No. 20-1104

IN THE

Supreme Court of the United States

MAUMEE INDIAN NATION,
Petitioners,

v.

WENDAT BAND OF HURON INDIANS,
Respondent.

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

BRIEF FOR THE RESPONDENT
WENDAT BAND OF HURON INDIANS

TEAM T1018

Counsel for the Respondent

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QUESTIONS PRESENTED

This case requires the Court to resolve a dispute between two different federally recognized Indian tribes that each have a well-established treaty relationship with the United States and were then each subsequently subject to allotment.

The District Court in *Maumee Indian Nation v. Wendat Band of Huron Indians*, 305 F. Supp. 3d 44 (D. New Dak. 2018) concluded that the Maumee Reservation was not diminished and that the State of New Dakota was permitted to levy its Transaction Privilege Tax directly on a non-member tribal entity. A divided Thirteenth Circuit reversed. In *Wendat Band of Huron Indians v. Maumee Indian Nation*, 933 F.3d 1088 (13th Cir. 2020) the Thirteenth Circuit held that while the Maumee Reservation has been diminished, the Wendat Reservation remained intact. It further concluded that the State of New Dakota was prohibited from levying its tax on a Wendat tribal entity.

The Maumee Nation maintains that the Thirteenth Circuit erred when it interpreted this Court's most recent opinion in McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) and the Thirteenth Circuit's opinion on infringement and preemption is contrary to well established Supreme Court precedent.

The Questions Presented Are:

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

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

STATEMENT OF THE CASE

1. Statement of Facts

Respondents are the Wendat Band of Huron Indians ("Wendat Band") who have resided in and served as land caretakers in what is now known as the State of New Dakota since time immemorial. Petitioners are the Maumee Indian Nation ("Maumee Nation"), whose traditional homelands are also in New Dakota. The Maumee Nation and the Wendat Band are both culturally distinct federally recognized tribes. Both tribes claim traditional land territories that overlap, specifically where their present reservations share a border. The 1859 Treaty with the Wendat reserves lands east of the Wapakoneta River to the Wendat Band. The 1802 Treaty of Wauseon, ratified by Congress, reserves lands west of the Wapakoneta River to the Maumee Nation.

In the 1830s, the Wapakoneta River moved approximately three miles to the west. This created a section of land which was west of the Wapakoneta River in 1802, but east of it in 1859. Both tribes have maintained the rights to these lands since at least 1937, relying on their respective treaties. For the last eighty years, both tribes have referred to this section of land as the "Topanga Cession." Both dispute ownership of this section. In 1880, the demographics of the Maumee Indian Reservation, the Western Half of the Wendat Reservation, and the Topanga Cession were all above 92% American Indian/Native Alaskan. As of 2010, they are respectively 40.4%, 19%, and 17.9%.

The tribes agree that the Topanga Cession comprises land that was mostly declared surplus under one of the two allotment acts but disagree about which act. Under the General Allotment Act of 1887, both tribes were subject to allotment by Congress. The Wendat Band was paid $2,200,000 for more than 650,000 acres of land. The Maumee Nation was paid about

$2,000,000 for about 400,000 acres of land sold between 1908 and 1934. The Bureau of Indian Affairs was unable to retain the records of which exact parcels the Maumee Nation was compensated for. Neither of the tribes' members were allotted land within the Topanga Cession. The Indians who currently reside there either live in rented accommodation or purchased their lands in fee from non-Indians, the State of New Dakota, and/or the United States. The majority of the Topanga Cession consists of fee lands that have been used for non-commercial purposes.

On December 7, 2013, the Wendat Band purchased a 1,400-acre parcel in fee in the Topanga Cession from non-Indian sellers. On June 6, 2015, the Wendat Band announced its plans to construct a combination residential-commercial development on the parcel. The development would include public housing units for low-income tribal members, a nursing care facility for elders, a tribal cultural center, a tribal museum, and a shopping complex owned by the Wendat Commercial Development Corporation ("WCDC"). The WCDC is owned by the Wendat Band with 100% of corporate profits remitted to the tribal government. The Wendat Band states that the WCDC shopping complex would include a cafe serving traditional Wendat cuisine, a grocery store offering fresh and traditional foods to help prevent the area from becoming a food desert, a salon/spa, a bookstore, and a pharmacy. The WCDC projects that the complex would support at least 350 jobs and earn more than $80 million in gross sales annually. The Wendat Band plans to use these proceeds to fund the tribal public housing and nursing care facility. The cafe, cultural center, and museum are expected to help raise revenue by attracting non-Indian consumers outside of the reservation.

On November 4, 2015, the Maumee Nation contacted the WCDC and the Wendat Tribal Council to remind them that the Maumee Nation considered the Topanga Cession their

land. The Maumee Nation held that any dispute regarding land ownership was resolved when the Wendat Reservation was allegedly diminished by the 1892 allotment act. The Maumee Nation therefore expects the shopping complex to pay the State of New Dakota the 3% Transaction Privilege Tax ("TPT"). The TPT statute allows the State to collect a tax on the gross proceeds of sales or gross income of a business for the 'privilege' of doing business in the State. If the Wendat Band is conducting business on the Maumee Reservation, then the Maumee Nation expects to collect 1.5% of the Wendat Band development's gross proceeds under the TPT. The Maumee Nation would like to use these funds because its largest source of revenue, sustainable timber harvesting, is being threatened by climate change. Their revenues are decreasing by 12% per year. The Maumee Nation therefore would use the TPT funds to pay for tribal scholarships and invest in renewable energy in order to continue providing basic services and jobs for Maumee tribal members. The Maumee Nation stated that its average member's income is 25% lower than the average income of Wendat tribal members. The Maumee Nation wants to use the TPT funds to improve the income of its members and encourage them to be avid consumers of the Wendat shopping complex.

The Wendat Tribal Council and the WCDC hold that the Topanga Cession has been part of the Wendat Reservation since the 1859 Treaty with the Wendat. They argue that if the Topanga Cession was part of the Maumee Reservation after 1859, that it was diminished by the Allotment Act in 1908 and reverted back to Wendat control pursuant to the 1859 treaty. The Wendat Band concedes that the land purchased in the Topanga Cession has not been taken into trust and is not yet Indian fee land. The Band still argues that the state of New Dakota does not have authority to collect the TPT because the land is still Indian Country. The Band

believes that the state's power to tax is therefore preempted by federal law or infringes on the Band's own sovereign powers.

2. Statement of the Proceedings

The issue before the Court is the application of the State of New Dakota's Transaction Privilege Tax (TPT) on the Wendat Band's commercial development. The TPT statute allows the State to collect a tax on the gross proceeds of sales or gross income of a business for the 'privilege' of doing business in the State. The Maumee Nation favors the application, arguing that they should receive 3% of the development's gross proceeds under the tax due to the fact that it is within the Maumee Reservation. On November 18, 2015, the Maumee Nation filed a complaint against the Wendat Band asking the federal court for a Declaration that any development by the WCDC in the Topanga Cession would procure a tax under the TPT. Alternatively, the Maume Nation asked that the Topanga Cession was declared not Indian Country at all, so that one-half of the TPT tax would be remitted to it under §212(6).

The New Dakota District Court ruled in the Maumee Nation's favor, holding that the Maumee Reservation had not been diminished and that the Topanga Cession was part of that territory. *Maumee Indian Nation v. Wendat Band of Huron Indians*, 305 F. Supp. 3d 44 (D. New Dak. 2018). The Court also held that the Treaty of Wauseon had not been abrogated. *Id*. Finally, the Court ruled that despite this holding, the State of New Dakota may levy its TPT in the Topanga Cession because there was no infringement upon the rights of Maumee Nation nor was the tax preempted by federal or tribal interests. *Id*.

The Thirteenth Circuit then held this case for nearly two years, awaiting the U.S. Supreme Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). *Wendat Band of Huron Indians v. Maumee Indian Nation*, 933 F.3d 1088 (13th Cir. 2020). The Thirteenth

Circuit overruled the lower court, holding that the Maumee Nation's claim to the Topanga Cession had been abrogated by the Treaty with the Wendat. *Id*. The Circuit Court also held that the Wendat Reservation had not been diminished and concluded that the Topanga Cession is located in Indian country within that territory. *Id*. Finally, the Circuit Court concluded that the State of New Dakota may not impose a TPT tax on Wendat Band's development in the Topanga Cession, because this imposition would be an infringement on tribal sovereignty and is subject to preemption. *Id*.

SUMMARY OF THE ARGUMENT

This case asks the Court to determine through treaty and allotment act language whether there exists abrogation of prior treaties and diminishment of reservations. Upon looking at the clear language of the relevant treaties and acts, the Court will not be able to find Congressional intent to (1) abrogate the Treaty with the Wendat, or (2) diminish the Wendat Reservation. However, there exists both clear Congressional language, legislative history, and surrounding events, that would lead this Court to conclusively find that (1) the Treaty with the Wendat Abrogated the Treaty of Wauseon, and (2) the Maumee Allotment Act of 1908 Diminished the Maumee Reservation. The Court will then conclusively find that the Topanga Cession can be statutorily considered Indian country within the Wendat Reservation.

This case also asks the Court to determine if a state tax can be imposed on a tribal corporation that may or may not be on an Indian reservation or Indian country. According to long-held Supreme Court precedent, "The Indian nations had always been considered as distinct, independent political communities retaining their original natural rights as undisputed possessors of the soil, from time immemorial." *Worcester v. State of Ga.*, 31 U.S. 515, 519 (1832). *Worcester* provides the foundation for both the doctrine of infringement and the

doctrine of preemption which together an individually prevent the State of New Dakota from collecting the TPT against a Wendat Tribal Corporation.

ARGUMENT

1. The Wendat Band's Land Claims Were Never Abrogated by Treaty or Diminished, so the Topanga Cession is Still Wendat Territory and Indian Country

At the root of this dispute are opposing views about reservation boundaries and diminishment between two neighboring tribes. The Court must decide if Congress intended to diminish the Wendat Band or Maumee Nation Indian reservations. When a reservation is diminished or disestablished, that area now excluded from the reservation is no longer Indian country under 18 U.S.C. § 1151(a), which refers to "all land within the limits of any Indian reservation." Only Congress can disestablish an Indian reservation. Once "a block of land is set aside for [a] Reservation and no matter what happens to the title of individual plots, [the area] retains its reservation status until Congress explicitly indicates otherwise." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). To discern whether Congress made an explicit statement, the Court starts with the statutory text. Statutory language is the "most probative" evidence of congressional intent. *Nebraska v. Parker*, 136 S. Ct. 1072, 1079 (2016). The Court then looks to the "history surrounding the [legislation's] passage," and to the "subsequent demographic history of the opened lands," *id*. at 1080-81. Ultimately, the text is the most important guiding factor, and this Court has never found disestablishment absent clear text. Most recently, this Court went even further in narrowing this foundational analysis by asserting that "When interpreting Congress's work in this arena, no less than any other, our charge is usually to ascertain and follow the original meaning of the law before us." *McGirt,* 140 S. Ct. at 2468.

If this Court cannot find the clear language supporting abrogation of the treaties or diminishment of reservations, this brings into question as to whether the reservation boundary

is riparian in nature, moving with the Wapakoneta River three miles to the west, or fixed at where the river existed before the 1830s. If the boundary is riparian, the Topanga Cession is part of the Wendat Reservation and is within Indian Country. If the boundary is fixed, the territory purchased by the Wendat Band in the Topanga Cession is still Indian Country. Further, if the boundary is fixed, the State has a strong interest in whether a tribal development conducted on the territory can be taxed under the TPT.

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

Similar to diminishment and disestablishment, Indian treaties may be abrogated unilaterally by Congress only by an act that "clearly express[es an] intent to do so." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999). If subsequent statutes or treaties appear inconsistent with an existing treaty, the courts have the ability to determine if there was expressed or unexpressed intent of Congress to abrogate. However, this Court has adopted different standards of review to determine whether Congress intended to abrogate treaty rights. "What is essential is 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." *United States v. Dion*, 476 U.S. 734, 739–40 (1986) (rejecting a per se rule requiring an explicit statement of abrogation from Congress).

The courts should also take into account the trust relationship between the federal government and the Indian tribes, which ought to weigh heavily against implied abrogation of treaties. The "canons of construction applicable in Indian law" are "rooted in the unique trust relationship [with] Indians," and must be upheld by this Court. *Oneida Cty. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 247 (1985). When congressional intent is unclear, this Court has sometimes given considerable difference to tribes to avoid the destruction of treaty rights.

Menominee Tribe v. United States, 391 U.S. 404 (1968) (holding that an Indian Tribe retained their historical hunting and fishing rights even after the federal government ceased to recognize the Tribe). The foundational practices of Indian treaty interpretation come from this Court's decision in *Worcester*, stating that "[t]he language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense." 31 U.S. at 582.

This Court further clarified that in addition to reading the treaties in in favor of Indian interests, it is the courts' "responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people." *Tulee v. Washington*, 315 U.S. 681, 684–85. Treaties should therefore be construed as they were understood by the tribal representatives who participated in their negotiation. *Id*. Courts are also supposed to "look beyond the written words to the larger context that frames the Treaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.'" *Minnesota*, 526 U.S. at 196 (quoting *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943)). So while the plain text is the most important guidance, this Court must also abide by its precedent to take into account the contextual history of a treaty.

The Maumee Nation claims its rights to the Topanga Cession through the Treaty of Wauseon, ratified by Congress in 1802. The treaty states that "the boundary line between the United States and Maumee Nation, shall be the western bank of the river Wapakoneta." The Treaty of Wauseon, Art. III, Oct. 4, 1801, 7 Stat. 1404. In signing the treaty, the Maumee

Indians "acknowledge[d] the lands east, south and west of the lines described in the third article...to belong to the United States." Treaty of Wauseon, Art. VI, Oct. 4, 1801, 7 Stat. 1404. It was during the time between the 1802 Treaty of Wauseon and the 1859 Treaty with the Wendat that the Wapakoneta River moved three miles west. As this river served as an important boundary marker for both tribes, it is important to note how Congress treated this dividing line between the reservations. By the time the Treaty with the Wendat was ratified by Congress in 1859, decades after the river had moved, Congress still chose the river still to be the correct boundary marker for the Wendat Reservation.

The Treaty with the Wendat evidenced that the Band "agree[d] to cede to the United States their title and interest to lands in the New Dakota Territory, excepting those lands East of the Wapakoneta River." Treaty with the Wendat, Art I, March 26, 1859, 35 Stat. 7749. In still marking the river as the western border of the Wendat Reservation beginning at this time, Congress demonstrated their intention to abrogate the Treaty with the Wauseon. The Treaty with the Wauseon which drew their boundary line as "the western bank of the river Wapakoneta," and put the territory now known as the Topanga Cession within their reservation boundaries, was thus overcome by the Treaty with the Wendat. Treaty of Wauseon, Art. III. Oct. 4, 1801, 7 Stat. 1404. By the time the Treaty with the Wendat was ratified in 1859, Congress was simultaneously noting that the Maumee Indians had already "slowly yielded their claims to the bulk of the[ir] Territory." Senator Solomon Foot (VT). Cong. Globe, 35th Cong., 2nd Sess. 5411-5412 (1859). The surrounding circumstances of the Treaty with Wendat therefore demonstrate that Congress was aware that the Maumee's territory was being diminished, and still found the Wapakoneta River to serve as the Wendat's territorial boundary.

While the Treaty with the Wendat contains clear and unambiguous language drawing up the Wendat Reservation's boundaries, both surrounding circumstances and legislative legislative history further bolsters this clear Congressional intent to abrogate the Treaty of Wauseon. Before the Treaty with the Wendat was ratified, Congress discussed how "few Indians live[d] along the Zion tributary and even fewer are to be found near the river Wapakoneta." Senator Lazarus Powell (KY). Cong. Globe, 35th Cong., 2nd Sess. 5411-5412 (1859). While the Maumee claimed that this was their reservation territory at this point, Congress clearly did not recognize it to be of "Indian character," and especially not "Maumee character." However, Congress did note that while the Maumee were diminishing in both size and territory, the Wendat Band stood distinct amongst their tribal neighbors in holding their land and character. In 1859, Congress noted: "The Territory of New Dakota is even now emptying of its Indian population. The Wendat are the last Indians to yield their claims to the bulk of the Territory and I am heartened that what is now a Territory will emerge a state before long." Senator Solomon Foot (VT). Cong. Globe, 35th Cong., 2nd Sess. 5411-5412 (1859). This statement tells us two things. First, that Congress recognized the unique "Indian character" of the Wendat people to hold their land and their tribe. Second, though Congress and the State may have wished "the reservation system would cease" "within a generation at most," this is not what came to fruition. *Solem,* 465 U.S. at 468. *McGirt* reaffirms that "Still, just as wishes are not laws, future plans aren't either." 140 S. Ct. at 2464–65.

This Court has the ability to determine whether subsequent treaties appear inconsistent with an existing treaty. This Court also has the ability to determine if there was expressed or unexpressed intent of Congress to abrogate. First, as discussed, the treaty language shows that Congress intentionally drew the Wendat Reservation's boundary line with the Wapakoneta

River, which in 1859 had already moved three miles west. If there was an inconsistency with the Treaty with the Wauseon, this Court can look to Congress' clear intent to abrogate it with these "new" territorial boundaries. Second, Congress demonstrated both express and unexpressed intent to abrogate the Treaty with the Wauseon. As discussed, Congress' willingness to openly identify the Wendat's boundaries by the Wapakoneta River and their discussion of their distinct "Indian character" being in apposition to that of the Maumee Nation confirms Congress' intent for the Wendat Band to call what is now called the Topanga Cession part of its Reservation. This Court will therefore find that Congress clearly intended for the Treaty with the Wendat to abrogate the Treaty of Wauseon.

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

The rule for finding whether a reservation has been diminished has been clarified by this Court most recently in *McGirt*, relying on the precedent set by *Solem* that "only Congress can divest a reservation of its land and diminish its boundaries." *Solem*, 465 U.S. at 470. Indian consent is not required to diminish a reservation, as this Court decided in *Lone Wolf v. Hitchcock* that Congress could diminish reservations unilaterally. 187 U.S. 553 (1903). *McGirt* therefore recently affirmed that the most probative evidence of diminishment is the statutory language used to open the lands. 140 S. Ct. at 2462–63. This Court has still "also considered the historical context surrounding the passage of the surplus land Acts." *Hagen v. Utah*, 510 U.S. 399, 411(1994). Further, this Court had explained in *Celestine*, that "reservation status depends on the boundaries Congress draws, not on who owns the land inside the reservation's boundaries; "when Congress has once established a reservation, all tracts

included within it remain a part of the reservation until separated therefrom by Congress." *United States v. Celestine,* 215 U.S. 278, 285 (1909).[1]

Legislation has provided examples of giving an "[e]xplicit reference to cession" or an "unconditional commitment ... to compensate the Indian tribe for its opened land." *Solem,* 465 U.S. at 470. This has included incidents where Congress has directed that tribal lands shall be "'restored to the public domain.'" *Hagen,* 510 U.S. at 412. Congress has also explicitly referred to a reservation as being "discontinued," "abolished," or "vacated." *Mattz v. Arnett,* 412 U.S. 481, 504, n. 22 (1973). Disestablishment or diminishment have "never required any particular form of words." *Hagen,* 510 U.S. at 411. But *Nebraska v. Parker* unanimously held that Congress must clearly express its intent to do so, "[c]ommon[ly with an] '[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests.' " 136 S.Ct. at 1079 (quoting *Solem,* 465 U.S. at 470).

Allotment has been held to not be "completely consistent with continued reservation status." *Mattz v. Arnett,* 412 U.S. 481, 497 (1973). This Court again recently reaffirmed that mere allotment does not end a reservation. *McGirt,* 140 S. Ct. at 2464. However, an allotment act may still contain language demonstrating intent to diminish. But where there exists no "statute evincing anything like the "present and total surrender of all tribal interests" in the affected lands," allotment does not disestablish a reservation. *Id*. For example, in *Hagan,* this Court decided "whether the Uintah Indian Reservation was diminished by Congress when it was opened to non-Indian settlers at the turn of the century." 510 U.S. 399, 401 (1994). It recognized that some surplus land acts were in fact found to diminish reservations. *See Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977). The *Hagan* Court held that "the

[1] See *Solem* citing *Celestine* at 104 S.Ct. at 1161.

restoration of unallotted reservation lands to the public domain evidences a congressional intent with respect to those lands inconsistent with the continuation of reservation status. Thus, the existence of such language in the operative section of a surplus land Act indicates that the Act diminished the reservation." 510 U.S. at 414.

Here, the 1908 Maumee Allotment Act contains the clear language that this Court's precedent has held to be evidence of diminished reservation boundaries. The Act states that its clear purpose is to "authorize the allotment, sale, and disposition of the eastern quarter of the Maumee Indian Reservation." Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908). The Maumee would like to claim that this in itself doesn't necessarily mean that the eastern portion was diminished. However, the Act further clarifies that "[u]nclaimed lands in the western three-quarters of the reservation shall continue to be reserved to the Maumee." Maumee Allotment Act of 1908, P.L. 60-8107, §1 (May 29, 1908). The act does not allow for unclaimed lands in the eastern portion of the reservation to stay reserved to the Maumee. Further, the most dispositive language showing *Solem's* [e]xplicit reference to cession in the Act is that the Maumee Nation "agreed to consider the entire eastern quarter surplus and to *cede* their interest in the surplus lands to the United States where it may be returned the public domain by way of this act." Maumee Allotment Act of 1908, P.L. 60-8107, §1 (May 29, 1908) (emphasis added). Thus, the Act on its face shows clear intent for the entire eastern portion to be diminished through clear statements of "cession" and "returning to the public domain," both of which this Court has held to be dispositive indicators of diminishment.[2]

[2] This is entirely in line with Judge Lahoz-Gonzales' concurrence/dissent in the Thirteenth Circuit, where they find that "the Maumee Act contains clear cession language." *Wendat Band of Huron Indians v. Maumee Indian Nation*, 933 F.3d 1088 (13th Cir. 2020).

The Maumee will try to rely on precedent that states that the mere opening up of lands does not conclusively mean that there was diminishment, however, this is not such case. In *DeCoteau*, this Court held that where "negotiations leading to [an a]greement show plainly that the Indians were willing to convey to the Government, for a sum certain, all of their interest in all of their unallotted lands," that a reservation had been terminated. *DeCoteau v. Dist. Cty. Court for Tenth Judicial Dist.*, 420 U.S. 425, 445 (1975). Similar to the 1891 Act that the *DeCoteau* looked at, the Maumee Act does not merely open lands to settlement, but also "appropriates and vests in the tribe a sum certain...in payment for the express cession" and expressly "cede[s] their interest" in the eastern portion. *DeCoteau,* 420 U.S. at 448. While the Act's language is clear on its face, the legislative history of the Maumee Allotment Act further clarifies this point. It demonstrates that "the purpose of this bill is to provide for the survey of the lands of the Maumee Indian Reservation...and for the allotment of the lands in severalty to the Indians and for the sale and disposal of the surplus lands after allotment." Representative Pray. *Congressional Record* 42 (May 29, 1908) p. H2345. On file with Respondent; Accessed 11/6/2020. When the question of "all lands unsold" was discussed, asking if they "will continue to belong to the Indians," the response was that Congress "expect[ed] all of the opened lands to be sold." Representative Gaines (TN) & Representative Pray. *Congressional Record* 42 (May 29, 1908) p. H2345. On file with Respondent; Accessed 11/6/2020. This agreement further demonstrates that Congress' intent was to not only open the Maumee reservation through allotment, but to be sold to non-members, thus diminishing the reservation altogether.

Even further, looking at the negotiations leading up to this Act in the same way that the *DeCoteau* Court did, this Court will find that further evidence of Congressional intent to diminish the Maumee Reservation:

> We conferred with the Commissioner of Indian Affairs and his assistants, particularly with Major Hans,who had gone into New Dakota among these Maumee Indians last year, and after spending considerable time had a written agreement with them in regard to the disposal of this reservation, and the amendments, which are quite lengthy here, were drawn for the purpose of making this bill conform to the terms of that written agreement in every essential detail. Representative Hackney. *Congressional Record* 42 (May 29, 1908) p. H2345. On file with Respondent; Accessed 11/6/2020.

This history illustrates that both Congress and the Maumee Nation had already been discussing the "disposal" of this territory. This is in line with practices that were being acknowledged long before the act of 1908, where Congress recognized that the Maumee exemplified Indians who were "hav[ing] slowly yielded their claims to the bulk of the[ir] Territory." Senator Solomon Foot (VT). Cong. Globe, 35th Cong., 2nd Sess. 5411-5412 (1859). The Maumee Nation was then not unfamiliar to how the process of ceding land would work and that it would directly result in a diminished reservation territory. This is supported by this Court's precedent in *Rosebud Sioux Tribe v. Kneip*, where circumstances surrounding the passage of the three Rosebud Acts unequivocally demonstrated that Congress meant for each Act to diminish the Rosebud Reservation. 430 U.S. 584. Exactly as is shown in this case, the tribe in *Rosebud* even voted in favor of an agreement to cede a portion of their land to the United States in exchange for a sum certain. *Id*. In addition to demonstrating the active consent of reservation diminishment, the makeup of the Maumee Nation was increasingly in a state of diminishment already. Congress noted that "[i]n the many years since the first treaty was made at Wauseon, the Maumee have been reduced in number and no longer inhabit parts of their territory." *Id.* This is reflected in the census data that shows a significant drop in Maumee Indians on the

Maumee Reservation after 1910. *Maumee Indian Nation v. Wendat Band of Huron Indians*, 305 F. Supp. 3d 44 (D. New Dak. 2018).

Though consent is not required, as is evidenced by *Lone Wolf*, the record still demonstrates a unanimous understanding of Maumee Reservation cession and diminishment. Leading up to the Act, "an agreement was entered into which was ratified by 95 per cent of the Indians of the reservation." Representative Pray, *Congressional Record* 42 (May 29, 1908) p. H2345. On file with Respondent; Accessed 11/6/2020. And it was confirmed that the bill was "made to conform in every respect to the wishes of the Indians." *Id.* The Maumee Nation was therefore familiar with these types of federal agreements. The concluding statement of Congress to state that "[t]his bill is on all fours with all of the bills of this character opening up Indian reservations," solidified the express intent of Congress to diminish the eastern portion of the Maumee Reservation, including the Topanga Cession. Representative Stevens (TX). *Congressional Record* 42 (May 29, 1908) p. H2345. On file with Respondent; Accessed 11/6/2020. This Court will find therefore that the Act on its face alone demonstrates diminishment. The additions of the legislative history and demographic information simply bolster this clear intent.

Finally, we find it essential to revisit this Court's assertion in *Celestine*, that "reservation status depends on the boundaries Congress draws." 215 U.S. at 285. Even if this Court is not convinced by the clear language of cession in the Maumee Allotment Act, precedent dictates that the Maumee's reservation boundary moved with the Wapakoneta River, as dictated by the original treaty agreement. *See* Treaty of Wauseon, Art. III, Oct. 4, 1801, 7 Stat. 1404. Because the River moved three miles east, that boundary drawn by Congress demonstrates that the Topanga Cession is still not within the Maumee Reservation. Ultimately,

this Court can find clear evidence on both points that the Topanga Cession is no longer part of the Maumee Reservation.

C. The Wendat Allotment Act Did Not Diminish the Wendat Reservation and the Topanga Cession is Indian country

The dispositive and undisputed fact is that the Wendat Allotment Act does not contain the clear language of diminishment that is found in the Maumee Allotment Act or in previous cases of diminishment. As previously discussed, this Court has catalogued numerous examples of explicit diminishment language. For instance, Congress may provide an "[e]xplicit reference to cession" to the United States, or an "unconditional commitment...to compensate the Indian tribe for its opened land." *Nebraska*, 136 S. Ct. at 1075 (quoting *Solem*, 465 U.S. at 470). Alternatively, Congress may "restor[e]" tracts to "the public, domain." *Id*. This language can be found nowhere in the Wendat Allotment Act and this Court will therefore not find that the Act had diminished the Wendat Reservation.

The 1892 Wendat Allotment Act is titled as an "act for the relief and civilization of the Wendat Band of Huron Indians." As previously discussed, this reflects both the State and Congress' desire to assimilate Indians into the life and society that existed outside of Indian reservations, otherwise known as European-American society. The Act tells us that "western half of the lands reserved by the Wendat Band in the 1859 Treaty" was to be surveyed by an Indian Agent for allotment. Wendat Allotment Act, P.L. 52-8222, §1 (Jan. 14, 1892). Again, as this Court has made clear time and again, allotment in itself does not result in diminishment or disestablishment. *McGirt*, 140 S. Ct. at 2464. The Act also stated that "[t]he 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." Wendat Allotment Act, P.L. 52-8222, §1 (Jan. 14, 1892). Congress therefore expressed to do two things here. First, to open

up the Wendat Reservation to allotment by "mov[ing] the Indians unto their allotments as quickly as possible, and to open the surplus lands to settlement." Wendat Allotment Act, P.L. 52-8222, §4 (Jan. 14, 1892). And second, to make sure that a portion of the Wendat Reservation was still held intact by the tribe and not subject to checkerboard status.

This case is similar to *Parker*, where this Court found that an 1882 Act contained none of the common textual indications that expressed such clear intent. The *Parker* Court was looking for "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests" or "an unconditional commitment from Congress to compensate the Indian tribe for its opened land." *Solem*, 465 U.S. at 470. The Court ultimately found that the 1882 Act's language which opened the land "for settlement under such rules and regulations as [the Secretary] may prescribe," falls into a category of surplus land acts that "merely opened reservation land to settlement." *DeCoteau*, 420 U.S. at 448. Further, this Court's most recent decision in *McGirt* clarified this practice, recounting:

> The federal government issued its own land patents to many homesteaders throughout the West. These patents transferred legal title and are the basis for much of the private land ownership in a number of States today. But no one thinks any of this diminished the United States's claim to sovereignty over any land. To accomplish that would require an act of cession, the transfer of a sovereign claim from one nation to another. 140 S. Ct. at 2464.

Applying these previous court precedents to the case at hand, this Court should find consistent with the fact that the Wendat Allotment Act was merely a standard practice opening up a reservation to homesteaders. Because there is no explicit language in the text of the Act demonstrating an intent to diminish, this Court will not be able to find diminishment of the Wendat Reservation. Justice Gorsuch affirmed in *McGirt* that the *Solem* precedent allows our analysis to stop here. Where the state attempted to "classif[y] and categorize[] how we should approach the question of disestablishment into three "steps."" *Id.* at 2468. Gorsuch made it

clear that the state was mistakenly reading "*Solem* as requiring us to examine the laws passed by Congress at the first step, contemporary events at the second, and even later events and demographics at the third." *Id.* He then asserts that this approach is incorrect: "When interpreting Congress's work in this arena, no less than any other, our charge is usually to ascertain and follow the original meaning of the law before us." *Id*. Therefore, according to this Court's most recent precedent, there can be found no diminishment of the Wendat Reservation by the Wendat Allotment Act.

Nonetheless, in the same manner as Justice Gorsuch in *McGirt*, we will still look to the legislative history of the Wendat Allotment Act to bolster this point. The Maumee Nation will point to the Act's language that "[b]y opening of this reservation more than 2,000,000 acres of valuable land will be added to the public domain." Secretary John Noble, *Congressional Record* 23 (Jan 14, 1892) p. H1777. On file with Respondent; Accessed 11/6/2020. But taken in context with surrounding developments of allotment and diminishing or disestablishing other Indian reservations, it is not surprisingly that Congress would merely discuss this possibility. The act was being urged because there were "many families awaiting the opening of these additional lands." Secretary John Noble, *Congressional Record* 23 (Jan 14, 1892) p. H1777. On file with Respondent; Accessed 11/6/2020. It was noted that "anticipating the opening of these lands, a very large number of people congregated along the border in the early fall…[they] have been settled there and have been waiting all winter." Representative Harvey, *Congressional Record* 23 (Jan 14, 1892) p. H1777. On file with Respondent; Accessed 11/6/2020. However, the large amount of 2,000,000 acres of land that was discussed by Congress when using the phrase "added to the public domain" never actually made it into the Wendat Allotment Act. There were only 650,000 acres of land that were allotted, far less than

what was mentioned in the legislative history. Further, if this Court were to find that there could be diminishment by the Wendat Allotment Act, the price paid by the Federal Government for this land would not be consistent with previous ruling where diminishment was found. Congress discussed that "[i]n this reservation of 4,000,000 acres there is twice as much land to be allotted for $15,000 as was allotted for the same amount in the case of the Creek lands." *Id.* However, in the Treaty with the Wendat, Congress agreed "to provide for the Wendat, if they shall at any time hereafter wish to change their residence, an amount...to an extent equal to what has been furnished any other Indian tribe or tribes emigrating, and in just proportion to their numbers." Art V, March 26, 1859, 35 Stat. 7749. The text of the Allotment Act simply does not reflect what was discussed in Congress or what had been negotiated in the Treaty with the Wendat.

The Maumee Nation therefore only relies on the fact that this Act opened up the Wendat Reservation to allotment, which is not enough to find diminishment. In *Mattz*, the Court held that an 1892 Act of Congress did not terminate a reservation because that Act declared the reservation lands 'subject to settlement, entry, and purchase' under the homestead laws of the United States, . Similar to the case here, that 1892 Act also "empowered the Secretary of the Interior to allot tracts to tribal members, and provided that any proceeds of land sales to settlers should be placed in a fund for the tribe's benefit." *DeCoteau,* 420 U.S. 425, 447 (1975). The 1892 statute could be considered a termination provision only if continued reservation status were inconsistent with the mere opening of lands to settlements, and such is not the case.

The Secretary of the Interior even requested "for an appropriation of funds and a full authorization to allot the Wendat lands" which led to the discussion of how this Act would resolve the "Indian question". Speaker & Representative Ullrich, *Congressional Record* 23

(Jan 14, 1892) p. H1777. On file with Respondent; Accessed 11/6/2020. This "Indian character" came into discussion again when the Indian Agent who went to survey the land stated that "the Indians stood silent, stubborn, and obstinate, and would not have anything to do with the matter, would not come in and take their allotments or make any selections." Representative Mansur, *Congressional Record* 23 (Jan 14, 1892) p. H1777. On file with Respondent; Accessed 11/6/2020. As previously mentioned, Congress therefore knew that many Wendat Indians were not agreeable to allotment and asserted holding their land. Considering that Congress had discussed this issue at length, we must conclude that if they had intended for diminishment to be the purpose of the Act, expressing so would have made it into the text of the Act. Between the language of the legislative history, and the clear text of the Act, there would have been clear opportunities for Congress to have stated that they intended to "discontinue[]," "abolish[]," "vacate[]," "restore[] to the public domain," or "surrender of all tribal interests." *Solem*, 465 U.S. at 47, *Hagen*, 510 U.S. at 412, *Mattz*, 412 U.S. at 504, n. 22. While this case does not need to look past the plain text of the Wendat Allotment Act that is absent of diminishment language, this case is still consistent with previous rulings that did look to both the legislative history and surrounding events that indicate that Congress did not intend to diminish the reservation.

2. Both the Doctrine of Indian Preemption and Infringement Prevent the State of New Dakota from Collecting the Transaction Privilege Tax Against a Wendat Tribal Corporation

"Indian country" is defined in 18 U.S.C. § 1151 as "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the

original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." When a reservation is diminished or disestablished, the area now excluded from the reservation is no longer Indian country per 18 U.S.C. § 1151(a), which refers to "all land within the limits of any Indian reservation." Particular sub-portions of the excluded area, however, may still qualify as Indian country under subsections (b) and (c) of § 1151—as dependent Indian communities or allotments in trust.

Even if this court determines that the Wendat Reservation was diminished, the fee land, purchased by the Wendat Commercial Development Corporation (WCDC) from non-Indian owners within the Topanga Cession, still qualifies as "Indian Country" under the §1151(b) exception enumerated above. Therefore, the combination residential – commercial development that WCDC plans to build on this parcel of land will be situated within Indian country.

One of the basic premises underlying the constitutional allocation of Indian affairs to the federal government was that the states could not be relied upon to deal fairly with the Indians.[3] Historically, the courts viewed tribal sovereignty as a shield against state civil jurisdiction in Indian Country. In *Worcester v. Georgia*, the Court determined that "the treaties and laws of the United States contemplate the Indian territory as completely separated from that of the States and provide that all intercourse with them shall be carried on exclusively by the Government of the Union." 31 U.S. at 519. Thus, "The Cherokee nation, then, is a distinct community, occupying its own territory … in which the laws of Georgia can have no force....

[3] *See* Powers of Indian Tribes, 55 Interior Dec. 14 (Oct. 25, 1934).

Id. at 520.[4] The prohibitions on state laws protect tribal control over the right to enter, as was at issue in *Worcester*, and have been subsequently expanded to include the right to tax. *Bryan v. Itasca County*, 426 U.S. 373 (1976).

In *Bryan v. Itasca County*, a Minnesota county attempted to levy a task against the mobile home of an enrolled member of the Minnesota Chippewa Tribe. The mobile home was located both within the bounds of the reservation and on trust land. Citing the prior Court opinions in *Mescalero Apache Tribe v. Jones* and *McClanahan v. Arizona State Tax Comm'n*, the Court ruled that the state did not have the authority to impose such a tax or, more generally, to regulate behavior on the reservation. *Bryan* at 373. This landmark case also called into question the ability of states to impose any sorts of regulations on reservation land, even beyond the levying of taxes. *Id*. at 373, fn 2.

Note that in cases such as *County of Yakama v. Confederated Tribes*, the Court has held that the Indian Allotment Act of 1887 does permit a county to impose an ad valorem tax on reservation land patented in fee pursuant to the Act, even when this land is owned by reservation Indians or the tribe itself. *County of Yakama v. Confederated Tribes and Bands of Yakama Nation, 502 U.S. 251.* However, in *Yakama*, the Court was careful to distinguish between the two taxes in question: the ad valorem tax and the excise tax on sales of fee-patented reservation land. The ad valorem tax was permitted because it exclusively burdened the land and thus qualified as a "taxation...of land" per the Indian Allotment Act. *Id*. at 252.

[4] In cases such as *White Mountain Apache Tribe v. Bracker*, the Court has articulated a place for States in relation to sovereign Indian nations stating: "Long ago the Court departed from Mr. Chief Justice Marshall's view that 'the laws of [a state] can have no force' within reservation boundaries." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141-42 (1980). (quoting *Worcester*, 31 U.S. at 561). However, even in *Bracker*, the Court ultimately determined that Arizona's tax assessed against a non-Indian working exclusively for a tribe and within reservation boundaries was preempted by federal law. Thus, even if a State does have civil jurisdiction in Indian Country, they are still subject to the doctrine of preemption.

The excise tax was not permitted because "[t]he Indian General Allotment Act explicitly authorizes only 'taxation of ... land,' not 'taxation with respect to land,' 'taxation of transactions involving land,' or 'taxation based on the value of land.' The tax in this case is a Transaction Privilege Tax (TPT) levied on the gross process of business income and paid to the state for the privilege of doing business in that state. This tax is even less related to the taxation of land than the excise tax which the Court denied in *Yakama*, thus the narrow tax exemption permitted in *Yakama* does not apply to these case facts.[5]

The precedent established in *Worcester*, *Mescalero*, *McClanahan*, and *Bryan* makes it clear that the State of New Dakota does not have jurisdiction to collect its transaction privilege tax against a Wendat Tribal Corporation. *Id*. However, if this court determines that this precedent does not apply to the facts of this particular case, then the Wendat Tribe relies on both the doctrines of infringement and preemption. Both doctrines, applied together or individually, establish a strong case in favor of the Wendat Tribal Corporation's argument that the State of New Dakota does not have jurisdiction to collect its transaction privilege tax. The power to tax is a fundamental attribute of tribal sovereignty. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982).[6] If this Court permits the State of New Dakota to levy a tax on land within Wendat reservation boundaries, it will infringe upon the adjudicatory and regulatory jurisdiction critical to the Wendat Tribe's sovereignty.

[5] *See Also, Ramah Navajo School Bd., Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982). In *Ramah*, a Navajo school board and construction company challenged the imposition of a state tax on the proceeds from the construction of a school within reservation boundaries. *Id* at 834. Once again, the state was preempted from taxing non-Indians doing business with tribal entities within reservation boundaries. *Id*.

[6] *Merrion*, however, was careful to note that an Indian tribe's inherent power to tax only extended to "'transactions occurring on *trust lands* and significantly involving a tribe or its members.'" 455 U.S. at 137. The Wendat Tribal Corporation would contend that even if the tribe's inherent power to tax extends only to trust lands, the limit on the State's power to tax tribal entities applies throughout all reservation lands, irrespective of allotment. c

A. Doctrine of Infringement Prevents the State of New Dakota from Collecting Its Transaction Privilege Tax Against a Wendat Tribal Corporation

The Doctrine of Infringement extends from the basic holding of *Worcester*. Essentially, absent governing Acts of Congress, the case turns on whether the state action "infringed on the right of reservation Indians to make their own laws and be ruled by them." *Worcester* at 219-220. Thus, the question for this court is: Does the State of New Dakota's TPT infringe upon the right of the Wendat Tribe to make their own laws and be ruled by them?

The seminal decision for defining jurisdiction over claims by non-Indians against Indians when the events in question took place within reservation boundaries is *Williams v. Lee,* 358 U.S. 217 (1959). In *Williams*, a non-Indian operated a general store in Arizona under a license required by the federal government. The owners of the store extended credit to enrolled members of Navajo Nation and when those customers did not pay in full for the goods they had purchased, the store owners wanted the state to intervene and collect on the debt. The Supreme Court held that the state did not have jurisdiction to collect on this debt because state jurisdiction in this matter would threaten the sovereignty of the Navajo Nation. In his majority opinion, Justice Black relied heavily on Justice Marshall's position in *Worcester* that state laws "have no force" in Indian country. *Id*. at 219. He further stated, "[o]ver the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of Worcester has remained." *Id.*[7]

The Court in *Williams* adopted the *Worcester* principle of adjudicatory authority and established the "infringement test" as follows: If state-court jurisdiction over Indians or

[7] The Court in *Williams* also noted that Congress in PL 280 had provided the sole means for a state to acquire civil and criminal jurisdiction in Indian Country. However, the issue before this court centers on taxing authority rather than law enforcement at issue in PL 280.

activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law.[8] *Worcester*, 31 U.S. at 540. In 1997, the Supreme Court returned to the question of state civil jurisdiction in Indian Country in the case of *Strate v. A-1 Contractors*. *State v. A-1 Contractors*, 520 U.S. 438 (1997). This case demonstrates the limits of the *Williams* infringement test. *Strate* concerned a car accident between persons not tribally enrolled on a state highway that ran through a reservation. The plaintiff filed the case in tribal court, but tribal jurisdiction was contested by the defendant. The Court held that the tribal court did not have jurisdiction over a dispute between non-enrolled persons that took place on land ceded to the state for the purpose of building a highway through a reservation. *Strate*, 520 U.S. at 459.

In coming to this decision, the Court relied upon both *Williams* and *Montana v. United States*, 450 U.S. 544 (1981). *Montana* held that the tribe, as a domestic dependent nation, had no power to regulate nonmember activities on nonmember-owned fee lands. Montana did specify two exceptions by which a tribe could regulate non-Indian activities on fee-owned reservation lands: (1) a tribe may regulate and tax "the activities of nonmembers who enter consensual relationships with the tribe or its members," and (2) a tribe may regulate conduct of nonmembers that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id*. at 565-66. The Court in *Strate* determined that "opening the Tribal Court for [petitioners] optional use is not necessary to protect tribal self-government; and requiring [petitioner] and [defendant] to defend against this commonplace state highway accident claim in an unfamiliar court is not crucial to the Tribes' political integrity, economic security, or health or welfare. *Strate*, 520 U.S. at 459. This case

[8] Subsequently applied by the Court in *Fisher* v. *District Court*, 424 U.S. 382 (1976), and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987).

demonstrates how the Supreme Court applies both the evolution of the *Montana* standard and the *Williams* infringement test to determine the extent of state jurisdiction in Indian Country.

In this case, the State of New Dakota statute 4 N.D.C. §212 provides that businesses operating within the state must obtain a Transactional Privilege Tax (TPT) license and remit to the state 3.0% of gross proceeds of sales or gross income on transactions commenced in the state. 4 N.D.C. §212(1) - (2). The State of New Dakota will then remit to a tribe the proceeds of the TPT if the taxed entity is operating within reservation boundaries. 4 N.D.C. §212(5). The only exception to the TPT is if the entity is owned by the tribe *and* is operating on trust land. 4 N.D.C. §212(4). Notably, failure to obtain a TPT license or pay the tax is as a Class 1 Misdemeanor. 4 N.D.C. §212(7). The Wendat Tribe, as whole owner of the Wendat Commercial Development Corporation (WCDC) contests the attempts by the State of New Dakota to levy the TPT on the combined residential-commercial development that is planned for land within the Topanga Session.

The prospectus for this complex indicates that it will gross $80 million in sales annually. These proceeds will be used to "fund the tribal public housing and nursing care facilities whose operating costs would otherwise pose a financial hardship to the Wendat Band and could not be constructed." *Maumee Indian Nation,* 305 F. Supp. 3d 44. These facts present an even more compelling case for this court's determination of state infringement than either *Williams* or *Strate*. In applying the *Williams* infringement test, it is clear that the state tax would infringe upon the Wendat tribe to make their own laws and be ruled by them. The funds from the commercial development will be applied for the essential tribal functions of housing and nursing care. These are fundamental functions for any government, and the State of New Dakota's attempt to siphon money away from these tribal functions directly threatens their

sovereignty. Furthermore, the State's argument that they should collect the tax because "the centralization of collection and enforcement … is the most effective means of providing these funds to tribes" directly threatens tribal sovereignty. 4 N.D.C. §212(5). Mere convenience cannot contravene decades of clear precedent that favors tribal sovereignty over state civil jurisdiction in Indian Country.

In turning to the *Montana* test, this court should determine whether the Tribe's ability to both determine whether a tax should be paid to the State on the proceeds of the WCDC development and the tribe's ability to control the method of the tax collection are crucial to the Tribes' political integrity, economic security, or health or welfare. Unlike the facts presented in *Strate,* it is clear in this case that a tax on the development presents a direct threat to the Tribe's sustained economic security, health, and welfare. Furthermore, the involvement of the state in the collection of the tax is a threat to the Tribe's political integrity.

Under either the *Williams* infringement test or the *Montana* test, it is clear that Wendat Tribal sovereignty is threatened by the application of 4 N.D.C. §212. If this court permits the State of New Dakota to levy their 3% TPT tax, $2.4 million dollars will be unavailable to the tribe to manage these large-scale projects crucial to the health, safety, and economic security of their sovereign nation.

B. Doctrine of Preemption Prevents the State of New Dakota from Collecting Its Transaction Privilege Tax Against a Wendat Tribal Corporation

Even if this Court does not agree that the doctrine of infringement prevents the State of New Dakota from collecting the TPT, the doctrine of preemption prevents the state from applying 4 N.D.C. §212 to the WCDC. Preemption stems from the proposition that Congress alone has plenary power to define tribal jurisdiction. Thus, the nature of the trust relationship between Congress and tribal sovereign nations is that Congress may define how much

sovereignty a given tribe may use and how they may use it. Initially, Congress exercised this power by ratifying the treaties that the Executive negotiated with the tribes themselves, as we see in this case with the ratification of the Treaty with the Wendat in 1859.

The plenary powers that Congress retains means that state laws are not applicable to enrolled members within reservation boundaries *except* where Congress has expressly provided state laws should apply. The case that most clearly demonstrates the nature of the trust relationship in the context of the preemption doctrine is *McClanahan v. AZ State Tax Comm'n. McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973). In *McLanahan*, Arizona attempted to impose personal income tax on an enrolled member of the Navajo Nation, living within reservation boundaries, whose entire income was derived from reservation sources. *Id*. The Court held that Arizona did not have jurisdiction to impose the tax as taxation of Indians on reservation land with reservation income fell within the exclusive jurisdiction of the federal government and the tribe. *Id*. In its analysis, the Court read the applicable statutes and treaties with the "tradition of sovereignty" in mind and, in the process, defined its perspective on the nature of tribal sovereignty. *Id*. at 173. The Court determined that virtually all of the tribe's sovereignty had been delivered in trust to the federal government. *Id*. at 172. By focusing on preemption rather than tribal sovereignty, the Court seems to imply tribal sovereignty is placed into a federal preserve, and then treaties or congressional laws set the rules protecting the tribes domestic sovereignty and thus preempting state jurisdiction.

In *McClanahan*, the Navajo Treaty of Fort Sumner of 1868 set apart a reservation for the "use and occupation of the Navajo Tribe of Indians," and thus retained civil jurisdiction via federal treaty protection. *McClanahan* at 174. In turn, as states were admitted to the Union, the establishing acts usually contained provisions by which the state disclaimed all rights and

title to jurisdiction over land and property held by tribal nations and protected by treaty. Given the elevation of the relationship between tribes and the federal government and the fact that treaties between tribes and the federal government often predated the establishment of the states themselves, the Court has subsequently held that states cannot violate federal preemption by "interfer[ing] with or [acting] incompatibl[y] with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983). This gives rise to the possibility that a state's interest may override tribal sovereignty, but the presumption remains in favor of tribal sovereignty under the protection of federal preemption.

In *White Mountain Apache v. Bracker*, the Court relied upon the *McClanahan* decision to determine that Arizona state taxes assessed against a non-Indian contractor working exclusively for the White Mountain Apache tribe within the boundaries of the reservation were preempted by federal law. *White Mountain Apache v. Bracker*, 448 U.S. 136 (1980). The Court acknowledged that there is no "rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members." *Id*. at 142. However, citing *McClanahan*, Justice Marshall's majority opinion stated that "[a]mbiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *Id*. at 143-144. Justice Marshall clarifies that when "on-reservation conduct involving only Indians is at issue, state law is generally inapplicable." *Id.* at 144. However, when a state asserts authority over the conduct of non-Indians engaging in activity on the reservation, the court must conduct a "particularized inquiry into the nature of the state, federal, and tribal interests at stake" to determine whether, "in the specific context, the exercise of state authority would

violate federal law." *Id* at 145. The fact-pattern in *White Mountain* required the court to engage in the particularized inquiry Justice Marshall articulated and through that inquiry, the Court determined that the Arizona tax would "threaten the overriding federal objective of guaranteeing the Indians that they will 'receive... the benefits of whatever profit [the forest] is capable of yielding…" per the language of 25 CFR § 141.3 (a)(3) (1979). *Id*. at 149. Furthermore, the Court determined that the State did not have a legitimate interest for the taxes they sought to impose, and the tax was not in return for government functions it performed for those on whom the taxes fell. *Id*. at 150. Thus, the Court entertained the idea introduced in *McClanahan* and extended in *Mescalero* that state interests might be sufficient to justify the assertion of state authority but ultimately found that the federal interests in regulation and the tribal sovereignty concerns override any articulated state interests.

In this case, the Court must look to the text of the Treaty with the Wendat of 1859, the text of 4 N.D.C. §212, and the text of the Native American Business Incubator Act in order to determine whether Congress has expressly provided state laws should apply or, if not, whether the state has articulated a clear interest in applying the TPT to the WCDC that is sufficiently compelling to overcome the presumption of federal preemption.

First, we turn to the Treaty with the Wendat of 1859. In Article 1, it is clear that at the time of the ratification of the treaty what is now the State of New Dakota was merely the "New Dakota Territory." Treaty with the Wendat, Art I, March 26, 1859, 35 Stat. 7749. Thus, like in *McClanahan*, the trust relationship between the Tribe and the federal government predates the establishment of the State. Other than this brief mention of the New Dakota Territory, the rest of the treaty expounds upon only relations between the Wendat Tribe and the United States.

Nothing in the text of the treaty suggests that Congress expressly provided state laws should apply within reservation boundaries.

Next, we review the text of 4 N.D.C. §212. Importantly, this is a state statute. There is no indication that this statute was implemented at the direction of Congress or as part of a larger federal legislative agenda. Nevertheless, the state legislation may provide clues as to the State interest in levying the TPT. Section 3 indicates that the purpose of the tax is "maintaining a robust and viable commercial market within the state including funding for the Department of Commerce, funding for civil courts … maintaining roads and other transport infrastructure … and other commercial purposes. 4 N.D.C. §212(3). These purposes seem compelling enough but in the subsequent Sections 4, the text stipulates that "in recognition of the unique relationship between New Dakota and its twelve constituent Indian tribes, no Indian tribe or tribal business operating within its own reservation on land held in trust … must obtain a license or collect a tax." 4 N.D.C. §212(4). Furthermore, in Section 5, the text stipulates that the State will "remit to each tribe the proceeds of the [TPT] collected from all entities operating on their respective reservations that do not fall within the exemption of [Section 4]." Sections 4 and 5 taken in combination provide a concession from the State of New Dakota to the argument that the tax is either a necessary return for government services performed or legitimately necessary to further commercial interests, as the Court required in *Bracker*. *Bracker*, 448 U.S. at 150. Even if the Court is willing to overlook the lack of express Congressional authority, the State interests in levying the tax are not sufficient to overcome the presumption of federal preemption.

Finally, we review the recent legislative development, the Native American Business Incubators Program Act, signed into law in October 2020. 116 P.L. 174, 134 Stat. 839 (2020).[9] Recent legislative developments are the strongest indication of Congressional objectives and potential clashes with state objectives. The stated purpose of the bill is to "stimulate economic development by providing Native entrepreneurs with the tools necessary to grow businesses that offer products and services to reservation communities." *Id*. at §2(5). The text of the law refers to various federal agency partnerships but makes no mention of state partnerships or state authority to regulate the distribution of program grants or incubator maintenance. *Id*. at §4(e)(1)(B), §7. As a tribal owned business dedicated to establishing a sustainable economic enterprise that will provide necessary products and services for the reservation community, the WCDC fits directly within the purview of the Act. Like in *Bracker*, this court should look to the text relevant federal legislation, such as this Act, as an indication of the state's role in relation to the federal government. The text of this Act makes it clear that tribal economic development is a priority for the federal government and, most importantly, that Congress does not envision a role for the state in partnering with tribal governments to encourage such development.

Taking the Treaty language, Statute language, and relevant legislation into consideration, it is clear that when it comes to commercial development for tribal corporations, state interests do not outweigh the presumption of federal preemption.

[9] Formerly H.R. 1900, 116th Cong. (2019-2020).

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court affirm the judgement from the Thirteenth Circuit.