

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 Criminal Appeals
for the Thirteenth Circuit*

BRIEF FOR RESPONDENT

Team # T1016

TABLE OF CONTENTS

TABLE OF AUTHORITIES. iii

QUESTIONS PRESENTED FOR REVIEW. 1

STATEMENT OF THE CASE. 2

 1. Statement of Facts. 2

 2. Statement of Proceedings. 5

SUMMARY OF ARGUMENT.

STANDARD OF REVIEW.

ARGUMENT.

 I. The Treaty of Wauseon was clearly abrogated by the Treaty with the Wendat. Even if the Court finds that the Treaty was not abrogated, the language of the Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908) and the congressional intent did in fact diminish the Maumee Reservation. However, the language and intent of the Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892) did not diminish the Wendat Reservation. As a result of the legislation and the geographical placement of the land at issue, the Topanga Cession remains in Indian Country.

 A. The Treaty of Wauseon was abrogated by the Treaty with the Wendat. Court of appeals

 B. Even if this Court determines that there was no abrogation, the language of the Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908) and the congressional intent of the Act did diminish the Maumee Reservation.

 C. The language and congressional intent of the Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892) did not diminish the Wendat Reservation.

 D. Since the Wendat Reservation was not diminished by the Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892), the Topanga Cession remains in Indian Country on the Wendat Reservation.

 II. The State of New Dakota is barred from collecting the Transaction Privilege Tax against the Wendat Band’s wholly owned corporation by either infringement or preemption.

 A. The Transaction Privilege Tax infringes upon the Wendat Band’s significant interest in developing new economic means for its members, which impacts the tribe’s sovereignty.

- B. Even if the State of New Dakota is not barred by tribal infringement, the doctrine of preemption prevents the State from levying the Transaction Privilege Tax because the State’s interest in raising revenue is outweighed by the federal scheme under the Reorganization Act of 1934.
 - 1. Because the Wendat Commercial Development Corporation is an arm of the Wendat Band tribe, the legal incidence of the Transaction Privilege Tax falls upon the Wendat Band thus preempting the State of New Dakota’s limited powers of taxation inside Indian Country.

CONCLUSION.

TABLE OF AUTHORITIES

CASES

<i>Alaska v. Native Village of Venetie Tribal Government</i> , 522 U.S. 520 (1998).....	23, 24, 25
<i>Atchison, Topeka and Sante Fe Ry. Co. v. Arizona</i> , 78 F.3d 438, (9th Cir. 1996).....	9
<i>Central Machine Co. v. Arizona State Tax Comm’n</i> , 448 U.S. 160 (1980).....	30
<i>Citizen Band Potawatomi Indian Tribe of Oklahoma v. Collier</i> , 142 F.3d 1325 (10th Cir. 1998).....	10, 11
<i>DeCoteau v. District County Court for Tenth Judicial District</i> , 420 U.S. 425 (1975).....	14, 17, 21
<i>Hagen v. Utah</i> , 510 U.S. 399 (1994).....	14, 21
<i>Iron Crow v. Oglala Sioux Tribe</i> , 231 F.2d 89 (8th Cir. 1956).....	26
<i>Lone Wolf v. Hitchcock</i> , 187 U.S. 553 (1903).....	10
<i>Mattz v. Arnett</i> , 412 U.S. 481 (1973).....	14, 15, 20, 23
<i>McClanahan v. State Tax Comm’n of Arizona</i> , 411 U.S. 164 (1973).....	28
<i>McGirt v. Oklahoma</i> , 140 S. Ct. 2452 (2020).....	<i>passim</i>
<i>Menominee Tribe of Indians v. United States</i> , 391 U.S. 404 (1968).....	10
<i>Mescalero Apache Tribe v. Jones</i> , 411 U.S. 145 (1973).....	29, 30
<i>Montana v. United States</i> , 450 U.S. 544 (1981).....	26

<i>Nebraska v. Parker</i> , 136 S. Ct. 1072 (2016).....	14, 23
<i>Oklahoma Tax Comm’n v. Chickasaw Nation</i> , 515 U.S. 450 (1995).....	30
<i>Ramah Navajo School Board v. Bureau of Revenue of New Mexico</i> , 458 U.S. 832 (1982).....	30
<i>Rosebud Sioux Tribe v. Kneip</i> , 430 U.S. 584 (1989).....	13, 15, 20
<i>Seymour v. Superintendent of Washington State Penitentiary</i> , 368 U.S. 351 (1962).....	14, 20, 23
<i>Solem v. Bartlett</i> , 465 U.S. 463 (1984).....	<i>passim</i>
<i>South Dakota v. Bourland</i> , 508 U.S. 679 (1993).....	10
<i>South Dakota v. Yankton Sioux Tribe</i> , 522 U.S. 329 (1998).....	19, 20
<i>United States v. Celestine</i> , 215 U.S. 278 (1909).....	13, 20
<i>United States v. Dion</i> , 476 U.S. 734 (1986).....	10, 11, 20
<i>United States v. Smiskin</i> , 487 F.3d 1260 (9th Cir. 2007).....	12, 13
<i>Wagnon v. Prairie Band Potawatomi Nation</i> , 546 U.S. 95 (2005).....	31
<i>Warren Trading Post Co. v. Arizona State Tax Comm’n</i> , 380 U.S. 685 (1965).....	30
<i>White Mountain Apache Tribe v. Bracker</i> , 448 U.S. 136 (1980).....	26, 28, 29
<i>Williams v. Lee</i> , 358 U.S. 217 (1959).....	27, 28

Worcester v. Georgia,
31 U.S. (6 Pet.) 515 (1832). 27

Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation,
502 U.S. 251 (1992). 28

FEDERAL STATUTES

Treaty with the Wendat,
35 Stat. 7749 *passim*

Treaty of Wauseon,
7 Stat. 1404 3, 12

Reorganization Act of 1934,
25 U.S.C.A. § 5123. 29, 30

Indian Country Defined,
18 U.S.C. § 1151. 8, 23, 24, 25

OTHER AUTHORITIES

Cong. Globe, 35th Cong., 2nd Sess. 5411-5412 (1859). 18, 19

Congressional Record 23: 1777 (Jan. 14, 1892). 21, 22, 25,

Congressional Record 42: 2345 (May 29, 1908). 17, 18, 19, 22

Maumee Allotment Act of 1908,
P.L. 60-8107 (May 29, 1908) 3, 16, 17, 31

Merriam-Webster.com,
<https://www.merriam-webster.com/dictionary/infringement> (last visited Dec. 13,
2020). 26

Wendat Allotment Act,
P.L. 52-8222 (Jan. 14, 1982) *passim*

4 N.D.C. §212 3, 4, 29

QUESTIONS PRESENTED FOR REVIEW

1. Was the Treaty of the Wauseon abrogated by the Treaty with the Wendat and/or did the Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908) diminish the Maumee Reservation? If that was the case, 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. Under the doctrines of either preemption or infringement, is the State of New Dakota estopped from levying the Transaction Privilege Tax against the Wendat Band's wholly owned corporation because the Topanga Cession is still in Indian Country?

STATEMENT OF THE CASE

1. Statement of Facts

The Wendat Band of Huron Indians (Wendat Band) settled in what is now known as the State of New Dakota along the Wapakoneta River long ago. Under the harsh pressures of the federal government of the United States, the Wendat Band was forced to sign a bare-bones treaty known as the Treaty with the Wendat, which was ratified by Congress in 1859. Treaty with the Wendat, March 26, 1859, 35 Stat. 7749. This skeleton of a treaty failed to provide even the most common agreements found in other treaties, such as a guarantee of peace, hunting and fishing rights, or a “bad men” clause. However, the treaty did expressly grant to the Wendat Band all lands east of the Wapakoneta River. At the time of the Wendat Band’s treaty, this grant would include the land now currently known as the Topanga Cession because this parcel was west of the river. R. at 5 and 12.

In 1892, the Wendat Band was once again strong-armed by the United States and forced into an allotment act, which obligated the Wendat Band to cede the western portion of its reserved land under the treaty, while maintaining the in trust status of the eastern half of the reservation. Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1982). Under the restrictive terms of the allotment act, the Wendat Band was only paid \$2,200,000 in return for more than 650,000 acres. *Id.* Additionally, the allotment act was a rushed process that was ratified prior to the completion of surveying and appraising the land. The allotment act also placed a limit on the amount of time the money received from the sale of the lands ceded could accrue interest. *Id.*

Similar to the Wendat Band, the Maumee Indian Nation (Maumee Nation) also settled along the banks of the Wapakoneta River. The Maumee Nation also had a

treaty with the United States known as the Treaty of Wauseon, which was ratified by Congress in 1802. Treaty of Wauseon, Oct. 4, 1801, 7 Stat. 1404. Like the Wendat Band's treaty, the Maumee Nation's treaty granted all lands west of the Wapakoneta River. But unlike the Wendat Band's treaty, the Maumee Nation's treaty was well thought-out and contained several terms favorable to the tribe, such as hunting and fishing rights, the right of exclusive use of the land, and a "bad men" clause. *Id.* The Maumee Nation also had an allotment act, which granted the tribe all land in the western half of the tribe's reservation while ceding the land on the eastern half. Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908). However, this allotment act also differed from the restraining allotment act with the Wendat Band. Most notably of those differences is that the Maumee Nation was generously paid \$2,000,000 in exchange for only 400,000 acres. Furthermore, the Maumee Nation's allotment act was not ratified until after the surplus land had been surveyed and appraised in full so that an accurate amount could be ensured. *Id.*

The heart of the issue in this case is whether the State may tax a commercial development owned by the Wendat Band, when both tribes have asserted claims of ownership over the land where the development is located. Both tribes point to their respective treaties and allotment acts as proof their ownership of the disputed land. The tax in question here is known as the Transaction Privilege Tax (TPT), which is regulated by the State of New Dakota for the privilege of being able to conduct business within the State. 4 N.D.C. §212. The TPT is levied against gross proceeds of sales or gross income of a business. Any business that makes more than \$5,000 per year in gross sales or income must apply for a TPT license and pay the State 3% of

their gross sales or income on transactions commenced within the State. 4 N.D.C. §212(2). The TPT collected is placed into the State’s general revenue fund “for the purpose of maintaining a robust and viable commercial market” 4 N.D.C. §212(3). The statute also states that a tribe or tribal business operating on tribal land held in trust is exempt from the license and tax payments and that all taxes collected from businesses operating on tribal land that are not exempt (owned by non-members) are to be paid to the tribe. 4 N.D.C. §212(4-5). Lastly, the Maumee Nation is to receive half of the TPT (1.5%) received from businesses operating in Door Prairie County, which is located in the Topanga Cession. 4 N.D.C. §212(6).

Sometime after the allotment acts of both tribes, there arose a disagreement of which tribe owned the land that was once west of the Wapakoneta River, but now lies east of the river due to the river shifting three miles some time in the 1830s. R. at 5. This land is now known as the Topanga Cession. Though each tribe claimed ownership, neither attempted to resolve the matter through the courts. This was largely due to the fact that the majority of Topanga Cession is residential property where the disputed tax cannot be collected. R. at 7.

This changed upon the Wendat Band’s purchase of 1,400 acres located within the Topanga Cession in 2013. *Id.* Shortly thereafter, the Wendat Band announced the tribe intended to use the development for the purpose of both residential and commercial development that would be owned by the Wendat Commercial Development Corporation (WCDC), which is owned by the Wendat Band. *Id.* The tribe plans to use the land to build a shopping complex, which will house a grocery store to combat the current food desert, a salon/spa, a bookstore, and a pharmacy. R.

at 8. Additionally, the development will include a museum and cultural center to ensure the traditions and legends of the Wendat Band live on through new generations. The tribe will use the proceeds from the development to fund public housing and a nursing care facility, both of which could not be achieved without the proceeds from the development. *Id.* The Wendat Band states the development will create more than three-hundred-and-fifty new jobs, earn more than \$80,000,000 in sales per year, and attract non-Indian customers to the reservation. *Id.*

Upon hearing this news, the Maumee Nation suddenly asserted a claim of ownership over the Topanga Cession where the development is located. The Maumee Nation claims the Wendat Band's claim to the land was diminished by the allotment act and thus must pay the TPT, which would be remitted to the Maumee Nation by the State. *Id.* Maumee Nation further claimed it was entitled to the full 3% of the TPT to supplement the loss of the tribe's current largest revenue, which is being threatened by climate change that has caused declining revenues. *Id.* The Maumee Nation seeks entitlement to the TPT because the tribe's members receive a lower income than the Wendat Band's members, and the TPT will help balance this disparity. *Id.*

2. Statement of the Proceedings

The Maumee Nation filed a complaint against the Wendat Band in federal court seeking a Declaration. The Maumee Nation has set forth one of two arguments: (1) the State can levy the TPT against the Wendat Band because the development is part of the Maumee Nation's reservation, so the tribe is entitled to the full 3% collected under the TPT, or (2) that the Wendat Band's claim on the land has been diminished through the allotment act and the Topanga Cession is now longer in Indian Country, so the tribe is entitled to 1.5% of the collected TPT. R. at 4.

On the other hand, the Wendat Band argues the State cannot levy the TPT because the action is barred by either preemption or infringement. *Id.* While the Wendat Band admits the land purchased within the Topanga Cession is not held in trust so the tribe is not entitled to automatic exemption under the TPT statute, the State cannot levy the TPT against the tribe because the land is still within Indian Country. R. at 8. In the alternative, the Wendat Band argues either the Topanga Cession belongs to the Wendat band according to the Treaty with the Wendat, or that the Maumee Nation's claim was diminished through the allotment act and was returned to the Wendat Band under the terms of the treaty. *Id.* Because the Wendat Band owns the Topanga Cession, the tribe asserts any TPT collected from businesses operating on the WCDC development should be paid to the Wendat Band.

The District Court ruled in favor of the Maumee Nation on both issues raised, holding the Topanga Cession is located on the Maumee Nation's reservation and the development owned by WCDC must obtain a TPT license and remit the full 3% required under the statute, which is to be paid to the Maumee Nation by the State. R. at 9. The Wendat Band proceeded with an appeal to the Thirteenth Circuit, which eventually reversed the District Court's decision.

The appellate court held that the Wendat's treaty clearly abrogated the Maumee Nation's claim to the Topanga Cession, but the Wendat Band's treaty had not been abrogated by the Wendat Allotment Act. R. at 10. The court concluded the Topanga Cession is located within Indian Country, and further held the Topanga Cession is located on the Wendat Band's reservation. Even though the Wendat Band admitted the newly purchased land was not held in trust and thus not entitled to the automatic exemption under the TPT statute, the court held found in favor of the Wendat Band based on the argument that the State cannot

levy the TPT against the development because the action is barred by preemption or infringement. R. at 11. The court found that while the Wendat Band only needed to show one of these limitations was present, the Wendat Band showed both were present here.

In a partial concurrence/dissent, J. Lahoz-Gonzales held the State would only be preempted if the Topanga Cession was located on the Wendat Band's reservation. The judge ultimately concluded under the latest tribal law decision by the Supreme Court, the Wendat Band has failed to show ownership of the Topanga Cession because both tribes have been abrogated by allotment acts. *Id.* Thus, the Topanga Cession is not located within Indian Country, which means the State can collect the TPT and must remit 1.5% of the TPT to the Maumee Nation pursuant to the TPT statute. *Id.*

SUMMARY OF ARGUMENT

The Thirteenth Circuit was correct in reversing the opinion written by the District Court from New Dakota. There was a clear congressional intent for the Treaty with the Wendat to Abrogate the Treaty of the Wauseon. Congress alone has the power to abrogate. If Congress wishes to abrogate or modify a treaty its intention must be clear, plain and explicit. Article I of the Treaty with the Wendat provides the explicit abrogation that is necessary to abrogate the Treaty of Wauseon by laying out the borders of the Wendat Reservation and ceding everything else in New Dakota to the United States. R. at 18.

When looking at the face of the Allotment Acts and the legislative history for both the Maumee Nation and the Wendat Band, it is clear that the Maumee Reservation was diminished by Congress and the Wendat Reservation was not diminished. The Allotment Act for the Maumee has explicit cession language written into Section One, while the Allotment Act for the Wendat lacks any of the traditional hallmarks of diminishment this Court has

used to determine the issue of reservation status. While there are no “magic words” that signify diminishment of the reservation, this Court requires that Congress express its intent to do so. The best place to look is the face of the Act and the text of the statute to see if there are any words that refer to cession or other language that evidences the present and total surrender of all tribal interests. When reading the Allotment Acts together with their corresponding legislative history, it will become apparent that the Maumee Reservation has been diminished while the Wendat Reservation still exists today.

Since the Wendat Reservation still exists, it is still Indian country according to 18 U.S.C. 1151(a). The Wapakoneta River moved west, which meant that geographically, the Topanga Cession fell on the Wendat Reservation land.

Although the land at the forefront of the taxation issue is not in trust, the State cannot tax because New Dakota infringes or is preempted. As far as infringement goes, New Dakota cannot do something that interferes with the tribe’s right to govern themselves. Here, the tribe has a significant interest in that it wants to use the revenue for low income housing, a nursing home, hospital and grocery store. New Dakota just wants to raise revenue and not provide any of the services the tribe is seeking, but there is also no express grant by Congress.

Preemption is the better path. Preemption will occur unless there is no interference with the tribal self-government and non-Indians are involved. To determine preemption, this Court must embark on a highly fact specific balancing test between the federal, state and tribal interests to determine if the State can regulate or tax on the reservation. Taxation fits under preemption and the State cannot tax on the reservation but it can tax if it is a Indian

business off the reservation or a non-member who purchases land on the reservation. If the legal incidence falls on the tribe then the State is unable to tax.

STANDARD OF REVIEW

Because the relevant facts of this case are undisputed, the proper standard of review for determining whether the State has the authority to levy the TPT against the Wendat Band is *de novo*. *Atchison, Topeka and Sante Fe Ry. Co. v. Arizona*, 78 F.3d 438, (9th Cir. 1996).

ARGUMENT

- I. The Treaty of Wauseon was clearly abrogated by the Treaty with the Wendat. Even if the Court finds that the Treaty was not abrogated, the language of the Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908) and the congressional intent did in fact diminish the Maumee Reservation. However, the language and intent of the Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892) did not diminish the Wendat Reservation. As a result of the legislation and the geographical placement of the land at issue, the Topanga Cession remains in Indian Country.**

The Thirteenth Circuit was correct in its ruling in favor of the Wendat Band on the jurisdiction issue of the Topanga Cession for four reasons. First, the Treaty with the Wendat abrogated the claim to the Topanga Cession held by the Maumee Tribe. R. at 10. Further, the lower court was correct when it determined that the Maumee Act “contains clear cession language. . . .” Second, this text—the cession language—coupled with the legislative intent behind the Maumee Act, when taken as a whole, would provide proof that there were sufficient hallmarks of diminishment of the Maumee Reservation. Third, upon a careful inspection of the facial text and legislative history of the Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892), there is nothing that would point this Court to determine that the Wendat Reservation has also been diminished. Finally, when the river shifted course after the 1830’s, the Topanga Cession fell on the right side of the riverbed—the Wendat side of the

river. Because the Wendat Reservation has not been diminished, the Topanga Cession remains located in Indian Country on the Wendat Reservation.

A. The Treaty of Wauseon was abrogated by the Treaty with the Wendat.

The landmark case of *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903) determined that the power to abrogate lies in the hands of congress and congress alone. Congress had this power because they possessed massive power over the property of the Indians. *Id.* at 565. This was largely due to Congress exercising its guardianship over the interests of the Indians and the fact that the authority was implied. *Id.* Congress has the power to abrogate the provisions of an Indian Treaty. *Id.* at 566. This is breaking a promise of the reservation, but if Congress wishes to do so, it must say so. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020). Congress does possess the power to abrogate rights that are given by treaty, but the “intention to abrogate or modify a treaty is not to be lightly imputed by the Congress.” *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-13 (1968).

This congressional power of abrogation should only be used when “circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. *Lone Wolf*, 187 U.S. at 566. Whenever a treaty was entered into, “it was never doubted that the power to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians.” *Id.*

This Court has required that when Congress wishes to abrogate, that it makes “express delegation of its intent to abrogate treaty rights.” *United States v Dion*, 476 U.S. 734, 739 (1986); *South Dakota v. Bourland*, 508 U.S. 679, 687 (1993). The standard for Congressional intent to abrogate must be “clear and plain” and the intent will not be lightly

inferred. *Dion*, 476 U.S. at 738; *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Collier*, 142 F.3d 1325, 1333 (10th Cir. 1998). There needs to be clear evidence that Congress actually considered the “conflict between its intended action. . . and the Indian Treaty rights. . . and chose to resolve that conflict by abrogating the treaty.” *Dion*, 476 U.S. at 740.

There is another approach that this Court can take to resolving the abrogation issue. The Court can also look to the legislative history, surrounding circumstances, and the face of the Act. *Id.* at 739. The most preferable evidence is an explicit statement by Congress showing “legislative accountability for the abrogation of treaty rights.” *Id.* If there is sufficiently compelling evidence of an intent by Congress to abrogate, “the weight of authority indicates that such an intent can also be found in the legislative history of a statute.” *Id.*

When evaluating a statute, the Court first needs to look at the language of the act, in this case the Treaty with the Wendat, to see if there is a sufficiently clear expression of an intent to abrogate the Treaty of the Wauseon and the Maumee Indian’s claims to the Topanga Cession. It may be necessary to read both treaties together with the Allotment Acts of both the Maumee and the Wendat. R. at 9. Upon reading the documents together as a whole and evaluating the legislative histories, there is a clear intent from Congress in the Treaty with the Wendat to abrogate the Treaty of Wauseon.

The Thirteenth Circuit correctly looked at the face of the Treaty with the Wendat of 1859 and determined that the Maumee’s claim had been abrogated. R. at 10. When looking at Article I of the treaty, there is the express intent to abrogate the Treaty of Wauseon. Treaty with the Wendat, March 26, 1859, 35 Stat. 7749. In that article, the Chiefs, Headmen and

Warriors agree to give to the United States their land in the New Dakota Territory, but provide for an exception of land that is east of the Wapakoneta River. Treaty with the Wendat, March 26, 1859, 35 Stat. 7749. The article continues further to cite to other landmarks that make up the rest of the reservation's boundaries. There is no mention of the Maumee reservation which had been established in 1801. Treaty of Wauseon, Oct. 4, 1801, 7 Stat. 1404. The Treaty of Wauseon gave the Maumee Indian Nation the lands west of the Wapakoneta. *Id.* However, the later treaty, the Treaty with the Wendat of 1859, said that the tribe would “cede to the United States their title and interest to lands in the New Dakota Territory, excepting those lands East of the Wapakoneta River; with the Oyate Territory forming the southern border. . . [t]he eastern terminus of these reserved lands is the line bordering the New Dakota Territory and the Oyate Territory.” Treaty with the Wendat, March 26, 1859, 35 Stat. 7749.

A reading of this section should show this Court that the Wendat Band agreed to give all land minus the land they explicitly carved an exception out for to the United States—including the land that the Maumee Indian Nation owned. There is an overlap of ownership on the lands west of the Wapakoneta that remain in New Dakota and stretch to Oyate. *Id.* By carving out the exception for the lands east of the Wapakoneta but ceding all other land in New Dakota to the United States, the Treaty with the Wendat of 1859 abrogated the Treaty of Wauseon and the Maumee Nation's claim to the Topanga Cession. Treaty with the Wendat, March 26, 1859, 35 Stat. 7749. Further, Congress must expressly apply a statute to Indians in order to abrogate their treaty right. *United States v Smiskin*, 487 F.3d 1260, 1264 (9th Cir. 2007). “The text of a treaty must be construed as the Indians would naturally have understood it at the time of the treaty, with doubtful or ambiguous expressions resolved in the

Indians favor.” *Id.* It is clear from the text of the Treaty with the Wendat that the Wendat Band understood the boundaries they had agreed to with the United States, and further, understood the land—including the land that the Menominee Nation stakes a claim to—they did not create an exception for would be given to the United States.

B. Even if this Court determines that there was no abrogation, the language of the Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908) and the congressional intent of the Act did diminish the Maumee Reservation.

Congress is the only body who can create a reservation, so it makes sense that Congress is also the only body who “can divest a reservation of its land and diminish its boundaries.” *McGirt*, 140 S. Ct. at 2462. This is breaking a promise that had been granted to an Indian tribe, but if Congress wants to break a promise, it must say so—explicitly. *Id.* Ultimately, history has shown that when Congress decides to withdraw or diminish a reservation, it knows how to do so. *Id.* When looking at diminishment, the Court can either decide that the surplus land act at issue did in fact diminish the reservation, or the Court can decide that the surplus land act “simply offered non-Indians the opportunity to purchase land within established reservation boundaries.” *Solem v. Bartlett*, 465 U.S. 463, 470 (1984).

The most important principle in a diminishment analysis is, again, the idea that “only Congress can divest a reservation of its land and diminish its boundaries.” *Id.* “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.” *United States v. Celestine*, 215 U.S. 278, 285 (1909). Further, similar to abrogation, diminishment will not be lightly inferred. *Solem*, 465 U.S. at 470. When analyzing the surplus land acts—the Allotment Acts, here—the Court needs to look and see if Congress clearly “evinced an ‘intent to change boundaries’ before diminishment will be found.” *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 615 (1977).

When looking at congressional intent, the most “probative evidence. . . is the statutory language used to open the Indian lands.” *Solem*, 465 U.S. at 470. Historically, there have been statutory texts that “[e]xplicit[ly] [refer] to cession or other language evidencing the present and total surrender of all tribal interests. . .” *Id.* There are other examples of statutory text which show the hallmarks of diminishment that courts look to. *E.g.*, *Solem*, 465 U.S. at 470 (an “unconditional commitment. . . to compensate the Indian tribe for its opened land); *Hagen v. Utah*, 510 U.S. 399, 412 (1994) (Congress directing that the tribal lands be “ ‘restored to the public domain’ ”); *Mattz v. Arnett*, 412 U.S. 481, 504 (1973) (a reservation has been spoken of as “ ‘discontinued,’ ” “ ‘abolished,’ ” or “ ‘vacated’ ”). Further, “disestablishment has never required any particular form of words.” *Hagen*, 510 U.S. at 411. Although there is no “magic word” for diminishment, Congress is still required to clearly express its intent to do so, which can be achieved by “[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests.” *DeCoteau v. District County Court for Tenth Judicial District*, 420 U.S. 425, 444-445 (1975); *Seymour v. Superintendent*, 368 U.S. 351, 355 (1962); *Nebraska v. Parker*, 136 S. Ct. 1072, 1079 (2016). This type of language is strong evidence that congress meant to divest from the reservation all unallotted opened lands. *DeCoteau*, 420 U.S. at 444-445; *Seymour*, 368 U.S. at 355. Further, if the language of cession is coupled with an “unconditional commitment from Congress to compensate the Indian tribe for its opened land, there is an almost unsurmountable presumption that Congress meant for the tribe’s reservation to be diminished. *Solem*, 465 U.S. at 470-471; *DeCoteau*, 420 U.S. at 447-448.

Explicit language of cession and unconditional compensation are by no means hard and fast rules to find diminishment. *Solem*, 465 U.S. at 471. “When events surrounding the passage of a surplus land act-particularly the manner in which the transaction was negotiated with the

tribes involved and the tenor of legislative reports presented to Congress—unequivocally reveal a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation [this Court has] been willing to infer that Congress shared the understanding that its action would diminish the reservation. . . .” *Id.* The Court has looked at other facts as well to determine Congress’s intentions regarding diminishment: events that occurred after a passage of a surplus land act, the way Congress treats the affected areas—“particularly immediately following the opening. . . [and] the manner in which the Bureau of Indian Affairs and local judicial authorities dealt with the unallotted lands. *Id.* This Court has also determined that who moved onto the opened reservation is relevant to the diminishment analysis. *Id.* Finally, this Court also looks to the “subsequent demographic history of opened lands” as another indicator of Congress’s intentions for diminishing a reservation once land was opened to non-Indian settlers. *Id.* “Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto* if not *de jure* diminishment may have occurred. *Rosebud Sioux Tribe*, 430 U.S. at 588, n.3.

There is a limit to how far the Court should go when figuring out Congress’s true intentions for a surplus land act. “When both an act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening.” *Mattz*, 412 U.S. at 505. Here, that quote applies not to the Maumee Nation but to the Wendat Band. If there is no 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, and in

the absence of some clear statement of congressional intent to alter reservation boundaries. . . .” it would be impossible for this Court to infer that there was a congressional intent to diminish. *Solem*, 465 U.S. at 478. The Court can look to the face and text of the act, the circumstances surrounding its passage, the subsequent events, subsequent treatment, who moved onto the land, and demographic history to determine diminishment. When evaluating these factors, the most weight should be given to the text of the act and the least weight should be given to the demographic history. *McGirt*, 140 S. Ct. at 2468.

Certain “buzzwords” have aided the Court in determining if there was diminishment or not. For example, phrases such as “cede, sell, relinquish and convey,” “the reservation thus diminished,” “reduced reservation,” and “the opened lands [are] part of the public domain” are indicative of diminishment and Congress’s reference to such shows that the land has lost “all vestiges of reservation status.” *Solem*, 465 U.S. at 473-478. Phrases such as “sell and dispose” and other similar phrases simply show that the provision does “no more than to 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 Indian, regarded as beneficial to the development of its wards.” *Solem*, 465 U.S. at 473.

When evaluating the Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908), there is a clear congressional intent to diminish the Maumee Nation reservation. Section One (1) of the Maumee Allotment Act of 1908 states, “[t]he Indians have agreed to consider the entire easter quarter surplus and to cede their interest in the surplus land to the United States where it may be returned to the public domain by way of this act.” R. at 13; Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908). Section Two (2) further provides additional evidence by way of unconditional compensation to the Maumee Nation: “[p]rior to the

proclamation the Secretary of the Interior, in his discretion, may permit Indians who have an allotment within the area described in section one of this Act to relinquish such allotment and to receive in lieu thereof a sum of eight-hundred dollars.” R. at 13; Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908). If the language of cession is coupled with an “unconditional commitment from Congress to compensate the Indian tribe for its opened land, there is an almost unsurmountable presumption that Congress meant for the tribe’s reservation to be diminished. *Solem*, 465 U.S. at 470-471; *DeCoteau*, 420 U.S. at 447-448. That is exactly what is presented in the Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908).

Consulting extratextual sources is not necessary if the meaning of the statute is clear. *McGirt*, 140 S. Ct. at 2469. Since the face of the Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908) is clear, this Court should do no further analysis aside from looking at the face of the Act. There is clear language of cession in section one, and there is clear congressional commitment to compensate the Maumee Nation in section 2, albeit not an unconditional payment, but a payment nonetheless. R. at 13; Maumee Allotment Act, P.L. 60-8107 (May 29, 1908).

If this Court is unpersuaded that the text of the Maumee Allotment Act is unclear and decides to consult the extratextual sources, the circumstances surrounding its passage, the subsequent events, subsequent treatment, who moved onto the land and demographics, there is still evidence that points to the diminishment of the Maumee Reservation. Examining the legislative history shows that the House intended for there to be a “sale and disposal of the surplus lands after allotment.” R. at 23; Representative Hackney. *Congressional Record* 42: 2345 (May 29, 1908). Mr. Hackney, referring to conversations with the Maumee Nation, was quoted as saying, “. . . after spending considerable time had a written agreement with them in

regard to the disposal of this reservation. . . [t]he greater portion of the land is grazing land. We give the Indians more than they asked for in the contract, as we raised the allotment to 160 acres.” R. at 25; Representative Hackney. *Congressional Record* 42: 2345 (May 29, 1908). Mr. Hackney also believes that this class of Indians are capable of assuming the duties of citizenship and called the Maumee Nation a “very intelligent class of Indians.” R. at 25; Representative Hackney. *Congressional Record* 42: 2345 (May 29, 1908).

Another Congressman, Mr. Ferris, was quoted as saying, “[t]he time has come in the history of the United States when it is not advisable, not desirable, nor right to leave Indians huddled together on a reservation. . . .” R. at 26; Representative Ferris. *Congressional Record* 42: 2345 (May 29, 1908). Mr. Ferris continued, “[t]hey are our coequals as citizens. . . We owe them our respect. . . [t]hey can not have these advantages huddled together on an Indian reservation. . . I believe it will even aid this Congress to open up those lands and let them be settled by home builders and home owners.” Representative Ferris. *Congressional Record* 42: 2345 (May 29, 1908). Mr. Stephens hoped that in a few years after the Act was passed, “there will not be a single Indian reservation left in the borders of this whole country.” R. at 26; Representative Stephens. *Congressional Record* 42: 2345 (May 29, 1908). Mr. Pray finally makes multiple mentions of the disposal of the lands. R. at 26-27; Representative Pray. *Congressional Record* 42: 2345 (May 29, 1908).

Senator Foot from Vermont had some interesting remarks about the two tribes. First, the Wendat are the last Indians to yield their claims to the bulk of the territory. This is a clue for the lack of diminishment of the Wendat Band. Cong. Globe, 35th Cong., 2nd Sess. 5411-5412 (1859). Second, the Maumee Nation began the trend of yielding claims to the territory. *Id.* Third, Senator Foot hopes that the Treaty with the Wendat will foster some peace between

the Wendat and the settlers. Finally, the Maumee Nation have been reduced in numbers and no longer inhabit parts of their territory. *Id.* This is a major clue to show the diminishment of the Maumee Reservation.

As far as demographics of Indians, there are only 1,300-1,500 Indians on the lands the Maumee claim as their Reservation. R. at 23; Representative Hackney. *Congressional Record* 42: 2345 (May 29, 1908). As of the 2010 Census, only 40.4% of the population living on the Maumee Reservation was an American Indian, and only 17.9% of the population in the Topanga Cession was an Indian. R. at 7.

The face of the Act clearly shows a Congressional intent to diminish the Maumee Reservation. If the Court is unpersuaded, there is vast evidence in the legislative history that calls for the Maumee Reservation to be diminished. Finally, if the Court still remains unpersuaded, the lack of Indian demographics and small population of Indians on the Reservation should guide the Court in declaring that the Maumee Reservation has thus been diminished.

C. The language and congressional intent of the Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892) did not diminish the Wendat Reservation.

To determine if the Wendat Reservation has been diminished, the Court should follow the same analysis it did in Section B when determining that the Maumee Reservation was diminished. However, the Court should come to a different result—the Wendat Reservation has not been diminished.

The Court should again begin with the actual Act itself and try to determine Congress's purpose from the act and remember that diminishment will not be lightly inferred. *Solem*, 465 U.S. at 470. The “touchstone” in determining whether a surplus land act diminished or retained reservation boundaries is congressional purpose. *South Dakota v.*

Yankton Sioux Tribe, 522 U.S. 329, 343 (1998); *Rosebud Sioux Tribe*, 430 U.S. at 615. The Court should look for explicit language of cession or unconditional compensation to the Indians as hints that Congress intended to diminish the reservation. *Solem*, 465 U.S. at 470. Only Congress can alter terms of an Indian treaty by diminishing reservation and its intent to do so must be clear and plain. *Yankton Sioux Tribe*, 522 U.S. at 343; *Dion*, 476 U.S. at 738-739. The Court should also look to see if there was a contemporaneous understanding that the reservation would shrink as a result of the proposed legislation. *Solem*, 465 U.S. at 470. Finally, if the congressional intent is still unclear, the Court may consult extratextual sources to determine the meaning. *McGirt*, 140 S. Ct. at 2468.

Extratextual sources include: events that occurred after a passage of a surplus land act; the way Congress treated the affected lands after opening; how judicial authorities deal with the unallotted lands; who moved onto the opened reservation and the subsequent demographic history of the opened lands. *Id.* Finally, the Court can look to see if the area has lost its “Indian character.” *Rosebud Sioux Tribe*, 430 U.S. at 588, n.3. But it is important to remember that there is “no need to consult extratextual sources when the meaning of a statute’s terms is clear. *McGirt*, 140 S. Ct. at 2469. “A congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history.” *Mattz*, 412 U.S. at 505; *Celestine*, 215 U.S. at 285; *Seymour*, 368 U.S. 351 (1962).

To begin, start with the text of the Act. Section one (1) of the Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892) says that “[a]ll lands not selected within one year of the survey’s completion shall be declared surplus lands open to settlement. The eastern half of the lands reserved by the Wendat Band in the 1859 Treaty shall continue to be held in trust

by the United States for the use and benefit of the Band.” R. at 15; Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892). Further, there is not any language of unconditional payment to the Wendat Band. Section two (2) does say that the Wendat Band will be paid three dollars and forty cents per surplus acre, but the amount is capped at two-million and two-hundred-thousand dollars. R. at 15; Wendat Allotment Act, P.L. 52-8222 (Jan. 14 1892). That is a condition upon the payment. Finally, Section four (4) calls for the opening of the surplus lands to settlement. R. at 15; Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892). A close and thorough reading of this act should yield results that are similar to the “open[ing] 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 Indian, regarded as beneficial to the development of its wards” language from *Solem*, 465 U.S. at 473, as opposed to the hallmarks of diminishment language from *Hagen*, 510 U.S at 411-412 or *DeCoteau*, 420 U.S. at 444-445.

The language of the does not call for diminishment of the reservation. Rather, the language calls for opening up the land for settlement. There is no explicit language of cession in the Wendat Allotment Act. R. at 15; Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892).

The legislative history of the Wendat Allotment Act might give the Petitioner some hope, but that hope is misplaced. The Wendat Reservation is about 4,000,000 acres and Congress intended that 2,000,000 of those acres be opened to the “public domain by way of allotment.” R. at 20; Representative Harvey. *Congressional Record* 23: 1777 (Jan. 14, 1892). Even if this Court were to interpret the “opened to the public domain” language as language of diminishment, the whole reservation is not being diminished—roughly half of it would be. “The tract of land has 4,000,000 acres, and in it are a vastly larger number of Indians to settle

with and to allot.” R. at 21; Representative Mansur. *Congressional Record* 23: 1777 (Jan. 14, 1892). The legislative history does not give an exact number of Indians residing in the Wendat reservation, but it hints that there are a lot of Indians who would be entitled to allotment.

When examining the legislative history for the Maumee Nation, one congressman called them an “intelligent class of Indians.” R. at 25; Representative Hackney. *Congressional Record* 42: 2345 (May 29, 1908). The exact opposite is insinuated when looking at the legislative history regarding the Wendats. The Wendat Indians were called the “most distinctly warrior Indians left on the continent today. . . .” R. at 22; Representative Mansur. *Congressional Record* 23: 1777 (Jan. 14, 1892). Further, “they kept themselves farther away from white people; and have less to do with them than any others; that they are only to be seen when they come to agencies for the purpose of drawing their annuities.” R. at 22; Representative Mansur. *Congressional Record* 23: 1777 (Jan. 14, 1892). Finally, “they are wholly wild and savage; and when it comes to allotment, you cannot bring the same influences to bear upon them that you can bring to bear upon other Indians more civilized. R. at 22; Representative Mansur. *Congressional Record* 23: 1777 (Jan. 14, 1892). The legislative history is ripe with congressmen imploring the others to pass the act so that settlers can enter the lands and make a crop. R. at 22; Representative Mansur. *Congressional Record* 23: 1777 (Jan. 14, 1892).

The hope for a crop harvest and the language calling the Wendat reserved, warriors, wild, and savage clearly show an intent to not diminish the lands but keep the reservation intact and only open the land up for settling. When reading the legislative history of the Wendat and comparing it to the Maumee, the Court can see that Congress sees the Maumee

as civilized and ready to assimilate into the United States, whereas, it sees the Wendat as still needing the reservation land. By imploring the House to let people settle and make a crop, Congress is proposing that the Wendat Allotment “simply offer[s] non-Indians the opportunity to purchase land within established reservation boundaries.” *Solem*, 465 U.S. at 470. As a final result, the Wendat Reservation is different from the Maumee Reservation as the Wendat Reservation has not been diminished by an explicit act of Congress.

Finally, “Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others. *Mattz*, 412 U.S. at 497. “[A]llotment under the . . . Act is completely consistent with reservation status. *Seymour*, 368 U.S. 356-358. Here, the Wendat reservation was being allotted, but the transfer of plots and the allotment process do not kill the reservation. The legislative history makes plain that the Wendat Band needs to be on the reservation and the settlers need to get there solely to yield a crop. R. at 22. The Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892) falls into the category of surplus land acts that opened the reservation land to settlement. These such schemes allow for non-Indian settlers to own land on the reservation. *Nebraska v. Parker*, 136 S. Ct. at 1079-1080. Generally, allotment is seen as the first, but not the final, step in disestablishment and dissolution of the reservation. *McGirt*, 140 S. Ct. at 2466. It is clear that the rest of the steps have not been completed.

D. Since the Wendat Reservation was not diminished by the Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892), the Topanga Cession remains in Indian Country on the Wendat Reservation.

Indian Country is defined by statute in 18 U.S.C § 1151. Section (a) of the statute reads: “all land within the limits of any Indian reservation under the jurisdiction of the United States Government. 18 U.S.C § 1151(a); *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 526-527 (1998). Section (b) reads: “all dependent Indian

communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state.” 18 U.S.C. § 1151(b); *Venetie*, 522 U.S. 526-527. Finally, section (c) reads: “all Indian allotments, the Indian titles to which have not been extinguished, including rights-of way running through the same.” 18 U.S.C § 1151 (c); *Venetie*, 522 U.S. 526-527. This statute “expressly contemplates private land ownership within reservation boundaries. *McGirt*, 140 S. Ct. at 2464.

Since the Wendat Reservation is not diminished, the Topanga Cession falls into 18 U.S.C § 1151(a) and is still Indian country as it is land that is within the limits of the Wendat Reservation, and that reservation is under the jurisdiction of the United States as shown by the Treaty with the Wendat, March 26, 1859, 35 Stat. 7749.

Even if this Court determines that the Wendat Reservation is no more, the Topanga Cession is still Indian country as the lands in question would fall under the protections of the dependent Indian community as defined in 18 U.S.C § 1151(b). A dependent Indian community refers to “a limited category of Indian land that are neither reservations nor allotments, and that satisfy two requirements—first, they must have been set aside by the Federal Government for the use of the Indians; second, they must be under federal superintendence.” *Venetie*, 522 U.S. at 527. “The federal set-aside requirement ensures that the land in question is occupied by an ‘Indian Community’; while the federal superintendence requirement guarantees that the Indian Community is sufficiently ‘dependent’ on the Federal Government that the Federal Government and the Indians involved, rather than the States, are to exercise primary jurisdiction over the land in question.” *Id.* at 731.

The Treaty with the Wendat, March 26, 1859, 35 Stat. 7749 set aside the land in question for an Indian Community. Article one (1) of the Treaty says that “[t]he Chiefs. . . agree to cede to the United States their title and interests to the lands in the New Dakota territory, excepting those lands East of the Wapokoneta River. . . .” *Id.* The Topanga Cession fell on the right side of geography, and when the river shifted, it shifted East; therefore, the Topanga Cession meets the set-aside requirement as it fell on lands previously set aside by the Government by treaty.

To show that the federal superintendence requirement has been met, there needs to be indicia of active federal control. *Venetie*, 522 U.S. at 534. A prime example of federal control is in Article six (6) of the Treaty with the Wendat, March 26, 1859, 35 Stat 7749. It is written that the “United States agree to erect a hospital on their lands, under the direction of the President of the United States.” A hospital is an essential service that people need, and the President is the highest federal body in the land. Further, if the Court again looks to the remarks made by Mr. Mansur when evaluating the Wendat Band: “. . .the Wendat are the most distinctly warrior Indians left on the continent today. . .they are wholly wild and savage. . . you cannot bring the same influences to bear upon them that you can bring to bear upon other Indians more civilized”—seemingly implying the Maumee Nation. R. at 22.

Representative Mansur. *Congressional Record* 23: 1777 (Jan. 14, 1892).

The Topanga Cession is located in Indian Country and on the Wendat reservation because the Wendat Reservation was not diminished by any clear and plain act of Congress, as explained in section C. Even if this Court decides that the Wendat Reservation has been diminished, the Topanga Cession is still Indian country as it meets the requirements of 18 U.S.C 1151(b) for a dependent Indian community.

II. The State of New Dakota is barred from collecting the Transaction Privilege Tax against the Wendat Band’s wholly owned corporation by either infringement or preemption.

The Wendat Band argues that while the newly purchased land in dispute is not held in trust and so the tribe is not entitled to the automatic exemption under the TPT statute, the State of New Dakota cannot levy the TPT against the WCDC’s development due to either infringement or preemption. Case law makes it clear that a state may not act when such action would involve tribal infringement or preemption by federal law, and that tribes only need to satisfy one of these doctrines to prevent the state from acting. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). The roots of the doctrines of preemption and infringement are traced back the tribe’s right to sovereignty. As sovereign nations, tribes are granted the right to govern and adjudicate the tribe’s members and land. Unlike the states, because of sovereignty the tribes are free to establish courts, levy taxes, or regulate hunting and fishing without an express grant of authorization from Congress. *See Iron Crow v. Oglala Sioux Tribe*, 231 F2d 89 (8th Cir. 1956). While subsequent cases have limited the tradition of sovereignty, there is no doubt that the tribes have retained the right to govern and adjudicate the activities of its members along with the activities of non-members with a consensual relationship with the tribes or that impacts “the political integrity, the economic security, or the health or welfare of the tribe.” *Montana v. United States*, 450 U.S. 544, 566 (1981).

A. The Transaction Privilege Tax infringes upon the Wendat Band’s significant interest in developing new economic means for its members, which impacts the tribe’s sovereignty.

Infringement is defined as “an encroachment or trespass on a right or privilege.”

Infringement, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/infringement> (last visited Dec. 13, 2020). Thus, the Supreme Court

has accordingly stated the test for tribal infringement is “whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.” *Williams v. Lee*, 358 U.S. 217, 220 (1959). Using the tradition of sovereignty, the Court found that when tribes were found to be separate nations the federal government was the only agency granted access to the reservations owned by the tribes. This meant the states were not to interfere *or assist* with the tribes – the Indians were left on their own to establish schools, courts, food production, roads, housing, etc. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). Thus, by the time *Williams* was decided the Court had made clear that state law is permitted inside Indian Country only “where essential tribal relations were not involved . . .” 358 U.S. at 219. The only exception is where Congress has expressly granted authorization to the state. *Id.*

Here, the Wendat Band has a significant interest in the WCDC’s commercial development. The new shopping center planned by the WCDC will put an end to the food desert and allows members an easier means to obtain necessities, such as access to a pharmacy. R. at 8. The funds from these facilities will be used to build a public housing project and nursing care facility to help the most vulnerable of the tribe’s members. The Wendat Band asserts it cannot provide these necessary services without the revenue from the commercial development. *Id.* Additionally, the development will create new jobs for the tribe’s members, which in turn are likely to spend more money at the development increasing the tribe’s economic return. *Id.*

The tribe’s ability to self-govern is infringed by forcing the Wendat Band to pay the TPT. The Wendat Band will not be able to provide jobs, housing, or care to the elderly members. Additionally, the State of New Dakota has failed to show an express grant by Congress authorizing the collection of the TPT against the Wendat Band. Furthermore, the

State of New Dakota is not willing to provide these services to the Wendat Band. As was stated in *Williams*, if the State has not undertaken the responsibility of providing services to the Wendat Band, then the State may not interfere with the tribe's right to govern and adjudicate themselves. 358 U.S. at 222-23. Without either an express grant by Congress or willingness to provide services to the tribe, the State of New Dakota is barred from levying the TPT against the WCDC's development by the doctrine of tribal infringement

B. Even if the State of New Dakota is not barred by tribal infringement, the doctrine of preemption prevents the State from levying the Transaction Privilege Tax because the State's interest in raising revenue is outweighed by the federal scheme under the Reorganization Act of 1934.

Though the modern-day test for preemption is found in *Bracker*, the test is based on language from an earlier case. In *McClanahan*, the Court stated while traditionally the states were prevented from acting inside Indian Country by the inherent sovereignty granted to tribes, the modern trend focuses more on federal preemption. *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 172 (1973). The Court further stated that the states were preempted from intruding into Indian Country without an express grant from Congress, unless two conditions were present: (1) the state action would not interfere with tribal self-government, and (2) the state action involves non-Indians. *Id.* at 168. However, the Court recognized that Congress is not always direct in the statute itself. In such a case, the Court must perform a balancing test of the state, federal, and tribal interests. This balancing test is highly fact specific and requires the Court to review the relevant treaty and statutes to determine if the state law interferes with the federal statute. *Id.* at 165.

The one bright-line exception to the case-by-case analysis in *McClanahan* is that states cannot tax the tribe's reservation lands or the members. *See Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 258 (1992). Subsequently, in *Bracker*

the Court reiterated the balancing test previously established. The Court held that state action is preempted if the state law in question disrupts a federal scheme of regulations. 448 U.S. at 151. The Court found the state's "generalized interest in raising revenue" to be insufficient compared to the federal scheme regulating commercial timber, the policy of which was to assure that "profits derived from the timber sales will inure to the benefit of the [t]ribe. . . ." *Id.*

In this case, the TPT statute clearly expresses the State's interest in levying the tax: "for the purpose of maintaining a robust and viable commercial market. . . ." 4 N.D.C. §212(3). Essentially, the State's only interest in collecting the TPT is to raise revenue. While this is sufficient against non-Indian businesses operating within the State, the Court has made clear that this "generalized interest" is not enough to overcome a federal scheme. Here, the applicable federal statute is the Reorganization Act of 1934. This Act sets up a federal scheme to ensure tribes had the proper tools to be self-sufficient since the states were not tasked with providing any services to the tribes. 25 U.S.C.A. §5123. The Act also ensured the tribes retained their sovereignty. The purpose of the Act was to encourage tribes "to revitalize their self-government through the adoption of constitutions and bylaws and through the creation of chartered corporations. . . ." and to "generate substantial revenues for the education and the social and economic welfare of its people. . . ." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973).

This is precisely what the Wendat Band is trying to do here: using the newly purchased land as a commercial development that will generate revenue for the social and economic benefit of the tribe's members. If the Wendat Band is forced to pay the TPT, its revenue will be greatly reduced. Without the full proceeds from the WCDC's development, the tribe will

not have the funds to build the public housing and nursing care facility projects it has planned. This would be devastating to the tribe's members who are in need of such services and rely solely on the tribe to provide such services. The federal scheme under the Reorganization Act of 1934 combined with the Wendat Band's interest in providing for the tribe's members outweighs the State's generalized interest in raising revenue.

1. Because the Wendat Commercial Development Corporation is an arm of the Wendat Band tribe, the legal incidence of the Transaction Privilege Tax falls upon the Wendat Band thus preempting the State of New Dakota's limited powers of taxation inside Indian Country.

Unlike *Jones*, the Wendat Band is not arguing the WCDC is a federal instrumentality that is constitutionally immune from state taxes. Instead, the Wendat Band argues the legal incidence of the TPT falls upon the tribe as owner of the WCDC, thus preempting the State from levying the TPT against the WCDC. The test for determining whether the state has the power to tax a tribe, the tribe's land, or the tribe's members is controlled by preemption, rather than tribal sovereignty. *Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685 (1965). The focus of the preemption test under taxation is the legal incidence of the tax, which cannot fall upon the tribe or the state is barred by preemption. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458-59 (1995). The Court found the balancing test from previous preemption case was inappropriate and held a State is without power to tax inside Indian Country "absent clear congressional authorization." *Id.*¹

¹ The Court has also rejected taxes by other states that are similar to the TPT being levied in this case. See, e.g. *Central Machine Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980) (holding a state tax on gross receipts was preempted by federal statutes when the state attempted to levy the tax against the sale of machinery in Indian Country by a non-Indian dealer who lived on non-Indian land); *Ramah Navajo School Board v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982) (holding a state tax on gross receipts levied against a non-Indian contractor building a school on the reservation was preempted).

The Court further stated in a later case the focus for taxation cases is the legal incidence and the location where it was imposed. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 102 (2005). While the tribe in *Wagnon* failed to meet the legal incidence test, the current case is distinguishable. Unlike *Wagnon* where the tax fell upon a distributor operating on non-Indian land, the Wendat Band owns the WCDC and receives 100% of the corporation's proceeds. R. at 7-8. So regardless of whether the WCDC pays the TPT prior to giving its proceeds to the Wendat Band or the Wendat Band pays the TPT directly, the Wendat Band is ultimately stuck with the bill. Furthermore, the newly acquired fee land is located inside Indian Country because the Wendat Band purchased said land and now includes the property as part of the tribe's reservation. The Wendat Band has successfully proven the legal incidence of the TPT falls on the tribe, therefore preempting the State from collecting the TPT against the WCDC and the commercial development located on fee land owned by the Wendat Band.

CONCLUSION

The Thirteenth Circuit was correct and their judgment should be fully affirmed. Treaty of the Wendat clearly abrogated the Treaty of Wauseon by the text of Article I. Further, the Maumee Reservation was diminished because the Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908) contained explicit language of cession and the present and total surrender of all the tribal interests back to the public domain. However, the Wendat Reservation was not diminished because the Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892) contained none of the hallmarks of diminishment this Court has found to be determinative of reservation status. As a result of the Wendat Reservation not being diminished, the Topanga Cession remains in Indian Country on the Wendat Reservation. The

Wendat Band's interest in providing for the members of the tribe outweighs the State's interest in raising revenue. The legal incidence of the TPT falls on the tribe preempts the State from collecting the TPT against the WCDC and the commercial development located on fee land owned by the Wendat Band. Unless there is an express congressional grant or a willingness to provide services to the tribe, New Dakota is barred from levying the TPT. The Wendat Band of Huron Indians respectfully asks this Court to award the Topanga Cession to their jurisdiction as well as preventing New Dakota from levying the TPT on the WCDC and the commercial development located on Wendat Band owned fee land.