpretive value." *Parker,* 577 U.S. at ——, 136 S.Ct. 1072, 1082. For example, in *Parker* the Court found there to be no diminishment even though the Omaha "Tribe was almost entirely absent… for more than 120 years" and did "not enforce any … regulations" or provide "any social services," and even though the federal government "for more than a century and with few exceptions … treated the disputed land as Nebraska's." *Id.* Along such lines, the Court in *Yankton Sioux* has defined the subsequent treatment of the land as the "least compelling" form of evidence. 522 U.S. at 356.

The present demographics of this area are not as severe as those occurring in *Parker*. While the American Indian population within the Western half of the Wendat Reservation decreased about 70% following the implementation of the Wendat Allotment Act, it nevertheless stands as about one fifth of the population (19%). ROA at 7. Moreover, neither the state nor the Maumee tribe has unquestionably acted with authority over the lands. Although the lands have historically been under dispute by the Maumee and the Wendat, the state's silence within the

matter strongly indicate an understanding that the lands were within Indian Country at any cost. Therefore, the Wendat Reservation includes the area of the Topanga Cession.

II. THE TPT IS BARRED BY BOTH DOCTRINE OF INDIAN PREEMPTION AND INFRIENGMENT.

The court has held early on that without congressional approval a state may not reach into Indian land and assert its jurisdiction. *Worcester v. Georgia,* 31 U.S. 515 (1832). Since this ruling the lines have moved, and the tests applied have become formidable. Several doctrines to emerge since those days are Indian preemption and infringement. Indian preemption doctrine involves identifying federal and tribal interests that have been deemed important enough to survive a balancing test against the state's traditional role of levying taxing upon its citizens. Infringement is rooted in the ever-lingering doctrine of Tribal Sovereignty and prevents the state from infringing the tribe's rights to "make their own laws and be ruled by them." *Williams v. Lee,* 358 U.S. 217, 220 (1959). Both of these doctrines alone have the ability to prevent a state from imposing its tax onto the WCDC's facility and both are present in this case.

A. The Federal Government's Comprehensive Regulation of both Housing and Health Care for Tribal Citizens Preempts the State's Attempt at Imposing the TPT on the WCDC's Residential-Commercial Complex.

The first doctrine barring the implementation of the TPT is Indian Preemption. The doctrine of preemption is one in which court identifies and combines the federal and tribal interests and subsequently weighs them against the interests of the state. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). Once the interests of the federal and tribal government are deemed to outweigh the state interest, the supremacy doctrine demands that the state law be preempted in order to prevent crowding of the field or frustration of the federal interests demonstrated. *Hines v. Davidoweitz*, 312 U.S. 52 (1941).

When a federal scheme for regulating an activity is so complex and expansive, it can be assumed that state legislation on the same topic is preempted. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Warren Trading Post Co. v. Ariz. Tax Comm'n*, 380 U.S. 685. Federal interests can range from the sale of timber for tribal self-sufficiency as seen in *Bracker* or the creation of businesses through federal approval and grants awarded by the Secretary of the Interior found in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). With regards to tribal interest, in *Cabazon* this Court upheld a tribal interest in the form of jobs and gaming experiences created by the tribe on tribal land. State interests have largely involved the regulation of nonmembers on tribal land through taxes where a state's goods or services have been brought onto the reservation. *Washington v. Confederate Tribes of the Colville Reservation*, 447 U.S. 134 (1980).

1. The Federal Interest

The Federal Interest in this case is its responsibility to provide tribal healthcare and housing. Tribal healthcare has long been a cornerstone responsibility of the federal government since the promise to "erect a hospital on their lands," as stated in the Treaty With the Wendat, March 26, 1859, 35 § 7749 art.6, to the more comprehensive regulation in the form of the Indian Health Care Improvement Act (IHCIA) of 1976 (25 U.S.C 1601). The congressional findings within the IHCIA involved discussion on "the maintenance and improvement of health of Indians" and "to provide resources, processes, and structure" which would require a comprehensive scheme at the very least and would leave no room for state involvement. *Id.*

Tribal housing is another responsibility taken on by the federal government through the passage of Native American Housing Assistance and Self-Determination Act (NAHASDA) of 1996, 110 § 4016. The federal government assumed responsibility of not only giving aid to

tribes, but also in regulating the financing to individual citizens, monitor the housing marketplace, and improving current housing conditions of tribal citizens on the reservation. *Id*.

With the Wendat's planned construction of their facility both of these comprehensive federal schemes will be implicated. The low-income housing within the WCDC's facility will be funded and extensively governed by the Tribe in cooperation with the federal government in order to satisfy the high expectations set out by the NAHASDA. Additionally, the nursing care facility will ensure that the IHCIA's goals of improving Native health will be realized through extensive programs and strict guidelines. Both of these multifaceted and comprehensive schemes leave no space for state interreference or additional regulation in their fields.

2. The Tribal Interest

The Tribal interest impacted here involves the ability to bring in revenue and create jobs with the building, maintaining and employing of the complex. This compares significantly to *Cabazon* where the tribe created a gaming experience on their land and, in doing so, built, maintained, and employed a facility which created jobs for the local tribal members. The facts at hand also stand in direct contrast to *Colville* where the tribe was only importing cigarettes and advertising them as being "tax exempt". 447 U.S. at 157. Here, the Wendat are creating a facility to house low-income tribal members, provide care for tribal elders and create a business complex to serve the local area which consists of mostly non-members. This complex will create jobs in the medical and retail field that the tribal members who are living in the low-income housing will be able to work at. This facility will not take resources from outside of the Tribe as *Colville* has held to be an invalid Tribal interest. Instead, the Tribe will create from resources within tribal land and bring in revenue with a sustainable and continued business model; similar to the actions of the Mescalero Apache Tribe regarding their federally approved comprehensive

fishing and wildlife regulation and the preservation and gathering of their resources. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983).

3. The State Interest

The state has on occasion been given the authority to levy taxes to nonmembers within tribal lands when it shows that its interests are apparent, and it works within a field where there is not a demonstrable comprehensive federal scheme at work. *Washington v. Confederate Tribes of the Colville Reservation*, 447 U.S. 134 (1980). The State will contend that their interest at hand is the consistent and efficient regulation of nonmembers through the Transactional Privilege Tax. 4 N.D.C. §212. This argument is faulty when assessed using this court's established precent in analyzing state interests.

Sufficient state interests have varied but typically have the same elements to them. The state must be regulating an activity that it takes part in as the case was in *Colville* where the tribes were taking away state revenue by use of advertising "tax exempt" cigarettes. In *Coville* the key distinction was that the good being sold was being brought onto the tribal land. Another interest is when the state provides services that it needs to regulate as was lacking in *Bracker* where the construction of the roads was solely done by the tribe, federal government and the independent contractors. The state in that case had nothing to do with the area it was trying to regulate and tax and therefore their regulation was preempted.

In this case the state is doing neither. The TPT's, "centralization of collection and enforcement by the State of New Dakota is the most efficient means of providing these funds to tribes." 4 N.D.C. §212(5). And the proceeds of this collection are remitted back to the tribes form which they are collected from. 4 N.D.C. §212(4). This establishes that the state doesn't

have a real interest beyond "efficient collection" and thus falls short of the standard set forth in *Coville.*

Additionally, a state may not regulate an activity it had no participation in. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983). In *Mescalero* the state did not help acquire any of the game nor did it assist in transportation, planning or research in conservation, or build any of the facilities. This is effectively identical. New Dakota will not aid in building, maintaining, or providing workers for the facility that they wish to regulate and tax.

4. Balancing the Interests

Since the proceeds of the entire facility, including the business center, will go to subsidizing the housing and care facility, the TPT will be in direct conflict with congressional goals by requiring that the Wendat to pay fees, taxes and be regulated by the state. Compounded with the tribal interest of creating sustainable tribal jobs, housing, and healthcare makes this side of the weighing test insurmountable by most traditional state interests. In juxtaposition, with the "efficient collection" being the only tangible state interest, this court should decide to uphold the appellate court's decision in determining that preemption is established and in effect.

B. The TPT Infringes on the Tribe's Right to Create Their Own Laws and be Governed by Them.

In the absence of a comprehensive federal regulation like that of the Indian Health Care Improvement Act and the Native American Housing Assistance and Self-Determination Act, the state would still need to show in order for it to have jurisdiction over activities within Indian country it would do so without infringing, "on the right of the Indians to make their own laws and be ruled by them." *Williams v. Lee, 358 U.S. 217, 220 (1959)*. This court has held that an unconsented state regulation on a tribal member on tribal land is the same as infringing on tribal

sovereignty because a tribe is a collection of citizens. *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164 (1973).

The law created by the Wendat in this case is the decision for the WCDC's facility's — which is a Section 17 IRA Corporation wholly owned by the Wendat Band— revenue generated to be used to subsidize the nursing care facility and the low-income housing. This law would be in competition with the taxes imposed by the state of New Dakota in the form of the TPT. This has been held to be improper jurisdiction because it would invalidate the tribe's self-regulation with their WCDC complex and that is a close essential relationship like the one between the tribe and their citizens. *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164 (1973). In *McClanahan* the state imposed an income tax on a tribal citizen working and living in Indian country. Despite the tribe not having a similar taxation scheme the court held that the tribe had a reserved right to impose this regulation and that the state infringed on this quintessential ability of a sovereign entity to regulate its own citizens. *Id.*

In this case the tribe has imposed their own power of regulation by determining that the proceeds of the WCDC complex will help fund the nursing care facility and the low-income housing. Since the WCDC is a tribally created entity it is analogous to that of a citizen in the sense that its relationship to the tribe is an essential and close one. The state's attempt to impose the TPT would infringe on the tribe's decision to use the facilities' proceeds for other tribal purposes and thus should be barred.

CONCLUSION

This court should uphold the judgement for the U.S. Court of Appeals for the Thirteenth Circuit. The explicit language of cession found within the Maumee allotment act provide sufficient evidence of a diminished reservation. Concurrently, through the creation of the Treaty With the Wendat, Congress implicitly abrogated the Maumee's claim to the Topanga Cession. Conversely, there exists no clear evidence of expressed intent by Congress to diminish the Wendat Reservation. Should this court disagree with this analysis, then either doctrine of Indian preemption or infringement bars New Dakota's application of the Transactional Privileged Tax upon the Wendat Commercial Development Corporation. Thus, this Court shall uphold the court of appeals decision.

Respectfully submitted,

January 2021 *Counsel for Respondent*