No. 20-1104

IN THE
SUPREME COURT OF THE UNITED STATES

SPRING 2021

MAUMEE INDIAN NATION,

Petitioners,

v.

WENDAT BAND OF HURON INDIANS,

Respondents.

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

BRIEF FOR PETITIONERS

T1019
Counsel for Petitioners

Oral Argument Requested

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases:

United States Circuit Court of Appeals Cases:

Constitutional Provisions:

Federal Statutes:

United States Treaties:

Legislative Materials:

Secondary Sources:

Ameyali Ramos Castillo, Kirsty Galloway McLean, *Energy Innovation and Traditional Knowledge*, Our World: Brought to you by United Nations University (November 2, 2012) https://ourworld.unu.edu/en/energy-innovation-and-traditional-knowledge.....27

Annie Sneed, *What Conservation Efforts Can Learn from Indigenous Communities* (May 29, 2019), https://www.scientificamerican.com/article/what-conservation-efforts-can-learn-from-indigenous-communities/ 26

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QUESTIONS PRESENTED

1. Did the Treaty with the Wendat abrogate the Treaty of Wauseon and/or did the Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908) diminish the Maumee Reservation? If so, did the Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892) also diminish the Wendat Reservation or is the Topanga Cession outside of Indian country?
2. Assuming the Topanga Cession is still in Indian country, does either the doctrine of Indian preemption or infringement prevent the State of New Dakota from collecting its Transaction Privilege Tax against a Wendat tribal corporation?

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

Both the Maumee Indian Nation and the Wendat Band of the Huron Indians are federally recognized tribes, with traditional lands located in what is now the state of New Dakota. R. 4. This dispute arises out of land claimed by both tribes, as well as the applicability of New Dakota's Transaction Privilege Tax ("TPT") to the Wendat Band's proposed mixed-use development. R. 4-5. While each tribe claims treaty rights to the disputed area, an area known as the "Topanga Cession", both sides agree that the Maumee Nation's treaty rights date from the 1802 Treaty of Wauseon, while the Wendat Band's treaty rights date from the Treaty with the Wendat of 1859. *Id.*In 1802, the Maumee Nation received treaty reserves on the lands west of the Wapakoneta River, while in 1859, the Wendat Band received reserves in the lands to the east of the Wapakoneta River. R. 5. However, during the 1830's, the course of the river changed, moving roughly three miles to the west. *Id*. Thus, this land, (the "Topanga Cession") that was held by the Maumee Nation as of 1802 was given to the Wendat Band in 1859, based on the then current path of the river. *Id*. Additionally, both tribes were later subjected to allotment by Congress. R. 5.Between 1908 and 1934, the Maumee Nation received roughly $2 million for land sold by the Bureau of Indian Affairs ("BIA") in the Topanga Cession. R. 7. Unfortunately, in an experience shared by many tribal nations, the BIA spoiled or lost the records that would clarify which lands were sold off, further complicating the process of verifying the Maumee Nation's rights to the Topanga Cession. *Id*. For the last 80 years, the Maumee Nation and the Wendat Band have disputed the rights to this land. *Id*. The land of the Topanga Cession is now largely populated by non-Indians. *Id*.

On December 17, 2013, the Wendat Band purchased roughly 1,400 acres of land in fee in the Topanga Cession from a non-Indian landowner. R. 7. Roughly a year and half later, on June 6, 2015, the Wendat Band (through its tribally owned corporation, the Wendat Commercial Development Corporation) announced plans to build a mixed-use development, which would include a shopping complex, public housing units, a cultural center, and a museum. *Id*. This shopping complex would include a salon/spa, bookstore, pharmacy, café, and grocery store. R. 8. All profits, based on a projected $80 million in gross sales, would be used to subsidize the cost of public housing and a nursing home. *Id*.

This shopping complex and development, like any business in the State of New Dakota with over $5,000 in gross annual income, would be required to purchase a Transaction Privilege Tax License, at an annual cost of $25. R. 5-6. Additionally, each licensee is required to remit 3% of their gross proceeds/income from transactions back to the state of New Dakota to grow the "robust and viable commercial market" of the state. R. 6. However, no tribal business "operating within its own reservation on land held in trust by the United States" is required to purchase a license or remit any TPT revenue. *Id*. Additionally, in Door Prairie County - the location of both tribes - any business "not located in Indian Country" is required to remit ½ of its TPT to the Maumee Nation, as compensation for mineral rights given away by the tribe. *Id*.

On November 4, 2015, the Maumee Nation reminded the Wendat Band of their exclusive ownership claim over the Topanga Cession. R. 8. Because of this, the Wendat Band's proposed shopping complex would be required to remit 3% of its gross proceeds as part of its standard obligations to the state of New Dakota. *Id*. Further, half of these proceeds would go to the Maumee Nation, as the Wendat Band's proposed development would be a "a

non-member business operating on Maumee lands." *Id*. The Wendat Band has responded, claiming ownership over the entire Topanga Cession based on their 1859 treaty. *Id*. The Wendat Band has conceded that the 1,400 acres they purchased from the non-Indian landowner in the Topanga Cession does not qualify as Indian trust land but is accorded the status of Indian fee land. R. 8.

As the Wendat Band was unwilling to relinquish their claim on the Topanga Cession, on November 18, 2015, the Maumee Nation filed suit seeking declaratory relief in the United States District Court for the District of New Dakota. R. 8.

II. STATEMENT OF THE PROCEEDINGS

On November 18, 2015, the Maumee Nation filed a complaint against the Wendat Band asking for a declaration stating that the proposed development of the Wendat Commercial Development Corporation ("WCDC") would require the Wendat Band to obtain a Transaction Privilege Tax ("TPT") license and payment of this tax because this development would be located on the Maumee Reservation. R. 8. Alternatively, the Maumee Nation asked the District Court for a declaration that the Topanga Cession could no longer be considered Indian Country at all, and, as a result, the Maumee Nation would be entitled to one-half of the TPT under 4 N.D.C. §212. *Id.* In 2018, the District Court of the State of New Dakota found that the Topanga Cession was part of the lands reserved by the Maumee Nation in the Treaty of Wauseon. R. 9. Thus, the proposed WCDC complex would be built on the Maumee Reservation, and would require the Wendat Band to obtain a TPT license and pay the subsequent taxes to the State of New Dakota for remission to the Maumee Nation pursuant to 4 N.D.C. §212. *Id*.

On September 20, 2018, the Thirteenth Circuit for the United States Court of Appeals reversed the decision of the District Court. R. 10. The Thirteenth Circuit found that the Topanga Cession was located in Indian country on the Wendat Reservation and that the TPT both infringed on tribal sovereignty and was subject to Indian preemption. R. 10-11. Thus, the State of New Dakota could not levy its TPT on the proposed WCDC development. *Id*.

On Friday, November 6, 2020, this Court granted certiorari and directed the parties to address the following issues: "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?" R. 1, 3.

SUMMARY OF THE ARGUMENT

The Topanga Cession is part of the Maumee Reservation because the Maumee Indian Nation's right to this land was not abrogated or diminished. Neither the plain language nor the legislative history of the Wendat Treaty shows any congressional intent to abrogate the Treaty of Wauseon. However, in contrast, the Wendat Band of Huron Indian's claim to the Topanga Cession has been diminished by allotment.

Even if the Topanga Cession is still in Indian country, federal preemption jurisprudence does not forbid the State of New Dakota from collecting its Transaction Privilege Tax from a Wendat tribal corporation. Further, the imposition of New Dakota's tax does not infringe upon the inherent sovereignty of the Wendat Band.

Thus, this court should overturn the decision of the Thirteenth Circuit Court of Appeals and provide declaratory relief to the Maumee Indian Nation.

ARGUMENT

I. Neither The Treaty With The Wendat Nor The Maumee Allotment Act Of 1908 Abrogated Or Diminished The Maumee Reservation

A. The Treaty With The Wendat Did Not Abrogate The Treaty Of Wauseon

When a treaty has been abrogated, this Court requires "Congress' intention to abrogate Indian treaty rights [to] be clear and plain." *United States v. Dion*, 476 U.S. 734, 738 (1986). Indeed, "[a]bsent explicit statutory language, [the Court has] been extremely reluctant to find congressional abrogation of treaty rights." *Id. citing Washington v. Washington Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 690 (1979). Generally, when this Court has looked to statutory language to determine congressional intent, it has required Congress expressly demonstrate its intent to abrogate treaty rights. *Id*. However, in other cases, this court has found congressional intent from the surrounding circumstances, including the legislative history of the act at issue. *Compare Leavenworth, L., & G. R. Co. v. United States*, 92 U.S. 733 (1876) (holding that Congress cannot grant property within an Indian reservation by a subsequent law with general terms, but that specific language is required to demonstrate such a purpose) *with Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (holding that the face of the Act, the surrounding circumstances, and the legislative history are to be examined with an eye toward determining congressional intent).

Despite these two seemingly different approaches, this Court has expressed that "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" is sufficiently compelling enough to demonstrate congressional intent. *Dion*, 476 U.S. at 739-40. Here, "there is no clear evidence of an intent[ion] to abrogate the Treaty of Wauseon on either the face of the Treaty with the Wendat or its legislative history." R. 9. In 1802, the Maumee tribe was promised land between the western bank of the Wapakoneta River, "between Fort Crosby to the North and the Oyate Territory to the South and run westward from there to the Sylvania river." Art. III, Treaty of Wauseon, Oct. 4, 1801, 7 Stat. 1404. The Maumee tribe was further promised that "[i]f any … other person … shall attempt to settle on any of the lands allotted to the Maumee Nation … such person shall forfeit the protection of the United States, and the Indians may punish him as they please." Art. V, Treaty of Wauseon, Oct. 4, 1801, 7 Stat, 1404. The Maumee Nation did not receive consideration for this exchange.

Where the Maumee Nation did not receive monetary consideration for giving up their lands, in contrast, the Wendat received over $200,000. Art. III, Treaty with the Wendat, March 26, 1859, 35 Stat. 7749. In 1859, the Wendat decided 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; with the Oyate Territory forming the southern border and the Zion tributary forming the northern born." Art. I, Treaty with the Wendat, March 26, 1859, 35 Stat. 7749. In exchange for their cession, the United States agreed to pay "an annuity for the term of twenty years, of two-hundred thousand dollars … and a further sum of ninety thousand dollars." Art. III, Treaty with the Wendat, March 26, 1859, 35 Stat. 7749. As noted by the District Court of New Dakota, "the Wendat Act clearly contains an unequivocal commitment to pay a sum certain." R. 11 As such, there is sufficient congressional intent in

the historical record to conclude that the Wendat reservation has been diminished. However, the same cannot be said for the Maumee Indian Reservation.

Here, there is no clear evidence of congressional intent to abrogate the Maumee Reservation established by the Treaty of Wauseon. The language of the Wendat Act only says that the Wendat agree to cede "their lands in the New Dakota territory." Art. I, Treaty with the Wendat, March 26, 1859, 35 Stat. 7749. Both a contextual approach and a textual approach lead to the conclusion that the Wendat Act falls short of expressing Congressional intent to abrogate the Treaty of Wauseon. The Treaty with the Wendat granted a reservation to the Wendat with lands east of the Wapakoneta River. Art. I, Treaty with the Wendat, March 26, 1859, 35 Stat. 7749. In contrast, the Treaty of Wauseon granted a reservation to the Maumee Nation on land that was west of the Wapakoneta River. Art. III, Treaty of Wauseon, Oct. 4, 1801, 7 Stat. 1404. Therefore, according to a textual approach, Congress did not abrogate the Treaty of Wauseon signed in 1801 by enacting the Wendat Treaty in 1859.

Additionally, utilizing a contextual approach here also leads to the conclusion that the Treaty of Wauseon was not abrogated by the Treaty with the Wendat. A contextual approach requires looking at the face of the Treaty, the legislative history, and the "circumstances underlying its passage" to determine congressional intent to abrogate. *Solem v. Bartlett*, 465 U.S. 463, 469 (1984). Here, the face of the Treaty with the Wendat does not clearly express congressional intent to abrogate the Treaty of Wauseon. Even assuming arguendo that the face of the Wendat Treaty is ambiguous, this Treaty should be "construed liberally in favor of the [Maumee Nation], with ambiguous provisions interpreted to their benefit*." County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 269 (1992). So, it

follows that if this Court were to find the Treaty to be ambiguous, it should be interpreted more favorably towards the Maumee tribe because the abrogation of their land is in question.

Finally, the legislative history of the Treaty with the Wendat also leads to the conclusion that Congress did not intend to abrogate the Treaty of Wauseon. This Court has consistently held that abrogation of a reservation requires that "Congress clearly express its intent to do so, commonly with an explicit reference to cession or other language evidencing the present and total surrender of all tribal interests." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2456 (2020) *citing Nebraska v. Parker*, 136 S. Ct. 1072, 1079 (2016). Although the legislative history of the Wendat Treaty indicates that there was discussion about reducing Maumee members inhabiting parts of their territory, this discussion alone does not give rise to abrogation, because it does not clearly demonstrate congressional intent to abrogate the Treaty of Wauseon. While discussing the terms of the 1859 Treaty, Senator Lazarus W. Powell of Kentucky said that he would support the Wendat Treaty but that he wanted the Commissioner to "consider sending another Agent forthwith to secure further concessions from the Indians." Cong. Globe, 35th Cong., 2nd Sess. 5411-5412 (1859). Although Congress may have wanted to obtain the lands surrounding the Wapakoneta River controlled/owned by the Maumee Nation, they recognized that they had not yet done so, and that the abrogation of the Treaty of Wauseon would require a request for further concessions from the Maumee Nation. "Such dueling remarks by individual legislators are far from the clear and plain evidence of [abrogation] required under [the] Court's precedent." *Parker*, 136 S. Ct. at 1080 (2016). Therefore, neither the face nor the legislative history of the Wendat Treaty gives rise to a finding of congressional intent to abrogate the Treaty of Wauseon.

B. The Maumee Allotment Act Of 1908 Did Not Diminish The Maumee Reservation

The diminishment of a reservation requires congressional intent to diminish the reservation boundaries through "explicit 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. Language in the act that provides for "the total surrender of tribal claims in exchange for a fixed payment" will generally create a presumption that Congress intended to diminish the tribal reservation. *S.D. v. Yankton Sioux Tribe*, 522 U.S. 329, 345 (1998). But "allotment [or the] opening of a reservation alone does not diminish or terminate a reservation." *Osage Nation v. Irby*, 597 F.3d 1117, 1120 (10th Cir. 2010). Further, "Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others." *McGirt*, 140 S. Ct. at 2464 *citing Mattz v. Arnett*, 412 U.S. 481, 497 (1973). Thus, "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem*, 465 U.S. at 470 citing *United States v. Celestine*, 215 U.S. 278, 285 (1909). "Allotment under the … Act is completely consistent with continued reservation status." *McGirt*, 140 S. Ct. at 2464 *citing Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 356-358 (1962). Generally, "explicit language of cession and unconditional compensation are not prerequisites for a finding of diminishment." *Rosebud Sioux Tribe*, 430 U.S. 584, 586. However, this Court will find the "most probative evidence of congressional intent [in] the statutory language of the act itself." *Solem*, 465 U.S. at 470. Therefore, if an act itself does not demonstrate clear congressional intent to diminish a reservation, this Court will look to

see if "events surrounding the passage of a[n] … act … unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Id.* at 471.

Although the "assumption at the turn of the century [was] 'that Indian reservations were a thing of the past,' many surplus land acts did not clearly convey whether the opened lands retained reservation status or were divested of all Indian interests." *Parker*, 136 S. Ct. 1079 *citing Solem*, 465 U.S. at 468. As such, this Court has rejected the argument that "diminishment can be the result of Congress's general expectation in the late nineteenth and early twentieth centuries that its actions would lead eventually to the end of the reservation system." *Oneida Nation v. Vill. of Hobart*, 968 F.3d 664, 668 (7th Cir. 2020). Mere general expectations of Congress "do not show an unequivocal contemporary understanding that [a] statute would diminish [a] reservation and effectively abrogate the Unites States' treaty." *Id.* Still, "subsequent events and demographic history can support and confirm other evidence" of reservation diminishment. *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1396 (10th Cir. 1990). Additionally, "'subsequent demographic history' provides an 'additional clue as to what Congress expected would happen.'" *McGirt*, 140 S. Ct. at 2468 *citing Solem*, 465 U.S. at 471-472.

Here, the Maumee Allotment Act of 1908 did not diminish the Maumee Reservation granted to the tribe through the Treaty of the Wauseon. The Allotment Act itself specifies that "nothing in this law provides for the unconditional payment of any sum to the Indians but that the price of said lands actually sold shall be deposited with the United States treasury to the credit of the Indians." Sec. 3, Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908). Therefore, the Act did not diminish the Maumee Reservation. Further, the census data

from 2010 indicates that 40.4% of people residing on the lands granted by the Wauseon Treaty are members of the Maumee Indian Reservation and the Topanga Cession has a 17.9% Native population. R. 7. 40.4% is hardly sufficient to demonstrate that the land has lost its tribal status. These demographics strongly suggest that the Maumee Nation continued to function as a tribal nation on their reservation long after the Maumee Allotment Act was ratified in 1908 and support a finding that the Maumee reservation was not diminished by the Allotment Act.

In a case similar to ours, this Court concluded that Congress did not intend to diminish an Omaha Indian reservation through the passage of an 1882 Act. *Parker*, 136 S. Ct. at 1082. The issue in that case was whether Congress diminished a reservation through its acts of surveying, appraising, and selling up to 50,000 acres on the western side of the reservation through allotment. *Id.* at 1078. This Court found that instead of the government purchasing a portion of the reservation for a fixed sum, Congress had authorized the Omaha tribe to sell the allotments of its tribal land on the reservation. *Id.* at 1079. This Court found that the sale of these allotments did not diminish the tribal boundaries of the Omaha Tribe. *Id.* The Act at issue was found to have permitted the Omaha tribe to sell allotments of their land to non-tribal members but did not express congressional intent to diminish the reservation. *Id.*

Similar to *Parker*, the Maumee Allotment Act did not compensate the Maumee Nation for the eastern quarter of their reservation granted to them by the Treaty of Wauseon. Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908). Instead, the Act permitted the unclaimed lands in the western three-quarters of the reservation to be reserved for the Maumee to select their individual allotments of the reservation to sell. Maumee Allotment

Act of 1908, P.L. 60-8107 (May 29, 1908). Here, "no member of the Maumee tribe selected an allotment within the Topanga Cession and the tribal members who live there now either live in rented accommodations or purchased their lands in free from non-Indian homesteaders, the State of New Dakota, or the United States." R. 7. As in the ruling in *Parker*, the Maumee Allotment Act did not abrogate the Maumee reservation because Maumee Nation was not compensated for their lands and its members did not choose to allot the portions of land along the Topanga Cession.

Here, Congress "only enabled nonmembers to purchase land within the reservation," *Parker*, 136 S. Ct. at 1078. Therefore, Congress did not diminish the Maumee Reservation through the Maumee Allotment Act. Further, there is no clear expression of Congressional intent to diminish the Maumee Reservation either on the face of the 1882 Allotment Act or in the legislative history of the passing of the Act. Therefore, because the Maumee tribe was not compensated for the eastern quarter of their land, no member of the Maumee tribe "selected an allotment within the Topanga Cession" R. 7, and the demographics strongly suggest that the reservation lands continue to retain Native character, the Allotment Act did not diminish the Maumee Reservation over the Topanga Cession.

II. In The Alternative, The Topanga Cession Is Not In Indian Country Because The Wendat Reservation Was Diminished By The Wendat Allotment Act Of 1892

A. The Wendat Reservation Was Diminished By The Wendat Allotment Act of 1892

Alternatively, the Topanga Cession is not Indian Country at all because the Wendat Reservation was diminished by the Wendat Allotment Act of 1892. This Court's recent decision in *McGirt* adjusted the "*Solem* framework to place a greater focus on statutory text, making it even more difficult to establish the requisite congressional intent to disestablish or

diminish a Native American Reservation." *Oneida Nation*, 968 F.3d at 668. However, this Court will still "infer diminishment or disestablishment despite statutory language that would otherwise suggest unchanged reservation boundaries when events surrounding the passage of the act unequivocally reveal a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Osage Nation*, 597 F.3d at 1122 citing *Solem*, 465 U.S. at 471. Generally, "[s]um-certain payments indicate an intent to terminate the reservation." *Osage Nation*, 597 F.3d at 1123. Therefore, "[e]xplicit language signifying an intent to terminate a reservation combined with a sum-certain payment creates 'an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished.'" *Id.* citing *Solem*, 465 U.S. at 470-71.

In an earlier case, this Court found that the Sisseton-Wahpeton bands' Lake Traverse Indian Reservation had been terminated because (1) there was express language in an allotment act from 1891 demonstrating congressional intent to diminish the reservation, (2) the tribe received a sum-certain payment, and (3) the tribe consented to the agreement. *DeCoteau v. Dist. Cnty. Court for Tenth Judicial Dist.*, 420 U.S. 425 (1975). This Court found that the language of the act, the circumstances surrounding the passing of the act, and the legislative history collectively led to the conclusion that the Lake Traverse Reservation had been terminated. *Id.* at 449. Specifically, this Court distinguished the decision in *DeCoteau* (where the Sisseton-Wahpeton bands agreed to the cession of land to the government in exchange for a sum certain) from *Mattz*, (where an agreement merely opened reservation land to settlement and provided that the uncertain future proceeds of settler purchases would be held for the tribes' benefit). *Mattz*, 412 U.S. 481. This Court found this distinction in the agreements important because it demonstrated that the Allotment Act at

issue in *DeCoteau* "plainly vacated and resorted to the public domain" the Lake Traverse Reservation. *DeCoteau*, 420 U.S. at 449 citing *Seymour*, 368 U.S. at 355. Here, the language of the Wendat Allotment Act demonstrates sufficient congressional intent to conclude that the Wendat reservation has been diminished. The Wendat Act shows plainly that the tribe was "willing to convey to the government for a sum certain all of their interest in all of the unallotted lands." *DeCoteau*, 420 U.S. at 426.

Similar to the Act in *DeCoteau*, the Wendat Allotment Act expressed that the government would pay the Wendat Band "the sum of three dollars and forty cents for every acre declared surplus, provided that no matter how much land is ultimately surplus the Wendat Band shall not be entitled to a payment of more than two-million and two-hundred-thousand dollars in total and complete compensation." Chap. 42, Sec. 2, Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892). The "Wendat Act clearly contains an unequivocal commitment to pay a sum certain." R. 11. So it follows that the Wendat reservation was diminished by the Allotment Act. Therefore, the Topanga Cession is not Indian Country and the proposed WCDC complex should be taxed by the State of New Dakota through §212(3) with half of any funds collected to be remitted to the Maumee Indian Tribe under §212(6).

III. New Dakota's Transaction Privilege Tax Is Neither Subject To Federal Preemption Nor Is It A Violation Of The Inherent Sovereignty Of The Wendat Band

A. New Dakota's Transaction Privilege Tax Is Not Preempted By This Court's Jurisprudence Regarding Federal, Indian, And State Relationships

Even from the founding era, the complex relationship and balancing of power between states, American Indian tribes, and the federal government has been litigated in American courts. The unique quasi-sovereign relationship between American Indian tribes and the federal government is noted in the Constitution, which gives Congress the power to

regulate commerce with Indian tribes and foreign nations. U.S. Const. art. I, §8, cl. 3. This Court noted in early cases that Indian tribes were uniquely positioned as "domestically dependent nations." *Cherokee Nation v. Georgia*, 30 U.S. 1, 15 (1831). Further, in the most significant of the early Indian cases, this court found that "[t]he whole intercourse between the United States and… [the Cherokee] nation, is… vested in the government of the United States", not that of the states. *Worcester v. Georgia*, 31 U.S. 515, 561 (1832). However, "[t]his is not to say that the Indian sovereignty doctrine, with its concomitant jurisdictional limit on the reach of state law, has remained static…" *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 171 (1973). Indeed, this court has recognized that states have significant regulatory power "where essential tribal relations were not involved and where the rights of Indians would not be jeopardized." *Williams v. Lee*, 358 U.S. 217, 219 (1959). The regulatory and taxation powers of a state generally require that the state have some sort of criminal or civil jurisdiction over the activity it wishes to regulate. 411 U.S. at 178-79.

Therefore, using the *Williams* framework, state governments' regulatory powers are not wholly preempted by federal law, especially when the interaction involves non-Indians. *See Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 138 (1980). While not subject to wholesale preemption, "state regulation of even non-Indians is preempted if it runs afoul of federal Indian policy and tribal sovereignty based on a nebulous balancing test. This test lacks any rigid rule…" *McGirt*, 140 S. Ct. at 2501 (J., Roberts, dissenting). The standard for determining whether a state may impose taxation requires applying "flexible pre-emption analysis sensitive to the particular facts and legislation involved." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989). Further, "it requires a particularized examination of the relevant state, federal, and tribal interests."

Ramah Navajo Sch. Bd. v. Bureau of Revenue, 458 U.S. 832, 838 (1982). This examination should "determine whether, in the specific context, the exercise of state authority would violate federal law." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). In sum, any pre-emption analysis must be quite specific to the individual facts and circumstances of each tribe. 490 U.S. at 176-77.

Then, which kinds of specific state actions have been preempted by federal law? A state may not levy a state income tax on an Indian, living on a reservation, who earned all her income from work on the reservation. 411 U.S. at 179-80, *see also Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114 (1993), (where a unanimous court affirmed the holding of *McClanahan* and ruled that the state of Oklahoma could not tax income earned solely within a tribe's territory or jurisdiction). A state may not impose a cigarette vendor's license fee on tribe members selling cigarettes on a reservation, may not levy a cigarette tax on sales between tribe members, and may not impose personal property taxes on vehicles owned by reservation Indians. *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 480-81 (1976). However, this court also found that a state could require an Indian retailer to collect the tax on cigarette sales to non-Indians, noting that this was "a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax… We see nothing in this burden which frustrates tribal self-government… or runs afoul of any congressional enactment dealing with the affairs of reservation." *Id*. at 425 U.S. 483.

Beyond these examples, the presence of a comprehensive federal regulatory scheme can prove that state taxation has preempted federal law. 448 U.S. at 150. For example, in *Bracker*, the state of Arizona attempted to levy a motor carrier license tax (of 2.5% of all

gross receipts) and an excise (use) fuel tax (of $0.08/gallon) on Pinetop Logging Company, a private, non-Indian corporation hired to cut timber by the Fort Apache Timber Company, a tribally owned enterprise, where all operations took place on reservation land. *Id*. at 136-40. There, this court found that multiple aspects of the federal government's regulatory scheme and its extensive involvement in the day-to-day logging operations outweighed Arizona's "general desire to raise revenue." *Id*. at 147-150. Notably, in this case, the federal government was involved in nearly every aspect of the operation - setting sustainable forestry limits, requiring that the Bureau of Indian Affairs approve any contracts between Indian enterprises and private logging companies, and, most importantly, funding all the logging roads and roads within the reservation. *Id*. If the state of Arizona could point to specific functions it provided to the tribe, it could conceivably be allowed to tax, even in the circumstances of *Bracker*, as Justice Marshall notes:

> …this is not a case in which the State seeks to assess taxes in return for governmental functions it performs for those on whom the taxes fall… respondents… refer to a general desire to raise revenue, but we are unable to discern a responsibility or service that justifies the assertion of taxes imposed for on-reservation operations conducted solely on tribal and Bureau of Indian Affairs roads. Pinetop's business in Arizona is conducted solely on the Fort Apache Reservation. Though at least the use fuel tax purports to "[compensate] the state for the use of its highways," Ariz. Rev. Stat. Ann. § 28-1552 (Supp. 1979), no such compensatory purpose is present here. The roads at issue have been built, maintained, and policed exclusively by the Federal Government, the Tribe, and its contractors. We do not believe that respondents' generalized interest in raising revenue is in this context sufficient…

Id. at 150.

In a similar case just two years later, this court found state taxation to be preempted by federal regulation where the state of New Mexico attempted to tax the gross receipts of a non-Indian construction firm for their work building a school on a Navajo Reservation. 458

U.S. at 846-47. Justice Marshall, again writing for the majority, noted that "the comprehensive federal regulatory scheme and the express federal policy of encouraging tribal self-sufficiency in the area of education preclude the imposition of the state gross receipts tax in this case." *Id*. Notably, the federal government filed an *amicus curae* brief in this case requesting that the court set a standard for state action based in the dormant Indian Commerce Clause that "would place a higher burden on the State to articulate clearly its particularized interests in taxing the transaction [related to Indian country] and to demonstrate the services it provides in assisting the taxed transaction." 458 U.S. at 846. The majority declined to do so, noting that a "more flexible consideration of the federal, state, and tribal interests" was beneficial, presumably in cases where a state may levy a tax. *Id*.

However, in the absence of a comprehensive federal regulatory scheme or clear evidence of congressional action to the contrary, states may tax business activity occurring in Indian country; as this court has noted, "a State can impose a nondiscriminatory tax on private parties with whom the United States or an Indian tribe does business, even though the financial burden of the tax may fall on the United States or tribe." 490 U.S. at 175. In *Cotton*, the state of New Mexico levied an eight percent oil and gas severance tax on the Cotton Petroleum Corporation ("Cotton"), for oil and gas that Cotton extracted from the Jicarilla Apache reservation, based on Cotton's contract with the federal government and Jicarilla Apache. *Id*. at 183-87. Cotton argued that New Mexico's tax was akin to the taxes criticized by this court in *Ramah* and *Bracker* and should be preempted by a similar understanding of federal preemption. *Id*. However, this court found this argument unavailing, stating that "Cotton ignores the admonition included in both of those decisions that the relevant preemption test is a flexible one sensitive to the particular state, federal, and tribal interests

involved." 490 U.S. at 184. In applying this flexible test, this court found that three factors were determinative in deciding to find for the state of New Mexico: first, that the state of New Mexico did provide "substantial services" to both the Jicarilla Apache tribe and to Cotton, even if they were not proportional; second, that New Mexico did not economically burden the tribe, as "the Tribe could, in fact, increase its taxes without adversely affecting on-reservation oil and gas development", and finally, that "although the federal and tribal regulations in this case are extensive, they are not exclusive, as New Mexico regulated significant aspects of the wells." *Id.* at 183-86. In sum, "[t]o find pre-emption of state taxation in such indirect burdens on this broad congressional purpose, absent some special factor such as those present in *Bracker* and *Ramah Navajo School Bd.*, would be to return to the pre-1937 doctrine of intergovernmental tax immunity." *Id.* at 187.

In an earlier case, this court also found that, absent specific federal legislation to the contrary, the state of New Mexico could tax a tribe's ski resort where "the rights and land were acquired by the Tribe beyond its reservation borders for the purpose of carrying on a business enterprise…" *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 157-58 (1973). This court further noted that "[i]n this context, we will not imply an expansive immunity from ordinary income taxes that businesses throughout the State are subject to… [t]ribal status does not] bar the collection of New Mexico's nondiscriminatory gross receipts tax and… the Tribe's ski resort is subject to that tax." *Id.* This principle has been applied in other contexts as well, such as allowing states to regulate off-premises liquor sales in Indian country. *Rice v. Rehner*, 463 U.S. 713, 726 (1983).

In a pair of recent cases, the 8th Circuit has found similarly that states have the right to levy nondiscriminatory taxes on contractors for Indian casinos when "the issue… turns

upon whether imposition of the excise tax on nonmember contractors for construction services performed on the Reservation is preempted under the ***Bracker*** balancing test." *Flandreau Santee Sioux Tribe v. Haeder*, 938 F.3d 941, 945 (8th Cir. 2019). This balancing test compared the "rather minimal federal and tribal interests… against the State's significant interest in raising revenue for its general fund to provide services to residents." *Id*. at 946.

Here, New Dakota's Transaction Privilege Tax ("TPT") is a prime example of a non-discriminatory tax on Indian business enterprises that is not preempted by federal law. R. 9. Much like the Mescalero Apache tribe's ski resort, the Wendat Band's proposed business on the Topanga Cession is on land "acquired by the Tribe beyond its reservation borders for the purpose of carrying on a business enterprise." R.7-8, 411 U.S. at 157-58. The Wendat Band's proposed business is "expected to be particularly helpful in raising revenue by attracting non-Indian customers who may live outside of the reservation." R. 8. When a tribal business serves non-Indian customers outside of Indian country, this business can be taxed by a state. 411 U.S. at 157-58. Further, none of the three factors set forth by *Cotton* argue for finding federal preemption of New Dakota's TPT in relation to the proposed Wendat development. First, New Dakota provides substantial services to the Wendat band through its implementation of the TPT. R. 6. All funding from the TPT pays for commercial growth in the state - including roads utilized by Indian and non-Indian state residents, civil courts that would be utilized by the Wendat in any cases including local non-Indian parties, as well as distinct provisions allowing for remittance of the TPT specifically for tribal support. R. 6. This is in direct contrast to the situations in *Ramah* and *Bracker*, where the states attempting to levy a tax on activity in Indian country could not point to any significant contributions they were making in return to their taxation. *See Flandreau Santee Sioux Tribe v. Haeder*,

938 F.3d 941, 946-47 (8th Cir. 2019). Second, the Wendat have not shown that the 3% tax levied by New Dakota has caused any substantial economic hardship (especially compared with the 8% tax levied by New Mexico on oil and gas production that was found to be permissible). *Cotton*, 490 U.S. at 183-86. Finally, no comprehensive federal regulatory scheme is in place for the activities proposed by the Wendat, in sharp contrast to those in place for Indian-owned casinos or sustainable timber harvesting. *Flandreau Santee Sioux Tribe*, 938 F.3d at 948.

In light of all these factors, New Dakota may collect its Transaction Privilege Tax on the Wendat Band for the commercial activities proposed for the development on the Topanga Cession.

B. New Dakota's Transaction Privilege Tax Does Not Infringe On The Sovereignty Of The Wendat Band

While Indian tribes are considered to be domestically dependent nations, they "retain elements of 'quasi-sovereign' authority after ceding their lands to the United States." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978). As domestically dependent and quasi-sovereign nations, Indian tribes derive their authority over their land, tribe members, other Indians, and non-Indians through two possible sources, 1) treaties and acts of Congress, and 2) inherent sovereignty. *Montana v. United States*, 450 U.S. 544, 557 (1981). "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." *United States v. Mazurie*, 419 U.S. 544, 557 (1975). In addition to their treaty-given rights, Indians have rights retained by their inherent sovereignty as pre-existing sovereign entities. *Montana*, 450 U.S. at 557. Inherent sovereignty includes "those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary

result of their dependent status." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). For "powers not expressly conferred them by federal statute or treaty, Indian tribes must rely upon their retained or inherent sovereignty." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 649-50 (2001).

While inherent sovereignty is not all-inclusive, in general, it "gives tribes power… to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members." *Montana*, 450 U.S at 564. Beyond their own tribes, tribal authorities may make and enforce tribal laws on both Indians of their tribe and Indians from other recognized tribes on their reservation land. *United States v. Lara*, 541 U.S. 193, 210 (2004). Tribes may still tax non-Indian businesses in some situations. *Merrion v. Jicarilla Apache Tribe* 455 U.S. 130, 137 (1982). However, Indians may not enforce tribal laws on non-Indians, because they do not have the reserved inherent sovereignty power to do so. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 211-212 (1978). Generally, on lands owned by non-Indians within reservations, tribal law does not apply. *Montana*, 450 U.S. at 562-63.

Despite these limitations on the inherent tribal sovereignty over non-Indians on reservation, within the *Montana* framework there are two important exceptions. *Id.* at 565. First, tribes "retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians… who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements". *Id*. Second, a "tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566.

Regarding the first *Montana* exception, this does not apply to a state's ability to tax commercial activity and land but merely establishes the limits of Indian taxation powers in regard to commerce and property. *Montana*, *Id.* at 565. Indeed, regarding property taxes, it is well established that "[s]tates may also tax reservation land that Congress has authorized individuals to hold in fee, regardless of whether it is held by Indians or non-Indians." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 810-11 (2014). Here, both parties agree that the land at issue in the Topanga Cession is treated as land held in fee. R. 8.

Regarding the second *Montana* exception, what kind of conduct threatens "the political integrity, the economic security, or the health and welfare" of a tribe? *Montana*, 450 U.S at 566. A tribe cannot utilize the second *Montana* exception to claim inherent sovereignty to tax non-Indians on a non-Indian parcel of land within a reservation. *Atkinson Trading Co.*, 532 U.S. at 658-59. Additionally, the second *Montana* exception does not allow tribes to regulate the hunting and fishing rights of non-Indians within reservation land that has been taken by the federal government. *Bourland*, 508 U.S. at 695-96. Ultimately, the bar for this type of conduct is high, and the general principle that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe" illustrates the contours of Indian sovereignty. *Montana*, 450 U.S. at 565. Further, to find a violation of a tribe's inherent sovereignty, "the conduct must do more than injure the tribe, it must imperil the subsistence of the tribal community… One commentator has noted that "th[e] elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 341 (2008).

Here, a 3% tax on gross receipts is neither imperiling the political future of the Wendat Band, nor its economic security. R. 11. The state of New Dakota charges an annual $25 license fee and its 3% TPT is remitted back to Indian tribes in many cases. R. 6. Ultimately, this is simply a case where "When… state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land. *Nevada v. Hicks,* 533 U.S. 353, 362 (2001).

Thus, New Dakota's TPT is not an infringement on the inherent sovereign powers of the Wendat Band.

IV. As A Matter Of Policy, The Maumee Nation Needs The Funding Provided By The TPT

A. The Maumee Nation Needs The Funding From The TPT To Improve The Lives Of Maumee Tribal Members

Given this country's historical practices in federal Indian affairs, it is apparent that "Native American reservations in the United States are disproportionately poverty stricken." Rebekah May Yeagley, *Why Native American Reservations Are The Most Poverty-Stricken Lands in America*, Foundation for Economic Education, Nov. 9, 2020 (https://fee.org/articles /why-native-american-reservations-are-the-most-poverty-stricken-lands-in-america/). Moreover, "Native Americans have the highest poverty rate among all minority groups." Dedrick Asante Muhammad, Rogelio Tec, and Kathy Ramirez, *Racial Wealth Snapshot: American Indians/Native Americans*, National Community Reinvestment Coalition, Nov. 18, 2019, (https://ncrc.org/racial-wealth-snapshot-american-indians-native-americans/). In fact, poverty on reservations has become so prevalent that many Indian reservations in the United States have been compared to third-world countries. *See* Robert J. Miller, *Economic Development In Indian Country: Will Capitalism or Socialism Succeed?*, 80 Or. L. Rev. 757

(2001) (comparing the economic problems facing tribes in the United States and third-world country economies).

As a Native American tribe, it is unsurprising that the Maumee Nation has struggled financially to "provide basic services and jobs" for its tribal members. R. 8. The TPT revenue at issue here would help "improve the income of Maumee tribal members who would then be more avid consumers of goods and services at the shopping complex." *Id.* Although both the Maumee Nation and Wendat Band have faced severe financial distress due the systemic oppression of the federal government, the Maumee Nation is in desperate need of the tax revenue from the WCDC in the Topanga Cession. The Maumee Nation's average citizen's income is "25% lower than the average income of a Wendat tribal member." *Id.* In addition to this disparity between average tribal members' incomes, the Wendat received compensation for the cession of their lands. *See* Chap. 42, Sec. 2, Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892) (stating that the United States Treasury is to pay the Wendat Band the sum of three dollars and forty cents for every acre declared surplus). The Maumee Nation, in contrast, received no compensation for the cession of their lands. Equally important, the Maumee Nation has sustainably harvested timber as its largest source of revenue for the tribe. *Id.* However, with increasing climate change, the Maumee Nation's largest source of revenue is seriously threatened, leading to a decline in 12% per year. *Id.*

Here, as a matter of policy, the Maumee Nation would benefit greatly from the TPT. Since Maumee members' average income is 25% lower than the Wendat, the Maumee did not receive compensation for their cession of lands from Allotment, and the Maumee tribes' largest source of revenue is declining by 12% a year, the Maumee Nation should be entitled

to the TPT because this additional tax revenue would help improve both the lives and income of the Maumee tribal members while also stimulating the local economy.

C. The Maumee Nation Should Receive Tax Revenue For The Use Of The Topanga Cession To Allow Them To Invest In Renewable Energy Projects

In addition to an average income 25% less than the average Wendat Band member, the Maumee Nation's members face another challenge that is borne disproportionately worldwide by indigenous people - the threat of climate change and environmental degradation. R. 8. As noted by the International Labor Office, groups like the Maumee Nation are "especially vulnerable to the direct impacts of climate change"; more so than other disadvantaged groups, largely because "they depend on renewable natural resources most at risk to climate variability and extremes for their economic activities and livelihoods." International Labor Office, Geneva, *Indigenous Peoples and Climate Change: From victims to change agents through decent work* (2017), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_551189.pdf. Still, despite the challenges of climate change, indigenous peoples are often in the best position to take the lead in environmental stewardship and alternative energy generation projects. Annie Sneed, *What Conservation Efforts Can Learn from Indigenous Communities* (May 29, 2019), https://www.scientificamerican.com/article/what-conservation-efforts-can-learn-from-indigenous-communities/. Indeed, the Maumee Nation's primary income source, sustainable timber harvesting, faces declining revenues of 12% per year, a decline attributable to the ravages of climate change. R. 8. Instead of relying on a declining resource, the Maumee Nation is looking forward and seeks to use tax revenue gained through the Topanga Cession to invest in renewable resources. *Id*. This approach could become quite lucrative for the Maumee and allow them to purchase more of the goods and services provided by the Wendat

Band's development, further stimulating the local economy. *Id*. Further, opportunities abound to invest in alternative, renewable resource generation, as noted by the United Nations:

> In North America… the increased demand for renewable energy using wind and solar power could make tribal lands an important resource for such energy, replacing fossil fuel-derived energy and limiting greenhouse gas emissions. The Great Plains could provide a tremendous wind resource and its development could help to reduce greenhouse gas emissions as well as alleviate the management problem of the Missouri River hydropower, helping to maintain water levels for power generation, navigation, and recreation. In addition, there may be opportunities for carbon sequestration.

United Nations Permanent Forum on Indigenous Issues, *Climate change and indigenous peoples*, https://www.un.org/en/events/indigenousday/pdf/Backgroun der_ClimateChange_FINAL.pdf (last visited January 2, 2021).

The Maumee Nation's approach to sustainable economic development through renewable energy investment will create long-term employment opportunities for tribe members - jobs not solely reliant on consumer spending, like those of the proposed Wendat Band project. Ameyali Ramos Castillo and Kirsty Galloway McLean, *Energy Innovation and Traditional Knowledge,* Our World: Brought to you by United Nations University (November 2, 2012) https://ourworld.unu.edu/en/energy-innovation-and-traditional-knowledge. The U.N. notes that "[i]n the United States, although native tribal lands cover only 5 percent of the country's land area, they have the potential to create wind power equivalent to 14 percent of the total energy production in the US." *Id*. Further, "one 240-megawatt wind farm brings 200 six-month-long construction jobs and 40 permanent maintenance and operation positions." *Id*. All of this is possible if the Maumee Nation can receive the tax benefits of the Wendat Band use of the Topanga Cession. Additionally, if the

Maumee Nation can create renewable energy on their land, they could sell it at a discount to the Wendat Band's shopping complex, increasing its profits and contributing to the sustainable development of the entire region. This approach of building energy resources across tribes has already been successful in allowing six Sioux tribes to collaborate and invest in renewable energy. Oceti Sakowin Power Authority, About Us. http://ospower.org/about-us/ (last visited January 2, 2021).

Thus, as a matter of policy, the Maumee Nation should receive tax revenue for the use of the Topanga Cession to allow them to invest in renewable energy projects.

CONCLUSION

WHEREFORE, Petitioners, the Maumee Indian Nation, ask this Court to overturn the decision of the Thirteenth Circuit and remand for further proceedings.

Respectfully submitted,

T1019
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