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 PETITIONER

Team No. T1015

Counsel for Petitioner

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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 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

A. Statement of Proceedings

On November 18, 2015, the Maumee Indian Nation (hereinafter 'Maumee') filed a complaint against the Wendat Band of Huron Indians (hereinafter 'Wendat') in the Federal District of New Dakota. *Maumee Indian Nation v. Wendat Band of Huron Indians*, 305 F. Supp. 3d 44 (D. New Dak. 2018). The Maumee sought a declaratory judgment indicating that the Wendat Commercial Development Corporation's (hereinafter 'WCDC') proposed project in the Topanga Cession lay within the bounds of the Maumee Reservation and that the WCDC's development was subject to New Dakota's Transaction Privilege Tax (hereinafter 'TPT'). *Id.* Alternatively, the Maumee requested a declaration that the Topanga Cession lay outside Indian country and that the WCDC was thus subject to all TPT requirements. *Id.*

In *Maumee Indian Nation v. Wendat Band of Huron Indians*, the District Court found the Maumee Reservation undiminished and applied the TPT to the WCDC as a non-member entity on the Maumee Reservation. 305 F. Supp. 3d at 49. On September 11, 2020, a divided Thirteenth Circuit reversed, finding the Maumee Reservation diminished and the Wendat

Reservation intact. *Wendat Band of Huron Indians v. Maumee Indian Nation*, 933 F.3d 1088 (13th Cir. 2020). Because the court found the Topanga Cession lay within the Wendat Reservation, it barred the application of the TPT to the WCDC's project. *Id.* at 1089.

The Maumee appealed the Circuit's ruling, claiming it conflicted with *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). On Friday, November 6, 2020, Certiorari was granted.

B. Statement of Facts

The Maumee and Wendat are both sovereign tribal nations situated in New Dakota. ROA.4.[1] The two nations share a border and have disputed ownership of the Topanga Cession, located in Door Prairie County, for over eighty years. ROA.7. The dispute arose from a three-mile westward shift of the Wapakoneta River's channel in the 1830s. ROA.5. This left a chunk of land, which lay west of the river when Congress created the Maumee Reservation, *see* Treaty of Wauseon, Oct. 4, 1801, 7 Stat. 1404 (ratified without amendment Feb. 8, 1802), east of its banks when the Wendat Reservation was created in 1859. *See* Treaty with the Wendat, Mar. 26, 1859, 35 Stat. 7749 (ratified without amendment Nov. 19, 1859). As the treaty of Wauseon set the Maumee Reservation's boundary at the "western bank of the River Wapakoneta" in 1802, Treaty of Wauseon, *supra*, at art. III, and the Treaty with the Wendat ceded all Wendat claims, save "those lands east of the Wapakoneta River" in 1859, Treaty with the Wendat, *supra*, at art. I, both tribes have laid claim to the Topanga Cession.

Since the creation of their respective reservations, both tribes have been subjected to allotment following the passage of the General Allotment Act, P.L. 49-105 (Feb. 8, 1887). *See* Maumee Allotment Act of 1908, ch. 818, P.L. 60-8107 (May 29, 1908); Wendat Allotment Act, ch. 42, P.L. 52-8222 (Jan. 14, 1892). However, the Acts were distinctive in

[1] "ROA" references the Record of Appeal.

both purpose and text. The Maumee Allotment Act opened their Reservation to Anglo-American settlement through the creation of a broker relationship between the Maumee and the United States, with proceeds accruing in a trust fund created for the Tribe upon sale of the land. *See* Maumee Allotment Act §§ 4, 9. The Wendat Act, on the other hand, diminished their Reservation by providing the Tribe with a sum certain in exchange for all lands declared as surplus by the federal government. *See* Wendat Allotment Act § 2.

More recently, the State of New Dakota enacted the TPT, a tax and licensure scheme requiring all entities earning more than $5,000 in gross receipts within the State's borders to apply for, and obtain, a license at the cost of $25. 4 N.D.C. § 212(1). All licensees are then liable to the State for 3% of their total proceeds, which must be remitted to the State and allocated to its general fund. *Id.* at (2)–(3). However, in recognition of the inherent tribal sovereignty of its twelve federally recognized constituent Indian tribes, New Dakota exempts these tribes, and their members, from tax and licensure requirements for activities conducted on trust lands within their own reservations. *Id* at (4). Furthermore, all TPT revenues collected from entities operating on reservations are remitted to the tribe to which the reservation belongs. *Id.* at (4). Finally, the scheme reserves half of all TPT revenues generated outside Indian Country in Door Prairie County to the Maumee. *Id.* at (6).

On December 7, 2013, the Wendat purchased a 1,400-acre parcel of fee land in the Topanga Cession from non-Indian owners. ROA.7. The Wendat plan to construct a mixed residential and commercial development providing low-income housing and elder care for its members, a tribal cultural center, museum, and a WCDC owned and operated shopping complex. ROA.7. The WCDC anticipates the museum, cultural center, and a proposed cafe in the shopping mall will attract non-Indian consumers from outside the reservation. ROA.8.

The proposed development lies on non-member fee land that has not been taken into trust. ROA.8. In these proceedings, the Maumee fully support the TPT's application to the WCDC as a non-member business operating within their Reservation's boundaries. ROA.8.

SUMMARY OF ARGUMENT

The Topanga Cession lies on Maumee land in accordance with *McGirt*, 140 S. Ct. at 2452. Clear boundaries delineating the Maumee's lands were set out in the Treaty of Wauseon, *supra*, art. III. The shifting of the Wapakoneta River did not diminish Maumee land claims, as only Congress can do so and only where it speaks clearly. *McGirt*, 140 S. Ct. at 2462. As such, the boundary stands where it stood when the law was enacted. *Id*. at 2468.

Nor did the Treaty with the Wendat diminish the Maumee Reservation. As the land *belonged to the Maumee* at the time of the treaty, it could not be *reserved* to the Wendat by that instrument. *United States v. Winans*, 198 U.S. 371, 381 (1905). Furthermore, no clear Congressional intent to convey that land to the Wendat is manifest in the text, *McGirt*, 140 S. Ct. at 2468, and the treaty journals do not indicate Congress even considered the matter, let alone chose to abrogate Maumee claims. *United States v. Dion*, 476 U.S. 734, 738 (1986).

The Maumee Allotment Act also failed to diminish the Maumee Reservation. *McGirt* requires a clear "'present and total surrender of all tribal interests' in the affected lands," 140 S. Ct. at 2464, and the Maumee Allotment Act did nothing more than create a broker relationship, with the federal government acting as the Tribe's real estate agent. Maumee Allotment Act §§ 4, 9. The Tribe retained its interest in the land until it was sold and this is insufficient for a finding of diminishment. *Solem v. Bartlett*, 465 U.S. 463, 473 (1984).

Even if the Maumee Allotment Act diminished the Reservation, the Topanga Cession did not revert to Wendat control. If the Reservation was reduced, by statute, it returned to the

public domain, Maumee Allotment Act § 1, a status incompatible with that of a reservation. *DeCoteau v. Dist. County Court for Tenth Judicial Dist.*, 420 U.S. 425, 446 (1975). Reversion is also impossible as it would require both tribes be compensated for the sale of identical parcels. *Compare* Maumee Allotment Act § 4, *with* Wendat Allotment Act § 2.

Furthermore, the Wendat Reservation was diminished by their Allotment Act, which included a sum certain in exchange for their lands. Wendat Allotment Act § 2. Paired with clear Congressional intent, this sufficed for diminishment. *DeCoteau*, 420 U.S. at 448.

As the Topanga Cession lies in Maumee territory, neither Indian infringement nor preemption prevent enforcement of the TPT against the Wendat. Under the *Bracker* test, the state and relevant tribal interests align, rendering infringement inapplicable. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144–45 (1980). Nor does federal preemption apply as the WCDC will not act as an "Indian trader" and even where it does, the principals animating *Warren Trading Post Co. v. Arizona State Tax Comm'n* are inapplicable. 380 U.S. 685, 690 (1965). Most importantly, the Maumee have "assented" to the State's regulation and thus, the State's law should be enforced. *Worcester v. Georgia*, 31 U.S. 515, 561 (1832).

If the Topanga Cession lies outside Indian country, the TPT is enforceable as it is nondiscriminatory. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 102 (2005).

ARGUMENT

A. The Topanga Cession lies on Maumee land.

The Supreme Court has made it eminently clear, in interpreting treaties, statutes, and other laws involving Indians, ambiguities are resolved in their favor, *Hagen v. Utah*, 510 U.S. 399, 400 (1994), words are to be interpreted as Indian negotiators would have understood them, *Washington v. Washington State Commercial Passenger Fishing Vessel*

Ass'n, 443 U.S. 658, 676 (1979), and any abrogation of rights must be made eminently clear. *McGirt*, 140 S. Ct. at 2456. Application of these cannons to the terms of this treaty make it entirely clear that the Topanga Cession remains a part of Maumee Nation to this day.

1. The Treaty with the Wendat did not diminish the Maumee Reservation.

Congress laid out clear boundaries for the Maumee Reservation from "the western bank of the Wapakoneta River . . . westward from there to the Sylvania." Treaty of Wauseon, *supra*, art. III. This set down a marker, at the bank of the river, where it stood in 1802. *Id.* This boundary was further highlighted by the creation of a pair of trading posts at the northern terminus of the Reservation along the western bank of the Wapakoneta and at the portage from the river to the Great Lake of the North. *Id*. at art. IV. As clearly reflected in the treaty itself, *id*. at art. V, the Tribe understood this to draw the line between their territory and that of the United States and the language indicates the trading posts were reserved from Maumee lands, *id.* at art. IV, so these too demarcated the eastern terminus of the Reservation.

Fifty-one years later, the United States made another treaty, this time with the Wendat to the east. Treaty with the Wendat, *supra*. By then, the river had shifted its course some three miles to the west. ROA.5. But this is irrelevant to the boundaries established under the Treaty of Wauseon. The bounds of Maumee land remained where they stood in 1802 because that is what the law meant "at the time of enactment." *McGirt*, 140 S. Ct. at 2468. After all, "ascertain[ing] and follow[ing] the original meaning of the law . . . is the only 'step' proper for a court of law." *Id.* This is also how Maumee negotiators would have understood the agreement. *Fishing Vessel*, 443 U.S. at 668. How were the Maumee to anticipate that the river, which had stood in the same place for hundreds of years, would suddenly shift course? It was simply not within the negotiators comprehension that such an event might come to

pass. *Fishing Vessel*, 443 U.S. at 668 (discussing how the passing of an entirely unforeseeable series of events leading to the diminishment of salmon stocks in the Pacific northwest should not limit secured treaty rights). Thus, the land reserved to the Maumee in 1802 remained the land of the Maumee when the Treaty with the Wendat was consummated.

The Ninth Circuit addressed a similar scenario in contemplating diminishing salmon runs in the Pacific northwest resulting from the construction of culverts blocking their spawning streams. *See United States v. Washington*, 853 F.3d 946 (9th Cir. 2017). This decision was affirmed by an equally divided Supreme Court. *Washington v. United States*, 138 S. Ct. 1832 (2018). In response to Washington's argument that the Stevens Treaties guaranteed nothing more than the right to take a share of the available fish, and that this did not include an analogous guarantee to fish available to be taken, the Ninth Circuit held:

> Governor Stevens did not make, and the Indians did not understand him to make, such a cynical and disingenuous promise. The Indians reasonably understood Governor Stevens to promise not only that they would have access to their usual and accustomed fishing places, but also that there would be fish sufficient to sustain them.

Washington, 853 F.3d at 964. Similarly, here, the government promised the Maumee Nation the lands abutting the western bank of the river Wapakoneta as they existed in 1802. Treaty of Wauseon, *supra*, art. III. Any interpretation to the contrary would render that promise cynical and disingenuous indeed. *Washington*, 853 F.3d at 964. It would allow the Wendat, with their superior resources, or the State, with even greater power, to chisel away Maumee lands by dredging and rerouting the river. It would subject the Maumee's sovereignty to the whims of nature. How much land would the Maumee lose to these swirling currents before this Court says enough? We contend the Treaty of Wauseon means today what it meant when it was ratified on February 8, 1802. Accordingly, the answer to that inquiry is none. Any

other interpretation would contravene the mandate that "ambiguities [be] resolved in favor of the Indians, and diminishment [can] not lightly be found." *Hagen*, 510 U.S. at 400.

On this point at least, the parties appear to be in agreement. The Wendat's use of the term "abrogate" illustrates they concede the Topanga Cession belonged to the Maumee prior to 1859. ROA.10. *See also Abrogate*, Black's Law Dictionary (11th ed. 2019) ("To abolish (a law or custom) by formal or authoritative action; to annul or repeal."). Had the Cession fallen out of Maumee hands due to the movement of the river, there would be nothing to abrogate.

Nor was this Reservation diminished by the Treaty with the Wendat. To diminish a reservation, "Congress [must] clearly express its intent to do so." *McGirt*, 140 S. Ct. at 2463. This requires evidence of something akin to the "present and total surrender of all tribal interests" in the land in question. *Id.* at 2464. In determining whether Congress manifested the requisite intent, courts must "ascertain and follow the original meaning of the law before" them. *Id.* at 2468. "The most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands." *Hagen*, 510 U.S. at 411. If the text itself does not clearly diminish or preserve a reservation, *McGirt*, 140 S. Ct. at 2469, courts may look to "the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative reports presented to Congress." *Solem*, 465 U.S. at 471. If these "unequivocally reveal a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation, [courts] have been willing to infer that Congress shared the understanding that its action would diminish the reservation." *Id.* Finally, while courts can "sometimes consult contemporaneous usages, customs, and practices to the extent they shed light on the meaning of the language in question at the time of enactment," *McGirt*,

140 S. Ct. at 2468, these materials may only "help 'clear up . . . not create' ambiguity about a statute's original meaning." *Id.* at 2469. (internal citations omitted).

No such clear intention is manifest in the Treaty with the Wendat. Rather the Wendat "agreed to cede to the United States **their title and interest** in lands in the New Dakota Territory, excepting those lands East of the Wapakoneta River." Treaty with the Wendat, *supra*, art. 1. (emphasis added). The Topanga cession was, at the time the Treaty with the Wendat was negotiated, Maumee land, *see McGirt*, 140 S. Ct. at 2468 (emphasizing "the meaning of the language in question at the time of enactment."), and if the Cession belonged to the Maumee in 1859, it could not be included in a *reservation* of Wendat lands.

As the Maumee retained the rights "to live and to hunt on" the land in the Topanga Cession, Treaty of Wauseon, *supra*, art. IV, any claims the Wendat may have had to that land would have been subject to the Maumee's reserved rights. The Wendat could not cede those rights as they were not theirs to begin with. *See Cession*, Black's Law Dictionary (11th ed. 2019) ("To surrender or relinquish"). After all, "the treaty was, not a grant of rights to the Indians, but a grant of right from them," *Winans*, 198 U.S. at 381, and the Wendat could not retain something they had no claim to in the first place, that is the Maumee's recognized rights "to live and to hunt" within the Topanga Cession. Treaty of Wauseon, *supra*, art. IV.

Even if it were possible to reserve the Maumee's property rights to the Wendat, the Maumee retain these reserved rights unless "**clearly** relinquished by treaty or [ ] modified by Congress." *Dion*, 476 U.S. at 738. (emphasis added). A showing of abrogation requires "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.* Nothing in the text or Congressional journals suggests Congress

actively chose to abrogate Maumee territory via the Treaty with the Wendat. Indeed, nothing remotely suggests Congress was even aware of the property dispute it was creating.

In fact, the only hint that the Treaty with the Wendat conveyed the Topanga Cession to the Wendat is contained in a short speech given by Senator Lazarus in which he indicated:

> I wonder if the Indian agent could have secured even more cessions from the Indians. I am told that few Indians now live along the Zion tributary and even fewer are to be found near the river Wapakoneta. Those lands must by necessity eventually be opened to the cultivation of our people. Would it not be expedient to secure those concessions now when the price may be lower than to allow the Indian to continue to cross upon lands destined for our settlement?

CONG. GLOBE, 35th Cong., 2nd Sess. 5411 (1859) (statement of Sen. Lazarus). He concluded by adding "I will support the treaty before us, but I ask Commissioner Sells to consider sending another Agent forthwith to secure further concessions from the Indians." *Id.*

While this language might be construed as endorsing the notion that the Wendat could cede the land along the eastern bank of the Wapakoneta, the use of the term "Indians," as opposed to "Wendat Indians," indicates the Senator from Kentucky, likely unfamiliar with local tribal affiliations, simply desired the acquisition of more land from indigenous peoples, whatever their affiliation. *Id.* Moreover, the exhortation to send an additional envoy to "the Indians" indicates little beyond a continued desire to appropriate lands from tribal peoples, be they Maumee or Wendat. *Id.* It does not "unequivocally" indicate Congress believed it was bestowing those lands upon the Wendat, as required under *Solem*, 465 U.S. at 471.

The treaty journals, paired with the creation of trading posts within the boundaries of the Maumee Reservation, further suggest the Topanga Cession remained in Maumee hands. Senator Solomon Foot indicated how "the Maumee have been reduced in number and no longer inhabit parts of their territory. Their descendants have become among the most peaceable of Indians and trade and commerce between the Maumee and the noble residents

of Fort Crosby have expanded to the benefit of both parties." CONG. GLOBE, 35th Cong., 2nd Sess. 5412 (1859) (statement of Sen. Solomon Foot). Clearly, the trading posts within the Maumee Reservation were "becoming a center of commercial activity" and these marked the eastern terminus of the Maumee Reservation. *Id.* As they abutted the river in 1802, and remained in place in 1859, their boundaries must have crept east of the river's banks as it shifted in the 1830s. This undermines Wendat arguments that their negotiators understood, based on the negotiation's location, that the treaty conveyed to them all the land east of the river. Treaty with the Wendat, *supra*, art. VI.

While treaties are generally construed favorably for tribes, the policy underpinning this canonical interpretation is without force where the party divested is another tribe, particularly one facing diminishment. *Hagen*, 510 U.S. at 411. In fact, the Court has noted that where treaties diminish the land holdings of one tribe to make way for another, they must do so clearly. *See Nebraska v. Parker*, 136 S. Ct. 1072, 1077 (2016) (citing Treaty with the Omaha Indians, Mar. 6, 1865, 14 Stat. 667–668) ("In 1865, after the displaced Wisconsin Winnebago Tribe moved west, the Omaha Tribe agreed to 'cede, sell, and convey' an additional 98,000 acres on the north side of the reservation to the United States for the purpose of creating a reservation for the Winnebagoes."). The need for clarity is even more compelling where, as here, trading settlements east of the river marked the Maumee Reservation's eastern terminus, thus providing the Wendat with notice regarding the full scope of Maumee land claims. Treaty of Wauseon, *supra*, art. IV.

Additionally, Senator Solomon Foot's remarks, when read in tandem with Senator Lazarus's, at least suggest the "few" Indians "found near the River Wapakoneta" were Maumee. CONG. GLOBE, 35th Cong., 2nd Sess. 5411-12 (1859). After all, Senator Foot

indicated how the Maumee population had decreased and their lands had been depopulated. *Id.* at 5412 (statement of Sen. Solomon Foot). No congruent statement was made regarding the Wendat so the logical inference is that these depopulated areas, in lands initially reserved to the Maumee, remained Maumee. Further demographic data indicates more than 80% of the Topanga Cession's population remained Indian twenty years after Wendat lands were opened for settlement, while the Indian population dropped precipitously in the immediate aftermath of the Act opening Maumee lands. ROA.7. While "[e]vidence of the subsequent treatment of the disputed land . . . has 'limited interpretive value,'" and cannot "create' ambiguity about a statute's original meaning," it does help "clear up" any ambiguity as to whom the Topanga Cession belonged prior to 1908. *McGirt*, 140 S. Ct. at 2469.

Returning more squarely to the argument, neither the Treaty with the Wendat, nor the Act enabling it, contained anything explicitly diminishing Maumee lands. No such intent was manifest in the text or the legislative history and "[o]nce 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." *McGirt*, 140 S. Ct. at 2468 (citing *Solem*, 465 U.S. at 470). Nor does the record indicate "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." *Dion*, 476 U.S. at 738. Respondent's resort to inferences and canonical interpretation indicates that no clear intent was manifest here and that should be the end of the matter.

2. The Maumee Allotment Act did not diminish the Maumee Reservation.

Just as the Treaty with the Wendat failed to diminish the Maumee Reservation, the Maumee Allotment Act was similarly ineffective in redrawing the boundaries of Maumee

country. As the Court's most recent decision in *McGirt* made plain, diminishment is only appropriate where "Congress clearly express[es] its intent to do so." *McGirt*, 140 S. Ct. at 2462. Ultimately, diminishment requires Congress evidence something akin to the "'present and total surrender of all tribal interests' in the affected lands." *Id.* at 2464.

Congress has not spoken so clearly here. If anything, its clearest statement of intent cautions against diminishment. By statute, Congress indicated "it being the **intention of this Act** that the United States shall **act as trustee for said Indians to dispose of the said lands and to expend and pay over the proceeds received from the sale** thereof as herein provided." Maumee Allotment Act § 9. (emphasis added). Generally, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there," *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–54 (1992), and [t]he touchstone to determine whether a given statute diminished or retained reservation boundaries is congressional purpose." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 330 (1998).

If we take Congress at its word here, it appears it sought to do little more than act as the Maumee's real estate broker. After all, the "reference to the sale of Indian lands, coupled with the creation of Indian accounts for proceeds, suggests that the Secretary of the Interior was simply being authorized to act as the Tribe's sales agent." *Solem*, 465 U.S. at 473. The Act in question indicates "that the price of said lands **actually sold** shall be deposited with the United States treasury to the credit of the Indians. The money deposited will earn interest at three per cent per annum and expended for their benefit at the direction of the Secretary of the Interior." Maumee Allotment Act § 4 (emphasis added). It goes on to reiterate:

> That **nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described**, except sections sixteen and thirty-six or the equivalent in each township, or to

> dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof.

Id. at § 9 (emphasis added).

The Court has encountered these precise schemes on multiple occasions and has unfailingly rejected claims of diminishment. In *Parker*, the Court described how "parcels [were] sold piecemeal in 160–acre tracts rather than the Tribe's receiving a fixed sum for all of the disputed lands, [so] the Tribe's profits were entirely dependent upon how many nonmembers purchased the appraised tracts of land," before concluding that "[s]uch schemes . . . do not diminish the reservation's boundaries." 136 S. Ct. at 1079–80. In *Solem*, it held such language "opened but did not diminish the Cheyenne River Sioux Reservation." 465 U.S. at 474. In *Seymour v. Superintendent of Wash. State Penitentiary*, the Court held these terms "did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards." 368 U.S. 351, 356 (1962). And in *Mattz v. Arnett*, the Court found this lexicon "completely consistent with continued reservation status." 412 U.S. 481, 497 (1973).

This makes sense under *McGirt*'s framework requiring that an Act precipitate "a present and total surrender of all tribal interests." 140 S. Ct. U.S. at 2464. Here, any cession to the United States was only effective to the extent that the federal government agreed to act as the trustor of Maumee land. Maumee Allotment Act § 9. By the terms of the Act, the Tribe did not totally surrender their interest in the land. Rather, they possessed a pecuniary interest in its sale. Maumee Allotment Act § 4. Accordingly, any termination was neither present, as it depended upon later sale of the land, nor total, as the Maumee retained a pecuniary interest. It is therefore insufficient under *McGirt*, 140 S. Ct. U.S. at 2464.

This conclusion is reinforced by the statute's origins in a bill entitled "An Act To authorize the allotment, sale, and disposition of the eastern quarter of the Maumee Indian Reservation in the State of New Dakota, and making appropriation and provision to carry the same into effect." *See* Maumee Allotment Act. Once again, the Court has repeatedly emphasized that this language does nothing more than "allow 'non-Indian settlers to own land on the reservation.'" *Parker*, 136 S. Ct. at 1080 (2016) (citing *Seymour,* 368 U.S. at 356). *See also Solem*, 465 U.S. at 463 ("the Act's operative language authorizing the Secretary of the Interior to 'sell and dispose' of certain lands" did not diminish the reservation's boundaries); *Mattz*, 412 U.S. at 497 ("The Act did no more (in this respect) than open the way for non-Indian settlers to own land on the reservation.").

So, while there is language indicating an agreement to "cede" tribal interest in surplus lands, including the Topanga Cession, *see* Maumee Allotment Act § 1, the treaty also makes it exceedingly clear, "nothing in this law provides for the unconditional payment of any sum to the Indians." Maumee Allotment Act § 4. As such, the Act is not afforded an "insurmountable presumption that Congress meant for the tribe's reservation to be diminished." *Solem*, 465 U.S. at 470–71. Nor does the treaty employ terms related to the discontinuation, abolition, or vacation of the Reservation. *Mattz*, 412 U.S. at 504 n.22. And while it does indicate the land "may be returned to the public domain," this is contingent on further actions described in the Act. Maumee Allotment Act § 2. Given the clear statement of purpose indicating an intent to act as the Maumee's fiduciary, these "isolated phrases [ ] are hardly dispositive. And, when balanced against the [ ] Act's stated and limited goal of opening up reservation lands for sale to non-Indian settlers," cannot support a finding of diminishment. *Solem*, 465 U.S. at 475.

The public domain language is unavailing as it failed to mark a present diminishment of Maumee lands. Section 2 indicates "the lands shall be disposed of by proclamation under the general provisions of the homestead and townsite laws of the United States, and shall be opened to settlement and entry by proclamation of the President." Maumee Allotment Act § 2. Thus, while the Act may have marked the "first step in a plan ultimately aimed at disestablishment," via the land's return to the public domain, it does not mark an "arrival at [that] destination." *McGirt*, 140 S. Ct. at 2464. Rather, when the termination of a treaty right is made contingent on future Presidential action, that right only terminates when that action takes effect. *See, e.g.*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 193–95 (1999) (acknowledging Presidential power to terminate Chippewa usufructuary rights but refusing to give it effect without clear evidence of intent to do so).

Here, nothing in the record indicates the President ever issued a proclamation and as such, the Reservation has yet to be diminished. While the President could, even today, issue an order returning these lands to the public domain, thereby diminishing the Reservation, *see id.* at 194–95, as of this writing, no President has done so. Thus, just as the diminishment of the Creek was made contingent on "further legislation as Congress may deem proper," legislation that never came to pass, *McGirt*, 140 S. Ct. at 2466 (citing Creek Allotment Agreement, ch. 676, § 46, 31 Stat. 872 (Mar. 1, 1901)), diminishment here was made contingent on Presidential action that has not yet occurred. As such, this was not a present surrender as required under *McGirt*. *Id.* at 2464.

Of course, the fact that this Act would not diminish the Reservation dawned on at least one voting member of the House, as Representative Gaines inquired: "I understand that all lands unsold will continue to belong to the Indians is that right? Until there is payment the

land belongs to the Maumee?" CONG. REC. 42,2346 (May 29, 1908) (statement of Rep. Gaines). So, while "[t]here is no need to consult extratextual sources when the meaning of a statute's terms is clear," *McGirt*, 140 S. Ct. at 2469, if the Court chooses to look beyond the Legislature's clear statement of purpose, the legislative record here serves to "clear up" any ambiguities. *Id.* At the very least, the House's failure to directly address Mr. Gaine's inquiry illustrates that Congress did not "cho[o]se to resolve th[e] conflict" between diminishment and the Maumee's reserved land rights "by abrogating the treaty." *Dion*, 476 U.S. at 738.

While even this absence of a definitive reply should suffice to illustrate Congress's lack of clarity favoring diminishment, "the tenor of legislative reports presented to Congress [here] unequivocally reveal a widely-held, contemporaneous understanding that the affected reservation would [not] shrink as a result of the proposed legislation." *Solem*, 465 U.S. at 471. While a widely held consensus may diminish a reservation in the face of ambiguous text, *see e.g.*, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), here, the consensus favors continuation, which must stave off diminishment, given that "we resolve any ambiguities in favor of the Indians, and we will not lightly find diminishment." *Hagen*, 510 U.S. at 411.

The record indicates Congress spoke with a unified voice in terms opposed to the diminishment of the Maumee Reservation. Beyond Representative Gaines's, inquiries, Representative Pray, the bill's sponsor, spoke in terms of "allotment, sale and disposition." CONG. REC. 42, 2345 (May 29, 1908) (statement of Rep. Pray). He even referred to "grant[s] to the State of New Dakota for school purposes." *Id.* at 2346. Not only do these terms indicate an opening, rather than diminishment, of the Reservation, *Solem*, 465 U.S. at 473, there would be no need to grant land to the State for schools if the Reservation were diminished by operation of the Act. If the Reservation were diminished, the tracts would

already belong to the state. Representative Hackney spoke similarly in terms of "dispossession," CONG. REC. 42, 2347 (May 29, 1908) (statement of Rep. Hackney), while Congressman Mondell referred to "opening the lands." *Id.* (statement of Rep. Mondell). Again, this is not the language of diminishment. *Parker*, 136 S. Ct. at 1079. Representative Ferris, a staunch assimilationist, suggested the Maumee "need[ed] to have the other vacant lands **in that community** occupied, and let home owners 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." *Id.* at 2348 (statement of Rep. Ferris) (emphasis added). This language clearly contemplates settlers entering the Reservation, not its evaporation. Even Representative Stephens, who indicated he hoped "within a few years there will not be a single Indian reservation left in the borders of this whole country," couched his langue with respect to the Maumee in terms of "opening up Indian Reservations." *Id.* (statement of Rep. Stephens).

In total, the House spoke of "opening" the land on five occasions, *id.* at 2346–48, of its "disposal" on six, *id.* at 2345–49, and its "sale" on three. *Id.* at 2345, 2348. Totally absent is any discussion of "cession," "diminishment," "abolition," "termination," "vacation," or returning the land to the "public domain." *Id.* at 2345–49. While this evidence is less availing than the text itself, where, as here, the text suggests a purpose less than diminishment but contains language relating to a "cession," these discussions, which immediately preceded the bill's passage, help "shed light on the meaning of the language in question at the time of enactment" and counsel the Court to forgo diminishment. *McGirt*, 140 S. Ct. at 2468.

Any subsequent conduct, or modern demographics, relied upon by the Wendat, on the other hand, are largely irrelevant. Because they have no bearing on "the original meaning of the law before us," they are of "limited interpretive value." *Id.* at 2468–69. After all, courts

can never "favor contemporaneous or later practices instead of the laws Congress passed." *Id.* at 2468. Here, the Wendat may point to the precipitous drop in Indian population in the immediate aftermath of the Act's passage to suggest it diminished the Reservation. ROA.7. Interestingly, this argument implicitly concedes that the Treaty with the Wendat did not abrogate the Treaty of Wauseon and that the land remained in Maumee control as of 1859. Regardless, these acts do not bear on Congressional purpose, which is the "touchstone" of the diminishment inquiry, *Yankton Sioux*, 522 U.S. at 343, so they are of little, if any, value.

As the text and Congressional intent, manifested through the legislative journals, are at best ambiguous regarding Congress's designs for the Maumee Reservation, the Maumee Allotment Act could not have diminished the Reservation. There is simply no clear intent to affect a "present and total surrender" of the Tribe's rights. *McGirt*, 140 S. Ct. at 2464. Nor is there "clear evidence that Congress actually considered the conflict between its intended [Allotment] action on the one hand and Indian treaty rights [to Reservation lands] on the other, and chose to resolve that conflict by abrogating the treaty." *Dion*, 476 U.S. at 738. As we "resolve any ambiguities in favor of the Indians, . . . diminishment cannot be [so] lightly found." *Hagen*, 510 U.S. at 411.

B. If the Topanga Cession lies outside Maumee land, it lies outside Indian Country.

1. The Topanga Cession could not have "reverted" to Wendat control.

Even if the Court finds, *arguendo*, the Maumee Allotment Act diminished the Maumee Reservation, the Topanga Cession could not have "reverted back" to the Wendats as they contend. While the Act did not contain the clarity of voice requisite to diminish the Maumee Reservation, it is clear where the land went if the Reservation was diminished. By its very terms, the agreement indicates the surplus lands would be "returned to the public domain." Maumee Allotment Act § 1. As the Court has made clear, "when lands so reserved

were ‘restored’ to the public domain—i.e., once again opened to sale or settlement—their previous public use was extinguished.” *Hagen*, 510 U.S. at 412. *See also DeCoteau*, 420 U.S. at 446 (“lands ceded in the other agreements were returned to the public domain, stripped of reservation status”). It is clear then that “returned to the public domain” means removed from reservation status, not reverted to the land holdings of another tribe.

Furthermore, in the event the Maumee Reservation was diminished, Petitioner contends the “return to the public domain” was not made contingent on any subsequent Presidential Proclamation. Rather, under the statute, the Maumee “cede[d] 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 § 1. Unlike in *McGirt*, where diminishment was made contingent on “further legislation,” 140 S. Ct. at 2466 (citing Creek Allotment Agreement, ch. 676, § 46, 31 Stat. 872), the land here was returned to the public domain upon the passage of this very Act. Under this analysis, Section 2 did not affect the reversion of the lands, it only impacted how they were “opened to settlement and entry.” Maumee Allotment Act § 2.

Thus, while the lands immediately reverted to the public domain, they were only opened to settlement upon the issuance of a Presidential Proclamation. *Id.* Essentially, the federal government returned the lands to the public domain but retained rights to exclude settlers subject to the executive’s terms. This is not uncommon and the federal government regularly retains conditional exclusive power over public lands. National Park fees offer one such example. Counsel recognizes this argument contravenes earlier contentions regarding the meaning of “by way of this act,” but as it is made in the alternative, we retain it in the event the Court finds the Maumee Reservation diminished.

This Presidential power to limit entry poses further problems for the Wendat. Section 2 stipulates “no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed in such proclamation.” Maumee Allotment Act § 2. No proclamation permitting wholesale Wendat occupation of the Topanga Cession was ever issued, so even if the reservation of “those lands East of the Wapakoneta River” somehow could be construed as a right to a reversion of the Topanga Cession upon the abdication of the Treaty of Wauseon, Treaty with the Wendat, *supra*, art. 1, such a conclusion is statutorily barred by the clear language of the very act the Wendat claim enables it. While treaties are only abrogated where Congressional language and intent are clear, *Dion*, 476 U.S. at 738, it is eminently apparent from this explicit language that any reversion was impossible without a Presidential proclamation, a proclamation the Wendat have failed to identify.

The trust status afforded to revenues generated through land sales under the terms of the Maumee Allotment Act blasts yet another hole in the reversion argument. Had Congress intended to diminish the Maumee Reservation such that the land reverted to Wendat control, why on earth would the proceeds from the sale of newly Wendat land “be deposited with the United States treasury to the credit of the” the Maumee? Maumee Allotment Act § 4. Making matters worse, if the Topanga Cession reverted back to the Wendat upon the ratification of the Maumee Allotment Act, $3.40 would have to have been “placed in the Treasury of the United States to the credit of all the Wendat Band of Indians” for every acre declared surplus, Wendat Allotment Act § 3, while the proceeds from the sale of that same land would be placed, in whole, in the United State Treasury for the benefit of the Maumee. Maumee Allotment Act § 4. While the federal government is no stranger to creative accounting in the area of Indian affairs, *see e.g.*, *Cobell v. Norton*, 240 F.3d 1081, 1089 (D.C. Cir. 2001) (“Not

only does the Interior Department not know the proper number of accounts, it does not know the proper balances for each IIM account"), the creation of overlapping trust funds, each of which must contain the proceeds from identical sales, stretches even federal financing beyond the point of feasibility. As courts "construe statutes so as to avoid results glaringly absurd, *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 586 n.16 (1982), a reversion of Maumee land to Wendat control at any time after the Treaty with the Wendat cannot stand.

2. The Wendat Allotment Act diminished the Wendat Reservation.

Even if, *arguendo*, the Treaty with the Wendat abrogated the federal government's solemn promise to the Maumee, made less than a generation before, the Topanga Cession would have passed out of Indian Country as of 1892. Unlike the Maumee Allotment Act, the Wendat Allotment Act paired a sum certain, Wendat Allotment Act § 2, with clear Congressional intent to return the land "to the public domain" via "a reduction of the reservation." CONG. REC. 23,1777-78 (Jan. 14, 1892) (Department of the Interior Report).

"Congress knows how to withdraw a reservation when it can muster the will. Sometimes, legislation has provided . . . an 'unconditional commitment . . . to compensate the Indian tribe for its opened land." *McGirt*, 140 S. Ct. at 2462. Here, Congress stipulated:

> **The United States hereby agrees to pay into the Treasury, in the name of the Wendat Band, the sum of three dollars and forty cents for every acre declared surplus**, provided that no matter how much land is ultimately surplus the Wendat Band shall not be entitled to a payment of more than two-million and two-hundred-thousands dollars in total and complete compensation.

Wendat Allotment Act § 2 (emphasis added). The Tribe's profits were in no way "dependent upon how many nonmembers purchased the appraised tracts of land." *Parker*, 136 S. Ct. at 1079. Rather, by statute, the Wendat received a single guaranteed payment based on the number of surplus acres, not the number of acres sold. As the Court noted in *McGirt*, this is amongst the ways Congress indicates its desire to diminish a reservation. 140 S. Ct. at 2462.

The reasoning behind interpreting a sum certain as an unequivocal, complete, and present surrender of rights is obvious. Such a payment marks the total and immediate end to tribal interests in a given parcel of land. Any future sale or disposition of that land is rendered irrelevant to the tribe. The Court has considered similar cases before. In *Yankton Sioux*, the Court held "'sum certain' language is 'precisely suited' to terminating reservation status," 522 U.S. at 344. In *DeCoteau* the Court noted "[t]he 1891 Act does not merely open lands to settlement; it also appropriates and vests in the tribe a sum certain—$2.50 per acre—in payment," before finding the Lake Traverse Indian Reservation diminished. 420 U.S. at 448. The Court contrasted acts that did not contain guaranteed payment, like the Maumee Allotment Act, with sum certain agreements, like the Wendat Allotment Act, on the grounds they "benefited the tribe only indirectly, by establishing a fund dependent on uncertain future sales of its land to settlers." *Id.* In contrast, the Wendat received a final, direct, payment of $2,200,000 upon the declaration of their surplus lands. ROA.5.

The importance of a sum certain in determining whether a given surplus land act diminished a reservation can hardly be overstated. Even in cases where the Court determined diminishment occurred in the absence of sum certain language, it looked to earlier acts and proposed agreements containing such language to essentially read one into the statute. *See Rosebud Sioux*, 430 U.S. at 588 ("Although the later Acts of Congress made less secure provisions for payment to the Tribe for the lands in question than did the 1901 Treaty, their language with respect to the reservation status of the opened lands was identical with or derivative from the language used in that proposed amendment. . . . [T]his language not only opened the land for settlement, [it] diminished the boundaries of the Reservation pro tanto."); *Hagen*, 510 U.S. at 404 (noting how legislation surrounding an earlier attempt to allot the

reservation "clarified that $70,000 appropriated by the 1902 Act was to be paid to the Indians 'without awaiting their action upon the proposed allotment in severalty of lands in that reservation and the restoration of the surplus lands to the public domain.'"). This makes sense given that guaranteed payment effectively cuts off any remaining tribal interest in land, whereas cession language alone may lend itself to multiple interpretations.

This reading of the Wendat Allotment Act comports with the Congressional Record, which, while not dispositive, is instructive in "ascertain[ing] and follow[ing] the original meaning of the law." *McGirt*, 140 S. Ct. at 2468. As was the case with the Maumee, the intent manifest in the Congressional journals was unanimous. Unlike the speeches and debates accompanying the allotment of Maumee lands however, the legislators and officials involved in allotting the Wendat lands spoke unanimously in terms denoting diminishment.

Department of Interior officials discussed "more than 2,000,0000 acres of valuable land [being] **added to the public domain**." CONG. REC. 23,1777 (Jan. 14, 1892) (Department of the Interior Report) (emphasis added). Representative Harvey echoed this sentiment, stating "at least 2,000,000 of which we expect will be opened to the public domain by way of allotment." *Id.* at 23,1778 (statement of Rep. Harvey). Congressman Ulrich spoke even more candidly "of the numerous negotiations which have been proceeding with the tribes for a **reduction of the reservations**." *Id.* (statement of Rep. Ullrich) (emphasis added). He went on to emphasize how "[t]he good work of reducing the larger Indian reservations, by allotments in severalty to the Indians and the cession of the remaining lands to the United States for disposition under the homestead law" informed the Act's progression. *Id.* Finally, he framed the Act as an expression of the same policy that "enabled [the] open[ing] to settlement in the Territory of Oklahoma 900,000 acres of land," in September of 1891 and

the negotiations by which the federal government sought to "open . . . the surplus lands of the Cheyenne and Arapahoe Reservation." *Id.* at 23,1779 (statement of Rep. Ullrich). Of course, those 900,000 acres refer to cessions made by the Iowa, Sac and Fox, Absentee Shawne, and Citizen Band Potawatomi tribes during the "Land Run of 1891," all of which have been found to have had their reservations diminished. *See Oklahoma Tax Comm'n v. Sac & Fox Nation,* 508 U.S. 114, 118 (1993) (Sac and Fox); *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Collier*, 142 F.3d 1325, 1328 (10th Cir. 1998) (Citizen Potawatomi and Absentee Shawne); *History*, IOWAY CULTURAL INST., http://ioway.nativeweb.org/history/ treaties.htm [https://perma.cc/7L8U-ZFMJ] (Iowa). The same is true of the Cheyenne and Arapaho Reservation. *See Mustang Prod. Co. v. Harrison*, 94 F.3d 1382, 1384-85 (10th Cir. 1996). Furthermore, the Court has even suggested that all 1891 agreements involving a sum certain led to diminishment. *DeCoteau*, 420 U.S. at 446.

In light of this aggressive reductionist policy and the clear language employed, Congressional intent could hardly be more specific. While the Act itself does not refer to "cession" or the "public domain," neither did the operative Act in *Hagen*, 510 U.S. at 422 (Blackmun, J., dissenting) ("The Court relies on a single, ambiguous phrase in an Act that never became effective, and which was deleted from the controlling statute, to conclude that Congress must have intended to diminish the Uintah Valley Reservation."). There, the Court relied heavily on the negotiation minutes and legislative record, which, as here, contained numerous references to the public domain and an unanimity of voice favoring diminishment. *Id.* at 418–19. If anything, the case for diminishment is stronger here than it was in *Hagen*, as a sum certain is contained in the effective statute itself and the legislative language contains

multiple explicit references to the reduction of the Reservation, not just references to a return to the public domain and "pull[ing] up the nails" of the Reservation's border. *Id.* at 417.

The case of *Rosebud Sioux* is also instructive. 430 U.S. at 584. In *Rosebud*, the Court confronted a statute that found its origins in an agreement between a tribe and the federal government, which had guaranteeing payment of a sum certain. *Id.* at 591. The agreement was ultimately amended, omitting the sum certain, as Congress refused to pay outright for the lands. *Id.* In the absence of dispositive language, the Court dug deep into the legislative record where, as in *Hagen* and here, it found unanimity around the proposition that the Reservation would be diminished by way of the Act. *Id.* at 593 (citing BIA inspector McLaughlin); ("You will still have as large a reservation as Pine Ridge after this is cut off."); *id.* at 595 (citing House Report) ("'There is no question but what the Indians have no use for the land that is proposed to be ceded by this bill"); *id.* at 598 (citing floor debate) ("The 'bill provided that the lands should be ceded by the Indians to the Government"). There, as here, both the BIA, and Congress unanimously spoke in terms wholeheartedly endorsing diminishment. This is the sort of evidence necessary to "unequivocally reveal a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Solem*, 465 U.S. at 471. As this consensus is clear from the journals, Congress clearly meant to diminish the Wendat Reservation at the time it passed the Act.

Finally, while the contemporaneous events surrounding the Acts passage are less availing than the text or legislative records, they can "shed light on the meaning of the language in question at the time of enactment." *McGirt*, 140 S. Ct. at 2468. Congress made clear in its deliberations that it was deeply concerned with the situation developing along the borders of what was then the Wendat Reservation. CONG. REC. 23,1778 (Jan. 14, 1892)

(statement of Rep. Harvey). In passing the law, Congress sought to open the area to a great number of settlers massed around the Reservation, many of whom rushed to take up the land in the immediate aftermath of the Act's passage. *See* ROA.7 (the Wendat Reservation's western population dropped from 97% to 23% indigenous during the 1890s). Paired with Congressional language contemplating the reduction of reservations to make way for the occupation of formerly tribal land in mere hours, CONG. REC. 23,1779 (Jan. 14, 1892) (statement of Rep. Ullrich), these actions lend further credence to the notion that Congress considered the effect its policies would have on tribal land holdings and resolved the matter by choosing to diminish the Reservation. *Dion*, 476 U.S. at 738. As such, even if the Treaty with the Wendat somehow abrogated the Treaty of Wauseon, the Wendat Allotment Act diminished the Wendat Reservation, leaving the Topanga Cession outside of Indian Country.

C. New Dakota can tax non-member Indians on Maumee lands just as it may tax non-members generally.

1. The TPT does not infringe on Maumee's tribal sovereignty.

Because the proposed development is slated to occur on non-member fee land within the Maumee Reservation, the State, with tribal consent, may apply the TPT to the WCDC's activities. While the Court has struck "state action [that] 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), the principles animating that decision are wholly inapplicable here. *Williams* kept with the long-held recognition of tribal nations as "distinct independent political communities, having territorial boundaries, within which their authority is exclusive." *Worcester*, 31 U.S. at 557. *Worcester* recognized that absent tribal "assent" to Georgia's state laws, their applicability within the Reservation, and even the entrance of Georgian citizens, was wholly unacceptable. *Id.* at 561. The TPT tax, however, is not a law that restricts the

ability of “reservation Indians to make their own laws [or] be ruled” thereby. *Williams*, 358 U.S. at 220. Rather, here, the only tribe with jurisdiction, that is the Maumee, has consented to, and argued in favor of, state regulation. ROA.8. As the statute itself acknowledges, the State is essentially stepping into the regulatory shoes of the Tribe. 4 N.D.C. § 212(5). On the most basic level, the TPT does not infringe on the Maumee’s tribal sovereignty because the Maumee have “assented” to the state tax. *See Worcester*, 31 U.S. at 561.

This is not to say the Maumee could necessarily regulate the Wendat as non-members themselves. *Montana v. United States* and its progeny explicitly limit when federally recognized Indian tribes can regulate non-members on fee land inside their reservations to two scenarios. 450 U.S. 544, 565 (1981). Relying on the “implicit divestiture” of tribal sovereignty over matters involving “relations between a tribe and nonmembers of the tribe,” *id.* at 545 (citing *United States v. Wheeler*, 435 U.S. 313, 326 (1978)), *Montana* stipulated:

> A tribe may [only] regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements . . . [or] conduct [that] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”

Id. at 565. The Maumee likely lack the authority to tax the WCDC development directly as no consensual private relationship appears to have been formed and nothing suggests an existential threat has been implicated. *See e.g.*, *Atkinson Trading, Co. Inc., v. Shirley,* 532 U.S. 645 (2001) (striking down a tribal tax on a nonmember business operating on non-Indian fee land within a reservation where neither *Montana* exception was met). However, this does not mean the TPT restricts Maumee sovereignty and nothing suggests it does here.

2. The TPT, as applied to the WCDC, is not preempted on Maumee lands.

While the Maumee may not be able to tax the WCDC development themselves, the regulatory authority of the state is not so limited. *See, e.g.*, *Cotton Petroleum Corp. v. New*

Mexico, 490 U.S. 163, 163 (1989) (permitting state taxation of nonmember oil companies on Reservation trust lands); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 160–61 (1980) (permitting state taxation of cigarette sales to non-member Indians within the Colville Reservation). When a state attempts to regulate nonmember "activity on the reservation," courts must balance the "state, federal, and tribal interests at stake" to determine whether the "exercise of state authority would violate federal law." *Bracker*, 448 U.S. at 144–45. The state's ability to regulate non-members will be affirmed where the state can show some legitimate regulatory interest in its conduct and applicable federal and tribal regulations do not exclude it. *Cotton Petroleum*, 490 U.S. at 185–86. Importantly, *Bracker* "imposes [no] proportionality requirement on the States" *Id.* at 169.

Here, the state taxation of the WCDC development will benefit the Maumee by allocating 3% of gross sales and income for the purposes of tribal scholarships, renewable energy investment, and other sustainable economic development, providing jobs and services to Maumee members. ROA.8. Far from undermining Maumee self-determination, this tax will allow the Maumee "to revitalize their self-government" while "assum[ing] control over their 'business and economic affairs.'" *Bracker*, 448 U.S. at 149 (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973)). Thus, because the Maumee have taken a position in support of New Dakota's tax, striking it would run counter to the principles of self-governance enshrined in *Williams* by undermining "the tribe's general authority, as sovereign, to control economic activity within its jurisdiction." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982). The Wendat's interest in the matter is entirely irrelevant. As nonmember Indians, they "stand on the same footing as non-Indians resident on the reservation." *Colville*, 447 U.S. at 161. Accordingly, nothing confines the state's ability to

tax the Wendat development in the Topanga Cession unless the tax is wholly preempted by federal statute. *Bracker*, 448 U.S. at 144–45.

The Wendat have not pointed to a federal statute preempting a general state income tax and we search the federal code in vain for a statute exempting non-member Indians from state regulation on reservations not their own. After all, "[f]ederal statutes, even given the broadest reading to which they are reasonably susceptible, cannot be said to pre-empt [New Dakota]'s power to impose its taxes on Indians not members of the Tribe." *Colville*, 447 U.S. at 160. "The Indian Reorganization Act of 1934 [IRA, for its part] neither requires nor counsels [the Court] to recognize [a] tribal business venture as a federal instrumentality." *Jones*, 411 U.S. at 151. As such, the Wendat project is not "automatically immune from state taxation" and the Wendat cannot justify any exemption from state taxation on the IRA, which only "exempts land and rights in land, not income derived from its use." *Id.* at 155.

Nor does the licensing statute at issue in *Warren* foreclose the State's licensing system here. 380 U.S. at 690. While Congress has historically enacted extensive legislation related to licensure for Indian traders on reservations, *see, e.g.*, 25 U.S.C. § 261 ("The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes"). These regulations pertain to those "desiring to trade with the Indians on any Indian reservation." 25 U.S.C. § 262. So long as the Wendat are serving the housing needs of their low-income members, ROA.7, providing nursing care for their elders, ROA.7, or selling products to their own members or to non-Indian consumers living outside the Reservation, ROA.8, the Indian Trader Acts are wholly inapplicable. After all,

> [T]he mere fact that nonmembers 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. Nor would the imposition of [New Dakota]'s tax on these purchasers

> contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing Tribe. For most practical purposes those Indians stand on the same footing as non-Indians resident on the reservation.

Colville, 447 U.S. at 161.

The TPT should also be enforced even to the extent it requires the WCDC to obtain a state license to conduct transactions with Maumee members on their Reservation. *Warren* made it clear its animating principle was a desire to "permit[] the Indians largely to govern themselves." 380 U.S. at 686. So while the Court suggested that the "apparently all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders," it ultimately preempted Arizona's "state tax[es] on gross income [because they] would put financial burdens on appellant or the Indians with whom it deals in addition to those Congress or the tribes have prescribed." *Warren*, 380 U.S. at 690–91. Here, unlike in *Warren*, the Tribe's interest in self-determination is promoted through the TPT's application given that the Tribe actively encourages enforcement and, as the statute indicates, the State simply regulates on the Tribe's behalf and remits all proceeds back to the Maumee. 4 N.D.C. § 212(5).

Subsequent case law has clarified *Warren*'s holding. In *Bracker*, the severe preemption doctrine apparent in *Warren* gave way to the balancing test outlined above. 448 U.S. at 144 (holding that while no "express congressional statement" is required to preempt state law, "any applicable regulatory interest of the State must be given weight and 'automatic exemptions 'as a matter of constitutional law' are unusual."). [2] The Court

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[2] In *Wagnon*, the court confirmed its shift away from a strict preemption analysis towards a more factor driven balancing test under *Bracker*. (citing *Warren* as "supportive of the balancing test") 546 U.S. at 111.

indicated that "[w]hen on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and **the federal interest in encouraging tribal self-government** is at its strongest." *Id.* at 144 (emphasis added). This confirms that the federal interest at issue under the *Bracker* balancing test is its trust responsibility to preserve tribal autonomy. After all, Courts must "examine[ ] the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence." *Id.* at 144–45. Neither the policy of promoting tribal autonomy, nor the tradition of tribal independence is served by preempting the TPT here. Unlike in *Warren*, the Maumee have actively endorsed the State's regulatory authority, so there is no "federal interest in encouraging tribal self-government" to counter the State. *Id.*

Given "the trust responsibility of the federal government includes protecting tribal sovereignty," *Davis v. Muellar*, 643 F.2d 521, 525 (8th Cir. 1981) (citing American Indian Policy Review Commission, 95th Cong., 1st Sess., Final Report (Comm. Print 1977), at 104), it would be particularly inappropriate to apply *Warren*'s relaxed standard for federal preemption here, where the Tribe has actively endorsed state intervention. To do so would contort a doctrine intended to resolve ambiguities "in favor of tribal independence," *Cotton*, 490 U.S. at 177, to the Maumee's determinant by finding it divested them of any say over non-member businesses operating inside their Reservation.

Rather, the statute should be subject to traditional "presumption against the pre-emption of state police power regulations." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992). Read narrowly, the Indian trader statutes contained at 25 U.S.C. § 261, *et seq.*, did little more than require traders to obtain a federal license. The regulations passed

pursuant to them simply fleshed out the duration and application processes for federal licensure, established subjective price floors, prohibited the sale of tobacco to minors, and outlawed the sale of drugs, alcohol, antiquities, invasive plants, and gambling operations. *See* 25 C.F.R. Part 140. Applying the traditional presumption in favor of state regulation, it is certainly possible for New Dakota to apply an additional requirement on parties doing business on the Maumee Reservation. As such, the TPT must stand. This is particularly important here, as an alternative reading would leave both New Dakota and the Maumee without regulatory authority over the WCDC's sales to Maumee members, meaning the only law constraining the development would be the minimal provisions at 25 C.F.R. Part 140 and the Wendat's own laws. Thus, the Wendat's reading creates a gaping regulatory hole.

Given that nothing limits New Dakota's regulatory authority over Wendat activity on Maumee land, the TPT must be upheld. *See Cotton Petroleum*, 490 U.S. at 176. ("congressional silence no longer entails a broad-based immunity from taxation for private parties doing business with Indian tribes."). "Nor is this a case in which an unusually large state tax has imposed a substantial burden on the Tribe." *Id.* at 186. Rather, this is a generally applicable statewide tax borne by every business in New Dakota and its application here aligns with, rather than undermines, Maumee self-determination. 4 N.D.C. § 212(1). Finally, even if the Wendat are correct and Indian trader preclusions apply, the TPT would only be inapplicable on WCDC sales to Maumee members. The WCDC must still obtain a license and pay taxes on sales to its own members and the wider public.

The fact that the business in question is operated by a federally recognized tribe is wholly irrelevant. While it is true that where "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," *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995), this proposition is irrelevant "when Indians ('who') act outside of their own Indian country ('where'), including within the Indian country of another tribe." *Muscogee Nation v. Pruitt*, 669 F.3d 1159, 1172 (10th Cir. 2012) (citing *Jones*, 411 U.S. at 148–49; *Colville*, 447 U.S. at 161). In this scenario, "they are subject to non-discriminatory state laws otherwise applicable to all citizens of the state," *id.*, "for the simple reason that nonmembers are not constituents of the governing Tribe." *Colville*, 447 U.S. at 161.

There can be little debate that the legal incidence of the TPT is borne by the WCDC and not its customers. *See Wagnon*, 546 U.S. at 102. In relevant part, the TPT stipulates, "[e]very **licensee** is obligated to remit to the state 3.0% on their gross income on transactions commenced in this state." 4 N.D.C. § 212(2) (emphasis added). "[S]uch 'dispositive language' from the state legislature is determinative of who bears the legal incidence of a state excise tax." *Wagnon*, 546 U.S. at 102. New Dakota law is clear, "it is the [licensee], rather than the [consumer], that is **liable** to pay the [TPT] tax." *Id.* at 103 (emphasis added). Here, as in *Wagnon*, "the [licensees] are 'entitled' to pass along the cost of the tax to downstream purchasers, they are not required to do so." *Id.* Thus, even if Maumee members purchase goods from the WCDC, the legal incidence of the tax falls to the licensee, that is the WCDC, and *Chickasaw Nation* does not prevent the State from collecting it. 515 U.S. at 459.

Finally, because the "burden [from the gross receipt tax] falls equally upon all retailers within the State regardless of whether those retailers are located on an Indian reservation, . . . the [TPT] tax is not impermissibly discriminatory." *Wagnon*, 546 U.S. at 115. "Absent express federal law to the contrary, Indians going beyond [their] reservation boundaries have generally been held subject to non-discriminatory state law otherwise

applicable to all citizens of the State." *Jones*, 411 U.S. 145, 148–49 (1973). As such, the TPT is applicable to the WCDC development on Maumee lands. Given the Maumee's support of the state's regulatory authority here, holding otherwise here would not preserve tribal sovereignty, it would, in fact, impede the Maumee's ability "protect tribal self-government [and] to control internal relations." *Montana*, 450 U.S. at 564.

Effectively, the Wendat ask the Court to grant it supersovereign authority over affairs outside its Reservation and in so doing, divest both the Maumee and New Dakota of their authority. This, of course, cannot stand. *Chickasaw Nation*, 515 U.S. at 466. Because the WCDC is located on the Maumee Reservation, and accordingly, not held in trust for the Wendat, their sovereignty is irrelevant and the TPT may stand so long as the Maumee assent to its implementation. *Worcester*, 31 U.S. at 561. The Tribe has done so here. ROA.4.

D. New Dakota may regulate the Wendat directly outside Indian Country.

In the event, *arguendo*, the Topanga Cession lies entirely outside Indian Country, there can be no question the WCDC is subject to the TPT. Tribes do not have a "supersovereign authority to interfere with another jurisdiction's sovereign right to tax income, from all sources, of those who choose to live within that jurisdiction's limits." *Chickasaw Nation*, 515 U.S. at 466. The *Bracker* test is irrelevant as it "has never been applied where . . . a state tax imposed on a non-Indian arises from a transaction occurring off the reservation," *Wagnon*, 546 U.S. at 97, and non-member "Indians stand on the same footing as non-Indians resident on the reservation." *Colville*, 447 U.S. at 161. Finally, as discussed, *supra*, this levy in no way discriminates against Indians as it is equally applied at a 3% clip to all businesses across the State, regardless of their tribal status or location. 4 N.D.C. § 212(2). As such, it is applicable to the Wendat and, in the event the Topanga Cession lies outside Indian Country, must be enforced against the WCDC's development.

E. The Maumee have no legal interest in the TPT's application on Wendat land.

In the unlikely event, *arguendo*, the Court finds the Topanga Cession lies within the Wendat Reservation, the Maumee concede they have no justiciable interest in the TPT's enforcement there as federal jurisdiction requires "something more than 'generalized grievances.'" *United States v. Richardson*, 418 U.S. 166, 180 (1974). Even if the Maumee successfully argued the legal incidence of the TPT fell to consumers, and not the Tribe, and thus, that the state could tax WCDC revenue on Wendat lands, under 4 N.D.C. § 212(5), the whole of the tax would be remitted to the Wendat. Moreover, if the Cession is part of the Wendat Reservation, it necessarily falls within Indian Country under 18 U.S.C. § 1151, and no proceeds could be remitted to the Maumee under 4 N.D.C. § 212(6). Thus, in this unlikely event, the Maumee concede they have no justiciable interest in the TPT's applicability on Wendat land beyond "the public interest in proper administration of the laws." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576 (1992). This, of course, is insufficient for standing. *Id.* at 577.

CONCLUSION

As elucidated above, the Maumee Reservation retains the boundaries that Congress ratified in 1802. This includes the Topanga Cession as neither the Treaty with the Wendat, nor the Maumee Allotment Act, diminished the Reservation. If the Court finds the Maumee Reservation diminished, the Topanga Cession could not have reverted to the Wendat and even if reversion were possible, the Wendat Allotment Act certainly diminished that Reservation. As the Topanga Cession is under Maumee control, neither Indian infringement, nor preemption, precludes the TPT's application and even if the Cession lies outside Indian Country, the TPT may be applied to the WCDC. Given these facts and arguments, Petitioner requests the Court reverse the Thirteenth Circuit and reinstate the District Court's ruling.