No. 20-1104

IN THE
SUPREME COURT OF THE UNITED STATES

MAUMEE INDIAN NATION,

Petitioners,

vs.

WENDAT BAND OF HURON INDIANS,

Respondent.

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

BRIEF FOR RESPONDENT

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Counsel for Respondent

Oral Argument Requested

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QUESTIONS PRESENTED

I. 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?

II. 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?

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STATEMENT OF THE CASE

A. Statement of the Proceedings

A dispute arose between two federally recognized Indian tribes, the Maumee Indian Nation and the Wendat Band of Huron Indians, that both have a treaty relationship with the United States. R. 3. Both tribes have also been subsequently subject to allotment. R. 3. The State of New Dakota taxes commercial developments under the Transaction Privilege Tax (TPT) and attempted to tax the Wendat Band's new development on land that is claimed by both the Wendat Nation and the Maumee Nation. R. 4. Maumee Nation argues that the state tax is applicable and that the new Wendat development falls within Maumee Reservation, so the Maumee Nation would be remitted 3% of the gross proceeds under the taxation statute. R. 4. In the alternative, Maumee Nation argues that the Wendat reservation was also diminished, so the new development is not on Indian Country and Maumee Nation would get 1.5% of the proceeds under state law. R. 4. The Wendat Band argues that the State of New Dakota cannot impose tax on their commercial development because of the doctrines of infringement and preemption. R. 4. In the alternative, the Wendat Band argues that the development is located on Wendat Reservation land so the tax paid would be remitted back to the Band under state law. R. 4.

In *Maumee Indian Nation v. Wendat Band of Huron* Indians, 305 F. Supp. 3d 44 (D. New Dak. 2018), the District Court held that the Maumee reservation was not diminished, and the State of New Dakota could tax directly the non-member tribal entity. R. 3. The court determined that the Topanga Cession was part of the lands reserved by the Maumee Indian Nation through the Treaty of Wauseon. R. 9. The court also held that the Transaction Privilege Tax does not infringe upon reservation rights and therefore is not subject to preemption and infringement. R. 9. Therefore, the court determined that the Topanga Cession is within the Maumee Reservation

and the new development of the Wendat Band is required to pay the tax to the State of New Dakota who will remit the tax to the Maumee Indian Tribe.

In *Wendat Band of Huron Indians v. Maumee Indian Nation*, 933 F.3d 1088 (13th Cir. 2020), the Thirteenth Circuit reversed, holding that while the Maumee Reservation has been diminished, the Wendat Reservation has not. R. 3. The court held that the specific language of the Maumee Allotment Act was ambiguous and the Treaty with the Wendat clearly abrogates the Wauseon Treaty. R. 10. The court also held that the state is prohibited from taxing the tribe because it infringes on tribal sovereignty, thus causing the tax to be subject to preemption. R. 11. The Thirteenth Circuit reversed. R. 11. This Court granted certiorari from the Thirteenth Circuit and as such, reviews the question these questions of law *de novo*. *Williams v. Taylor*, 529 U.S. 362, 384 (2000).

B. Statement of the Facts

The Maumee Indian Tribe and the Wendat Band dispute ownership of the Topanga Cession and have disputed it for over eighty years. R. 7. December 7, 2013, the Wendat Band bought a 1,400-acre parcel from non-Native American owners within the Topanga Cession. R. 7. The Band's intention was announced on June 6, 2015 to build a combination residential-commercial development which includes 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, all owned by the Wendat Commercial Development Corporation (WCDC) which is wholly owned by the Wendat Band. R. 7. The purpose of this shopping complex, is to serve traditional Wendat cuisine, offer fresh and traditional foods to prevent the area of becoming a food desert, and offer other amenities such as a bookstore, a salon, and a pharmacy. R. 8. The WCDC predicts the complex to eventually support 350 jobs and earn around $80 million in gross sales yearly. R. 8.

On November 4, 2015, representatives of Maumee Nation approached the WCDC to remind them that they still considered the Topanga Cession their land and they expected the shopping complex to pay the State of New Dakota 3% according to the Transaction Privilege Tax. R. 8. According to the Maumee Nation, the tax would then be remitted back to the Maumee Nation pursuant to §212(5) because the WCDC would be a non-member business on Maumee land. R. 8.

The Wendat Tribal Council and WCDC responded that the Topanga Cession was within the Wendat Reservation and has been since the Treaty with the Wendat. R. 8. They also argued that even if the Topanga Cession was part of the Maumee Reservation after 1859, it was then diminished in 1908 through the Maumee Allotment Act, so the land would revert back to Wendat control through the Treaty with the Wendat. R. 8. The Wendat Band argues that the state of New Dakota also has no authority to collect tax on Indian Country because it is preempted by federal law and infringes on the Band's sovereign power. R. 8.

November 18, 2015, the Maumee Nation filed a complaint against the Wendat Band, asking for a Declaration from federal court that any development by the WCDC in the Topanga Cession would require a TPT license and payment of the tax because it was located on the Maumee Reservation. R. 8. In the alternative, the Maumee Nation asked for a Declaration that the Topanga Cession is not Indian Country at all, so one-half of the TPT tax would be remitted to the Maumee tribe under §212(6). R. 8.

SUMMARY OF THE ARGUMENT

There are two issues presented before this Court concerning the Treaty with the Wendat Band and the ability of the State of New Dakota to levy its Transaction Privilege Tax (TPT) upon the Wendat Band Corporation. Respondent respectfully asserts that this Court affirm the holding of the Thirteenth Circuit to conclude the Topanga Cession is located in Indian country on the Wendat Reservation. Although the Treaty with the Wendat abrogates the Treaty of Wauseon, the Wendat Allotment Act did not diminish the Wendat Reservation. Only Congress has the authority to diminish reservation boundaries and divest a reservation of land. In the instances of the Maumee Reservation, there is clear evidence to demonstrate that Congress intended to diminish the Maumee Reservation through the Allotment Act. However, there is not enough evidence present to show that Congress intended to diminish the Wendat Reservation. Therefore, the Topanga Cession is still located within Indian country on the Wendat Reservation.

Second, Respondent requests that this Court affirm the judgement of the lower court to prevent the State of New Dakota from levying its TPT tax against a Wendat Corporation. Since the Wendat Band purchased this land within the Topanga Cession, it is considered to be Indian country. The Band purchased its 1,400-acre parcel of land and intends to erect several structures for the use and wellbeing of its reservation members. As such, the State cannot require the Wendat Band to pay its tax on the basis of infringement and the doctrine of preemption. Additionally, public policy strongly supports the notions of tribal self-governance and economic efficiency. For these reasons, this Court should affirm the holding of the Thirteenth Circuit as to both issues.

ARGUMENT

I. THE WENDAT TREATY ABROGATES THE TREATY OF WAUSEON AND THE MAUMEE ALLOTMENT ACT DIMINISHES THE MAUMEE RESERVATION; HOWEVER, IT DID NOT DIMINISH THE WENDAT RESERVATION AND THUS THE TOPANGA CESSION IS STILL CONSIDERED INDIAN COUNTRY

Only Congress can diminish reservation boundaries and divest a reservation of its land. *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). Diminishment is not lightly inferred; there must be clear evidence of intent to change boundaries before any diminishment or divestment is found. *Id*. There is clear evidence that Congress intended to abrogate the Treaty of Wauseon through the Treaty with the Wendat. There is also evidence that Congress intended the Maumee Allotment Act to diminish the Maumee Reservation. There is not enough evidence to show that the Wendat Allotment Act was intended to diminish the Wendat Reservation. Therefore, the Topanga Cession is not outside of Indian Country, and it would be against public policy to determine otherwise.

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

In order for diminishment to be inferred, Congress must evince an intent to change the reservation boundaries. *Id*. First, and most probative, the analysis of Congress' intent starts with the statutory language. *Id*. Explicit reference to cession or any language that points to a divestment or surrender of tribal interests is a strong sign that Congress intended to diminish the reservation. *Id*. When the language that points to Congress' intention to diminishment is supplemented by a commitment from Congress to compensate the Tribe for its opened land, there is an "insurmountable presumption" that Congress meant for the reservation to be diminished. *Id*.

Here, to determine if the contested land of the Topanga Cession is within the Maumee Reservation or within the Wendat Reservation, we follow the analysis of diminishment, focusing on: the language of the statutes, the history and events surrounding the passage of the statutes and the demographic history and treatment of the land post-statute. The Treaty of Wauseon created the reservation boundaries of the Maumee Nation. Their boundary line is on the western bank of the river Wapakoneta, between Fort Crosby and the portage on the branch of the river into the Great Lake of the North. *Treaty of Wauseon*, Oct. 4, 1801, 7 Stat. 1404. This Treaty was created and signed October 4, 1801. *Id*. Around 58 years later, the Treaty of Wendat was created and made the land east of the Wapakoneta River the Wendat Reservation with the Oyate Territory making the southern border, to the Zion tributary on the northern border and the line of the New Dakota Territory making the eastern border. *Treaty with the Wendat*, March 26, 1859, 35 Stat. 7749. The issue was created when the river shifted because it cut into the already established Maumee Reservation, and the new Treaty of Wendat, described land west of the river as Wendat Reservation, even though some of that land, now called the Topanga Cession, was already accounted for as Maumee Reservation. R. 5. The language is unambiguous in the Treaty of Wendat and points to the intention of Congress in abrogating the Treaty of Wauseon.

Explicit language is not a requirement for diminishment, however, when history leading up to passage and events surrounding passage of a land
act show a contemporaneous understanding that the act would diminish the reservation. *Solem*, 465 U.S. 471. It is important to also consider all the circumstances surrounding the opening of a reservation. *Nebraska v. Parker*, 577 U.S. 1055, 1079 (2016). In the history surrounding the two treaties, it is clear the intention of Congress in determining the Topanga Cession as Wendat land.

From 1801 when Congress passed the Treaty of Wauseon, up until 1859 when Congress passed the Treaty with the Wendat, the land west of the river was Maumee Indian land. *Treaty of Wauseon*, 7 Stat. 1404. The river moved towards the west, cutting into Maumee land. R. 5. At the creation of the treaty, Congress knew about the previous treaty, which distributed the land west of the river to the Maumee nation, and they knew the exact coordinates of the river at the time of the treaty. *Treaty of Wauseon*, 7 Stat. 1404. Therefore, when Congress created the Treaty with the Wendat, they knew about the land on the other side of the river and knew that even though the river moved, they wanted all land to the east of the river to be considered Wendat land. This is evidenced by the history of the treaties. The Treaty with the Wendat was created in 1859, far after the Treaty of Wauseon was created, which points to the intention of Congress to determine the land now described as the Topanga Cession as Wendat land.

Finally, because the "turn-of-the-century assumption that Indian reservations were a thing of the past", many of the land Acts were not clear in the conveyance of whether the land retained reservation status or whether divestment occurred. *Nebraska*, 136 S. Ct. 1079. Because of this, an analysis into the demographic history and subsequent treatment of the land by government officials is important to consider. *Id* at 1081. However, evidence of the changing demographics of the land is the least compelling of all the evidence for a diminishment analysis. *Id* at 1082.

Here, the Topanga Cession recognizes about 17.9% American Indian demographics as of 2010. R. 7. The Native Americans who live there now live either on rented accommodations or bought their land from non-Native American homesteaders. R. 7. The Native American presence on the Topanga Cession diminished significantly from 98.3% in 1880 dropping to around 20.3% in 1920. R. 7. This shows the use of the land changing from previous years. It is hard to

differentiate what group of Native Americans are living on the Topanga Cession; whether it is Maumee Indians or Wendat Indians. Either way, since this factor is the least probative and holds the least weight, the other factors of the statutory language and the history and events surrounding the statutes show the intent of Congress to make the Topanga Cession Wendat land.

The explicit language of the treaties, the events and circumstances surrounding the passage, and the vagueness of the demographics on the Topanga Cession all point to and do not take away from the intent of Congress to abrogate the Treaty of Wauseon with the Treaty of the Wendat.

B. The Maumee Allotment Act Diminishes the Maumee Reservation

Only Congress can divest a reservation of its land and diminish the boundaries. *Solem*, 465 U.S. at 470. In order to determine if Congress diminished the reservation, the analysis is like the one done for the treaties of Wendat and Wauseon; considering, first, the statutory language used, then, the history and conditions around the passage of the statute, and lastly, the demographics of the land. *Id*. Some land acts have been found to diminish reservations. *Id* at 469.

Congressional intent controls and looking to the language of the act is important. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 587 (1977). Although the general rule is to resolve "doubtful expressions" in favor of the weaker party and to not diminish reservations with ambiguous terms, it is important recognize the facially manifested congressional intent when it is present. *See Id*. In *Rosebud Sioux Tribe v. Kneip*, the Court found that the intent of Congress was to change the boundaries through an allotment act. *Id* at 615. The Court focused more on the circumstances and history surrounding the land act, but the Court did discuss the actual language of the statute including that the act discussed half of the land to be "restored to the public

domain." *See Id* at 589. This same language is replicated in the Maumee Allotment Act; "the Indians have agreed to cede their interest in the surplus lands to the United States where it may be returned the public domain." R. 13. Since the Court concluded that the land act in *Rosebud* was enough to diminish the boundary of the Reservation, and the act in that case has almost identical language in parts to the Maumee Allotment Act, it would be reasonable to determine that the Maumee Allotment Act, on the face, was created with the intention of diminishment.

Within more of the language of the Maumee Allotment Act, it is clear to infer Congress' intent to diminish the reservation. The intent was not just to open the reservation to non-Native Americans, Congress also intended to determine if the land is bearing coal for the United States' benefit. *See* R. 13. This shows that the Maumee Allotment Act was created to diminish the Reservation boundaries to allow non-Indians to live on the land and to allow the United States' easier access to the lands that would benefit them. When language in an act points to the surrendering of tribal interests, it strongly suggests Congress' intent to divest the reservation of land. *Solem*, 465 U.S. 470. Here, by intending to focus on land that bears coal, the United States is snatching the Native Americans of their tribal interests in the land. This allotment act was unambiguous and, on the face of it, clearly showed the intention of Congress to diminish the reservation boundaries and divest the land.

When the language that points to Congress' intention to diminishment is supplemented by a commitment from Congress to compensate the Tribe for its opened land, there is then an "insurmountable presumption" that Congress meant for the reservation to be diminished. *Id* at 471. Here, the Maumee Allotment Act states that "the price of said lands actually sold shall be deposited with the United States treasury to the credit of the Indians." R. 13. This compensation,

in conjunction with the other factors such as the language of the statute and the circumstances surrounding the passage, point to Congress' clear intention to diminish the reservation boundaries.

Turning to the circumstances and events surrounding the passage of the Maumee Allotment Act, they reinforce the intention of diminishment. Within the Congressional Record discussing the Maumee Allotment Act, discussion was clear about the intention of this allotment act, the intent to diminish the reservation. "The time has come in the history of the United States when it is not advisable, not desirable, nor right to leave Indians huddled together on a reservation." R. 26. The discussions of the allotment focus on Indians going on an individual tract, letting homeowners and builders come in with their influence, and to let others inhabit the land. R. 26. This discussion shows clear intention that the Act is not only to open the reservation to non-Native American residents, but also that the reservation boundaries are unwanted by Congress anymore and Congress believed it would benefit to diminish the reservation.

Lastly, the demographics are hard to differentiate between which enrolled members are from which tribe. R. 7. It is not a huge hit to be unsure of demographics, however, because this factor is the least probative and holds the least weight in an analysis.

Since the explicit language of the Maumee Allotment Act is unambiguous about Congress' intent, and the circumstances surrounding the passage of the Act reinforce the intent of Congress, the Maumee Allotment Act diminishes the Maumee Reservation.

C. The Wendat Allotment Act Does Not Diminish the Wendat Reservation

The diminishment analysis requires finding the congressional intent of the act in question. *Solem*, 465 U.S. at 470. To determine this, the most probative factor considered is the

statutory language, followed by the events and circumstances surrounding the passage of the act, and rounded out by the least persuasive factor, the demographics of the land. *Id* at 471.

First, the statutory language of the Allotment Act of the Wendat Indians is clearly only focused on opening the reservation to non-Native American settlement and nothing more. *See* R. 15. The clear language of the Wendat Allotment Act states that the United States is to "move the Indians unto their allotments as quickly as possible, and to open the surplus lands to settlement." *Id.* There also is no language that explicitly states there is "present and total surrender of all tribal interests." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2464 (2020). In *McGirt v. Oklahoma*, the Court reiterated that without clear language pointing to the total surrender of all tribal interests, diminishment should not be granted. *Id*. "To equate allotment with disestablishment would confuse the first step of a march with arrival at its destination." *Id*. Looking at the face of the act, it is clear that the intent is to open the reservation land to non-Native American settlement but not to take away the tribal interests of the Wendat Tribe.

Even if the Wendat Allotment Act was not clearly focused only on opening the reservation, the language of the act is too ambiguous to assume any other congressional intent, especially compared to the unambiguous nature of the Maumee Allotment Act. *See* R.15. The Wendat Allotment Act is relatively vague and short, only discussing the distribution of allotments. *See* R. 15. Although cautiously accepted, the general rule is that "doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *Rosebud*, 430 U.S. 586. It is important that in more ambiguous land acts, the deference is given to the Native Americans, and to not lightly determine that land is diminished. *See Id*. In addition, the mere fact that a reservation is

opened to non-Native American settlement does not mean that the land has lost its reservation status. *Id*.

Next, the circumstances and events surrounding the passage of the Wendat Allotment Act, also show the intention of Congress to not diminish the Wendat Reservation. Within the discussion of the Wendat Allotment Act, the phrasing of the discussion stated, "by the opening of this reservation, …, valuable land will be added to the public domain." R. 19. This shows that the intent of the Wendat Allotment Act was to open the reservation to the public. On this point, discussion continued to focus on the settlors that have been waiting to live on the reservation land once it is opened. R. 21. Again, this shows that the main point of the Wendat Allotment Act was to create an open reservation to allow non-Native American settlors the ability to build and live on the land. Couple the discussions surrounding the passage of the act with the actual language of the Wendat Allotment Act, the intention was to open the reservation but not to take away tribal liberties.

The demographics of the Topanga Cession are difficult to differentiate and therefore should not be a factor considered in this analysis. R. 7. To consider this factor, anyway, would be unnecessary, given the overwhelming amount of evidence that the language of the act brings with the circumstances surrounding the passage of the act. In the alternative, if the act were determined to be ambiguous and unable to pinpoint the intent of Congress from the act and the circumstances surrounding it, deference should be given to the reservation because diminishment is not to be taken lightly. *Solem*, 465 U.S. 470. Overall, the Wendat Allotment Act did not diminish the Wendat Reservation.

D. The Topanga Cession is Indian Country and to Determine Otherwise Would Directly Contradict Public Policy

As a matter of public policy, the Topanga Cession must be determined Native American land. When acts and treaties are ambiguous and inexplicit in the intention of diminishment, the sacred rights of Native Americans should not be taken away so easily. *See Id*. Diminishment should never be lightly inferred, especially when it takes away from the culture of Native Americans. *See Id*. To infer diminishment from the Wendat Allotment Act which uses language in the discussion such as "the Indians are wholly wild and savage" and "the Wendat are the most distinctly warrior Indians left on the continent today" would be harmful to the Native Americans who live on the land presently. R. 22. When there is no clear evidence of intent by Congress to explicitly diminish the reservation boundaries, there should be no determination as such. The Wendat Treaty abrogates the Wauseon Treaty, and, in the alternative, the Maumee Allotment Act diminishes the Maumee Reservation. However, the Wendat Allotment Act does not diminish the Wendat Reservation. Therefore, the Topanga Cession is Indian Country.

II. THE STATE OF NEW DAKOTA IS BARRED FROM ASSERTING ITS TRANSACTION PRIVILEGE TAX OVER THE WENDAT BAND BECAUSE IT INFRINGES UPON THE RIGHTS OF INDIAN TRIBES, IT IS PREEMPTED BY FEDERAL LAW, AND PUBLIC POLICY HAS A LONGSTANDING HISTORY OF PROTECTING TRIBAL SOVEREIGNTY AND PRINCIPLES OF SELF-GOVERNENCE WITHIN THE JURISDICTION OF THE UNITED STATES

The state of New Dakota is unable to assert its Transaction Privilege Tax (TPT) over the Wendat Band's land sale on the basis of preemption and infringement. The Band announced on June 6, 2015 that intended to construct residential and commercial developments upon a 1,400-acre parcel of land that it purchased on December 3, 2013. R. 7. Since the Wendat still has control of the land pursuant to the 1859 treaty, the state of New Dakota cannot collect TPT if the

land resides within Indian country on the basis of federal preemption and the Band's sovereign powers. R. 8.

While it is true that laws of a state can have force within a reservation's boundaries, Indian tribes have an 'anomalous' and complex character. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980). In fact, this Court has described Indian reservations as " a semi-independent position not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within who limits they resided." *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 173 (1973). In order to preserve the ability of an Indian tribe to regulate its own affairs, Congress has continued to enact comprehensive legislation pursuant to the Indian Commerce Clause. *See Williams v. Lee,* 358 U.S. 217 (1959); *See* Art 1. §8, cl. 3.

With these notions in mind, Congress has accordingly recognized that "traditional notions of Indian self-government are deeply engrained in our jurisprudence that they have provided an important backdrop against which vague or ambiguous federal enactments must always be measured." *Id* at 172; *White Mountain Apache Tribe*, 448 U.S. at 143. For these reasons, this Court should uphold the decision of the Thirteenth Circuit in order to preserve the longstanding precedent of Indian sovereignty within the confines of the United States.

A. The Doctrine of Infringement Prevents the State of New Dakota From Collecting the Transaction Privilege Tax Against a Wendat Band Corporation

Pursuant to the doctrine of infringement, a state cannot impose a tax that infringes upon the rights of reservation Indians. *Williams*, 358 U.S. at 220. Following the enactment of several comprehensive statutes in 1834, "Congress has followed a policy calculated eventually to make

all Indians full-fledged participants in American society." *Id.* However, Congress has also repeatedly encouraged tribal governments and courts to be well-organized and independent from the jurisdiction of the United States. *Id*. Based on precedent, allowing the collection of the Transaction Privilege Tax against the Wendat Band Corporation would violate the doctrine of infringement.

This Court has held tribal taxation authority on tribal lands can even be exerted over non-Indians. *See Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 458 (1995); *Montana v. United States*, 450 U.S. 544 (1981). Accordingly, tribes have the ability to impose taxes on non-Indians engaging in commercial transaction on reservation land. *Id*. However, this ability to impose taxes was limited by this Court to the activities of non-Indians. *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 480-81 (1976). Further, "Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." *Williams*, 358 U.S. at 220. This is due to the longstanding intent to allow an Indian tribe to regulate its own internal affairs and encourage self-governance. *Id*.

In *Williams v. Lee*, this Court held that the State of Arizona could not exercise jurisdiction over a civil lawsuit where the two parties to the suit were Indian members and the cause of action arises on an Indian reservation. *Id* at 218. The state could not be allowed to exercise jurisdiction because it would "undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the rights of the Indians to govern themselves." *Id* at 223. Since the incident concerned two Indian members and occurred on the reservation, it was clear that the exercise of state authority would undermine Indian authority.

Here, the Wendat Band's ability to regulate its own affairs would be undermined if the State of New Dakota was able to collect its TPT tax and/or require the tribe to apply for a

license. The Wendat Band seeks to build public housing, a nursing care facility, a tribal cultural center, a tribal museum and shopping area on land located within the Topanga Cession. R. 7. The purpose of the TPT is " a tax levied on the gross proceeds of sales or gross income of a business and paid to the state for the 'privilege' of doing business in that state." R. 5. As the Topanga Cession should still be considered Indian Country, and if it is upheld to be by this Court, the State of New Dakota would infringe upon the Band's sovereignty by imposing the TPT tax. The developments being made by the Wendat Band Corporation are within the borders of its reservation and are to be used by Indians. The ability of the state to impose taxes within the Topanga Cession would be limited to those non-Indians whom are upon tribal lands for consumerism per the holding in *Salish & Kootenai Tribes*. Accordingly, this Court should affirm the holding of the Thirteenth Circuit that the Transaction Privilege Tax, if imposed, would infringe upon the Wendat Band's tribal sovereignty to regulate its own affairs.

B. In the Alternative, the Doctrine of Indian Preemption Bars the State of New Dakota From Collecting the Transaction Privilege Tax Against a Wendat Band Tribal Corporation

New Dakota is prohibiting from collecting the Transaction Privilege Tax against a Wendat corporation because a state cannot impose a tax that is preempted by federal or tribal interests. *White Mountain Apache Tribe*, 448 U.S. at 143. This Court has held that "the Indian tribes retain attributes of sovereignty over both their members and their territory." *United States v. Mazurie*, 419 U.S. 544, 557 (1975). Further, Congress has the power to regulate tribal relations and affairs per the Indian Commerce Clause. *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Therefore, states can levy taxes on non-Indians in Indian Country where 1) federal law does not explicitly prohibit the tax and 2) the tax does not interfere with the tribe's ability to

perform its governmental functions. *See Washington v. Confederated Tribes*, 447 U.S. 134 (1980).

Due to the traditions of Indian sovereignty and the ability of tribe to assert jurisdiction over its own matters and members, this Court has "rejected the proposition that in order to find a particular state law to have been preempted by an operation of federal law, an express congressional statement to that effect is required." *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 686 (1965). Accordingly, any ambiguities within federal law "have been construed to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *White Mountain Apache Tribe*, 448 U.S. at 144. Additionally, this Court further clarified in *Oklahoma Tax Commission v. Sac and Fox Nation* that the state had no jurisdiction to tax in Indian territory without express authorization from Congress. *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114 (1993).

In *White Mountain Apache Tribe v. Bracker*, the State of Arizona sought to impose taxes on the logging and hauling operations of an Indian tribe. This Court held that the state's generalized interest in raising revenue was insufficient to overcome the intrusion upon preexisting federal law regulating harvesting and timber sales for the tribe. *White Mountain Apache Tribe*, 448 U.S. at 146. Although the state argued that there was "no express congressional statement to contrary" regarding assessing taxes on non-Indians engaged in commerce on the reservation, federal preemption still applied. *Id* at 151; *See Warren Trading Post Co.*, 380 U.S. 685; *See Kennerly v. District Court of Montana*, 400 U.S. 423 (1971). The absence of express congressional language either prohibiting or allowing certain aspects of tribal affairs to be regulated by the state is not reason to trump the doctrine of preemption. *Id*.

Further, this Court held in *Moe v. Salish & Kootenai Tribes* that a state could not impose vendor license fees on an Indian reservation for Indians selling cigarettes on the reservation to other members. *Salish & Kootenai Tribes*, 425 U.S. at 480. The state could also not collect cigarette sales taxes by sale of cigarettes to Indians, but it could be added to the sales of cigarettes to non-Indian consumers visiting the reservation. *Id*. The Court's rationale for this is because "when on-reservation conduct only involving Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest. *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 480-81 (1976).

This case is similar to the facts of *White Mountain Apache Tribe* and *Salish & Kootenai Tribes*. The State of New Dakota is seeking to impose a tax on the Wendat Band or in the alternative, requiring the tribe to apply for a license within the confines of its land. Since the Topanga Cession is indeed Indian territory, requiring the Band to apply for a license and/or pay the TPT tax is preempted by federal law. R. 10. The at-issue purchased land will be used by the Band to construct housing—including public housing units for low-income tribal members. R. 7. Additionally, the Band will construct a tribal cultural center, a tribal museum, and a shopping center where all of the corporate profits will be remitted to the Wendat tribal government. R. 7-8. Although the café, cultural center, and museum may attract non-Indian consumers, this revenue will only benefit those living within the Reservation as the profits are remitted back to the tribal government. *Id*.

Here, the federal government's interest in preserving notions of tribal self-government is high here as it was similarly in *White Mountain Apache Tribe* and *Salish & Kootenai Tribes*. Even if there is no explicit congressional statute to the contrary, this Court has held that

congressional silence or ambiguity is not a reason to allow a state to intrude upon an Indian tribe's internal affairs. *White Mountain Apache Tribe*, 448 U.S. at 151. Accordingly, the State of New Dakota's TPT is preempted by federal law because the Band has sovereignty over its own tribal affairs.

C. Public Policy Favors Tribal Sovereignty Within the Jurisdiction of the United States Against Overreaching Local, State and Federal Laws

This Court affirmed the longstanding position in *United States v. Wheeler* that Congress has broad power to regulate tribal affairs per the Indian Commerce Clause. *See* Art 1. §8, cl. 3. It is also well-accepted that federal and tribal governments possess a shared interest in protecting tribal sovereignty. Steffani A. Cochran, *Treating Tribes As States Under the Federal Clean Air Act: Congressional Grant of Authority-Federal Preemption-Inherent Tribal Authority*, 26 N.M.L. Rev. 323, 341 (1996). Although many states have attempted to impose taxes on Indian reservations, these attempts have been repeatedly blocked on the basis of federal legislation and/or precedent from this Court. Larry Echohawk, *Balancing State and Tribal Power to Tax in Indian Country*, 40 Idaho L. Rev. 623, 624 (2004). For these reasons, the Transaction Privilege Tax directly contradicts public policy and precedent.

First, an example of strong public policy against taxing an Indian reservation occurred in Idaho in the early 2000s. The Idaho Legislature struggled to balance its state budget and some lawmakers attempted to remedy this by taxing non-Indians buying products from Indian stores within the reservation. *Id*. Several tribal leaders argued "that the proposed state taxes would infringe on tribal sovereignty and were not justified because state government does not provide a proportional level of services to reservation residents." *Id*. Several other objections were raised in reference to federal preemption and whether the state tax would violate federal law. *Id*. Accordingly, the law failed due to the implications of tribal sovereignty.

Other cases have reached this Court regarding the ability of states to tax within reservation boundaries. *See Salish & Kootenai Tribes*, 425 U.S. at 480-81. The analysis used to determine "whether a state has a regulatory authority over a non-Indian business or activity within Indian country balances the federal, tribal, and state interests." Karen L. Lenertz & Sandra Glass-Sirany, *State Regulatory Authority in Indian Country: State Osha Jurisdiction*, 17 Hamline L. Rev. 447, 472 (1994). This balancing test is specific to the facts of each case and focuses on "1) state infringement on tribal sovereignty and self-government, and 2) federal preemption of state regulation, including preemption by treaty and federal statute." *Id*. Even if there is no express preemption by Congress, this does not mean the state law will be automatically permitted. *Id*. This is because "generally, the policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Id.*; *See McClanahan*, 411 U.S. at 168.; *See Rice v. Olson*, 324 U.S. 789 (1945). Ultimately, this Court has upheld these principles and should not shy away from them in the Wendat Band's case.

Finally, as a matter of public policy, imposing state taxes on tribal governments limits tribal sovereignty and the ability of tribes to effectively self-govern. There's no question that imposing taxes upon tribal governments causes tribes to pursue litigation to get the tax overturned—as has occurred with the Wendat Band in this case. The "tax and litigation war" between states and tribal governments "significantly damages state-tribal relations and disrupt[s] the stability of business activities that are vital to economic growth within Indian communities. Echohawk, *Balancing State and Tribal Power*, supra, at 624. Instead of using Indian tribes as a means to make revenue, states should seek empower and support tribal nations' efforts at self-governance and economic efficiency. Accordingly, public policy from both Congress as well as longstanding judicial precedent strongly supports these notions.

In conclusion, the State of New Dakota's attempt to levy the Transaction Privilege Tax against the Wendat Corporation contradicts public policy. It is clear that both Congress and this Court have upheld notions of preserving tribal sovereignty since this Country's inception. For these reasons, the decision of the Thirteenth Circuit should be affirmed to preserve the Wendat Band's ability to regulate its own affairs.

CONCLUSION

WHEREFORE, Respondent Wendat Band of Huron Indians respectfully asks this Court to affirm the decision of the Thirteenth Circuit.

Respectfully Submitted,

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