No. 20-1104

IN THE
SUPREME COURT OF THE UNITED STATES
FEBRUARY TERM 2021

MAUMEE INDIAN NATION,
Petitioner,

v.

WENDAT BAND OF HURON INDIANS,
Respondent.

ON WRIT OF CERTIOARI TO
THE UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT

BRIEF FOR RESPONDENT

Team No. T1024

Counsel for Respondent

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(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 FACTS

This appeal arises out of Petitioner the Maumee Indian Nation's ("Maumee Nation's" or the "Nation's") attempt to use the State of New Dakota's tax law so that it can be remitted funds taxed on the Wendat Band of Huron Indians' (the "Band's") development within the Band's reservation, cutting away at the Band's sovereignty over its reservation lands that were promised in 1859 and never subsequently diminished. Importantly, this case concerns both the Band's promised right to self-governance and this Court's well-established precedents consistently upholding Congress' lone authority to break the federal government's promises made to sovereign tribes.

Since time immemorial, the Wendat Band has subsisted off the land and resources in what is now the State of New Dakota. R. at 4-5. In 1859, promoting its policy to move Indians onto reservations, the United States entered into the Treaty with the Wendat Band, ratified by Congress on March 26, 1859, which established a reservation for the Wendat Band on "those lands East of the Wapakoneta River; with the Oyate Territory forming the

southern border and the Zion tributary forming the northern born. The eastern terminus of these reserved lands is the line bordering the New Dakota Territory and the Oyate Territory." Treaty with the Wendat of 1859 art 1., March 26, 1859, 35 Stat. 7749. This, among other assurances made to the Band, was the beginning of a long-standing treaty relationship between the Wendat Band and the United States.

The Band is a culturally distinct, federally recognized tribe of nearly 2,000 members. R. at 4. Consistent with its sovereign authority, the Wendat Band sought to build a Wendat-owned development on fee lands purchased in the Topanga Cession. *Id*. In December 2013, the Band purchased a 1,400-acre parcel of land in fee from non-Indian owners on the Band's reservation within the Topanga Cession and, pursuant to the Transaction Privilege Tax ("TPT"), neither applied for a license nor expected to pay three percent (3%) of its gross income to New Dakota. R. at 7. The Band announced its plan in 2015 to construct a residential-commercial development on its parcel in the Cession, which would include public housing units for low-income tribal members, a nursing care facility for elders, a tribal cultural center, a tribal museum, and a shopping complex owned by the Wendat Commercial Development Corporation ("WCDC"). R. at 8. The development's shopping complex would also include a cafe serving traditional Wendat cuisine, a grocery store with fresh and traditional foods to prevent food desert conditions within the reservation, a salon and spa, pharmacy, and bookstore. R. at 8. WCDC, a Section 17 IRA Corporation, is wholly owned by the Band with its entire corporate profits remitted quarterly to the tribal government as dividend distributions. R. at 7-8. This landmark development would support 350 jobs and is projected to earn more than $80 million in gross sales annually. R. at 8. Although financial hardship has historically prevented the Band from providing public housing and a nursing care facility on its reservation, the Band expects that, by attracting non-Indian consumers

who live outside the reservation, commercial proceeds will allow the Band to adequately fund both programs aimed at providing for those in need on and around the Wendat Reservation. *Id*.

Petitioner Nation's reservation shares a border with the Band's, and the Nation dates its rights to the Treaty of Wauseon, ratified by Congress in 1802. R. at 4-5. Pursuant to its treaty in 1802, Petitioner Nation was reserved "those lands West of the Wapakoneta River[.]" Treaty of Wauseon, Oct. 4, 1801, 7 Stat. 1404. The subsequent Treaty with the Wendat, ratified by Congress after the Wapakoneta River's approximate three-mile move to the west in the 1830s, reserved to the Band "those lands east of the Wapakoneta River" as it stood then. *Id.* art.1. The tract of land, which was formerly west of the River but east of the River since the 1830s, is referred to by both tribes as the "Topanga Cession." R. at 5. The Topanga Cession is within Door Prairie County and is not a census designated place, and census records do not distinguish between opened lands and open lands on the Wendat Reservation effectuated by the Wendat Allotment Act. R. at 6. Both the Wendat Band and Petitioner, however, have worked together to create a demographic analysis using U.S. census records in Door Prairie County taken since 1880. *Id*. Although the history between these tribes is long and complicated, both tribes have sought to minimize conflict between them as they share a border, and no prior dispute over the Cession has arisen before federal courts, civil or criminal. R. at 4, 7.

Both the Wendat Band and Petitioner Nation were subject to allotment after Congress' passage of the General Allotment Act, P.L. 49-105 (Feb 8., 1887). R. at 5. Prior to the Maumee Allotment Act of 1908, Major Hans of the Indian Service met with Petitioner Nation for a conference in 1907 to thoroughly discuss the details of what allotment would entail and its impact on Petitioner Nation's reservation and other rights. 42 Cong. Rec. 2345-

46 (1908). Petitioner then entered into an agreement, which was ratified by 95 percent of Petitioner's members living on the reservation; pursuant to that agreement, the Indian Office subsequently prepared the bill that became the Maumee Allotment Act. *Id.* The Act of 1908 was passed by Congress for "the purpose of . . . provid[ing] . . . for the allotment of the lands in severalty to the Indians and for the sale and disposal of surplus lands after Allotment." 42 Cong. Rec. 2345 (1908) (statement by Rep. Pray). Congress saw that Petitioner and its members were "capable now of assuming the duties of citizenship[,]" 42 Cong. Rec. 2347 (1908) (statement by Rep. Hackney), and therefore owed "the power of the ballot and [] other powers of citizenship that entitle them to the other enlightened and beneficent conditions that White people enjoy." 42 Cong. Rec. 2348 (1908) (statement by Rep. Ferris). Since Petitioner and its members could not continue to become more civilized while "huddled together on an Indian reservation," Congress saw fit that the Maumee Reservation be diminished, for Petitioner's benefit and so that the federal government can give the "respect" owed to the Nation. *Id.* The final Act provided, in part,

> SEC. 1. . . Unclaimed lands in the western three-quarters of the reservation shall continue to be reserved to the Maumee. The Indians have agreed to consider the entire eastern quarter surplus and to cede their interest in the surplus lands to the United States where it may be returned [to] the public domain by way of this act.
> * * *
> SEC. 9 . . .[I]t being the intention of this Act that the United States shall act as trustee for said Indians to dispose of the said lands and to expend and pay over the proceeds received from the sale thereof as herein provided.

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

Contrasting the discussions regarding Petitioner Nation's allotment, in Congress' consideration of the Wendat Allotment Act, members of the House were especially concerned with the Band's apparent lack of progress toward becoming "civilized," and noted that "the Indians refused to act until they received the per capita appropriated by the act,

saying 'they would travel but one road at a time[.]'" 23 Cong. Rec. 1777 (Jan 14, 1892). To the House's dismay, "much valuable time was lost and the appropriation expended in part without results." *Id.* Given assumptions about the Band's being "very little civilized," Congress determined that the "wholly wild and savage" members of the Band were still "wards" who would still bear a burden upon the state to "car[e] for the Indian[.]" *See id.* at 1778 (statement by Rep. Ullrich). Congress presumed the Band was not yet prepared for its reservation's disestablishment and to become full citizens of the state and federal governments. *See id.* Although Congress intended to prepare the Band for future disestablishment with the passage of the Wendat Allotment Act, such goals were never fully achieved due to later changes in federal Indian policy. Under the terms of the Act, rather than diminishing the Band's reservation, Congress intended that "declared surplus lands [be] open[ed] to settlement" and that the Band's reservation remain intact. Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892).

The present dispute over diminishment of Petitioner and the Band's reservations is only at issue before this Court because of the State of New Dakota's wrongful application of its Transaction Privilege Tax statute on the Band's development. R. at 5. New Dakota's TPT "is 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. at 5. The statute provides that, for the privilege of doing business in New Dakota,

> (1). Every person who receives gross proceeds of sales or gross income of more than $5,000 on transactions commenced in this state and who desires to engage or continue in business shall apply to the department for an annual Transaction Privilege Tax license accompanied by a fee of $25. A person shall not engage or continue in business until the person has obtained a Transaction Privilege Tax License.

4 N.D.C. § 212(1). Recognizing the unique relationship between New Dakota and Indian tribes, the statute carves out exceptions for tribes:

> (4). . . . [N]o Indian tribe or tribal business operating within its own reservation on land held in trust by the United States must obtain a license or collect a tax
>
> (5). In further recognition of this relationship, the State of New Dakota will remit to each tribe the proceeds of the [TPT] collected from all entities operating on their respective reservations that do not fall within the exemption of §212(4).

4 N.D.C. § 212(4)-(5).

In November 2015, Maumee Nation representatives approached the WCDC and the Band's Tribal Council to assert that the Nation is owed 3% of the gross proceeds of the Band's development because it "considered the Topanga Cession to be its land." R. at. 8. Its farming revenue threatened by climate change, Petitioner Maumee Indian Nation urged that it also needed the funds the TPT would provide and would use the funds generated to invest in diversifying and strengthening its struggling tribal economy. R. at 8. The Wendat Tribal Council and the WCDC responded that the Topanga Cession was not a part of the Maumee Reservation because it was diminished by the 1908 Allotment Act and returned back to Wendat control. R. at 9. Shortly thereafter, the Maumee nation filed a complaint against the Wendat Band asking the federal district court to find that the WCDC was required to procure a TPT license and pay the tax. R. at 10.

II. STATEMENT OF PROCEEDINGS

On November 18, 2015, Petitioner the Maumee Indian Nation brought suit in the U.S. District Court for the District of New Dakota challenging the Band's commercial development on treaty-lands promised to the Band since 1859. *Maumee Indian Nation v. Wendat Band of Huron Indians*, 305 F. Supp. 3d 44 (D. New Dak. 2018); R. at 8. Specifically, Petitioners assert that the Wendat Band's commercial development within the Topanga Cession should have procured a TPT license and be subject to a 3% tax on development's gross proceeds pursuant to New Dakota's TPT. R. at 8. Petitioner bases its

claim, however, on its supposition that the Topanga Cession is within the bounds of the Maumee Reservation. R. at 4.

At the District Court, Petitioner argued that it should be remitted 3% of the Wendat development's gross proceeds based on two key arguments: first, that the development is within the Reservation and is accordingly owed the tax; and second, "in the alternative[,] the Wendat reservation has also been diminished and so the Wendat development is not in Indian country." *Maumee Indian Nation*, 305 F. Supp. 3d at 44. Relying primarily on *Solem* in its analysis on the Abrogation and Diminishment issues, the District Court erroneously concluded that the Maumee Reservation was not diminished and that the State of New Dakota properly levied its TPT directly on a non-tribal entity. *Id*. at 49. Contrary to well-established legal precedents by this Court, the district court further held that "nothing . . . would justify denying the right of New Dakota to impose the TPT to any commercial enterprise WCDC constructs . . . in the Topanga Cession." *See id.*

The Band agrees with the U.S. District Court that "[t]his case makes manifest how changes in federal Indian policy have created challenges to the resolution of legal questions in the twenty-first century," *see id.* at 44, but subsequently filed an appeal with the United States Court of Appeals for the Thirteenth Circuit. R. at 3. On appeal, the divided appellate court reversed, holding that while the Maumee Reservation had been diminished, the Wendat Reservation was not. *Wendat Band of Huron Indians v. Maumee Indian Nation*, 933 F.3d 1088, 1088 (13th Cir. 2020). Thus, the Thirteenth Circuit concluded that the State of New Dakota was prohibited by both infringement and preemption from levying its tax on a Wendat tribal entity built on its own Reservation. *Id.* at 1089. The Maumee Indian Nation now appeals the Thirteenth Circuit Court decision, arguing that the Thirteenth Circuit erred

in interpreting *McGirt v. Oklahoma* and that the circuit court's conclusion is contrary to well-established precedent concerning infringement and preemption.

The Supreme Court of the United States granted certiorari to decide two issues: (1) Did the Treaty with the Wendat abrogate the Treaty of Wauseon and/or did the Maumee Allotment Act of 1908 diminish the Maumee Reservation? If so, did the Wendat Allotment Act 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. at 3.

SUMMARY OF ARGUMENT

This case concerns the Wendat Band of Huron Indians and its promised right to self-governance and sovereignty over its lands, people, and affairs. The Band entered into a treaty with Congress – an agreement between sovereign nations and the supreme law of the land – and was promised by the federal government that its reservation would include the Topanga Cession, which falls within those lands east of the Wapakoneta River. The government's promise to the Band over its reservation has never been intended by Congress to be broken, so the State of New Dakota – and the Maumee Indian Nation – must comply with existing law and respect the Band's sovereign authority over its reservation. Today, akin to *McGirt v. Oklahoma*, this Highest Court is tasked with determining whether the land that was promised to the Band remains a part of its Indian reservation for purposes of New Dakota's tax law. Because Congress has not said otherwise, the government should be held to its word. *See McGirt v. Oklahoma*, 140 S.Ct. 2452, 2459 (2020).

Pursuant to the U.S. Constitution, Congress alone is entrusted "with the authority to regulate commerce with Native Americans." *McGirt,* 140 S.Ct. at 2462. Congress has the

authority to make legislation governing Indian tribes, even if such legislation conflicts with or abrogates treaties with tribes. *See Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). With this authority, the Congress has been able to protect tribes from the reach of the authority of the states to ensure Indian self-government and tribal sovereignty. *See McClanahan v. State Tax Comm'n of Arizona,* 411 U.S. 164, 164 (1973). Accordingly, clear congressional intent is required for the abrogation of treaties, *Lone Wolf,* 187 U.S. at 566, the diminishment of an Indian reservation, *McGirt*, 140 S.Ct. at 2462, and for any assertion of state authority on Indian tribes, including taxation. *See, e.g., Montana v. Blackfeet Tribe of Indians*, 471 U.S. 754, 764 (1985).

The Wendat's reservation has remained intact since its treaty with the federal government in 1859, as evidenced by the Treaty with the Wendat and the Maumee Allotment Act and their respective legislative histories. Thus, the Topanga Cession and the land on which the WCDC complex will be built is within Indian Country[1] on the fee lands within the Band's reservation. Regardless of whether land is held in trust or owned in fee, Indian country encompasses all those lands reserved for tribes not intentionally diminished by later acts of Congress. Congress – in neither the Wendat Allotment Act nor other subsequent federal law – expressed its clear intent to diminish the Wendat's reservation as it was promised to the Band in 1859.

Moreover, the TPT is preempted by federal law and directly infringes on the Band's ability to self-govern. State authority to tax Indian tribes is preempted by federal law unless

[1] "Indian country," as defined by 18 U.S.C. § 1151, includes:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and weather within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (1982 ed.).

Congress has expressed clear intent to grant a state such authority. *See McClanahan,* 411 U.S. at 177. This Court has also considered whether the state tax falls on the tribe itself and whether the tax has any regulatory function or service to justify its imposition. *See Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980). Here, there is no express language in the Treaty of Wendat nor the Allotment Act of the Wendat Reservation that favors New Dakota's taxing authority. The imposition of the TPT falls on the WCDC which consequently jeopardizes the Band's economy, and the State of New Dakota has no vital regulatory interest in implementing the tax on the Band. Tribes are entitled to autonomy as sovereign nations, and this Court has found that exertion of state authority interferes with a tribe's right to self-governance. *Williams v. Lee*, 358 U.S. 217, 222 (1959). The TPT also unlawfully infringes on the Band's promised right to self-governance because it deprives the Band of the ability to support its tribal government and the opportunity to promote tribal self-sufficiency.

Based on the well-established precedents established by this Court, the Band's Reservation remains intact and was only opened to settlement upon the Wendat Allotment Act's enactment. Accordingly, the Topanga Cession is Indian country, within the bounds of the Wendat Reservation, and the State of New Dakota is prevented by both doctrines of preemption and infringement from imposing the TPT on the Wendat corporation's development.

ARGUMENT

I. In accord with congressional intent, the Topanga Cession remains Indian country within the Wendat Band of Huron Indians' Reservation.

The Topanga Cession remains within the Wendat Band of Huron Indians' reservation. The Band, similar to this Court in *McGirt v. Oklahoma*, appreciates that Congress' promises

to the Band in 1859 "were[not] made gratuitously . . . Nor were the government's promises meant to be delusory." *See* 140 S.Ct. 2452, 2460 (2020). Since Congress never evinced its clear intent to break its promise with the Band, the Band's reservation – bound on the west by the Wapakoneta river – remains intact pursuant to that 1859 Treaty.

The authority to breach those promises made with Indian tribes, "this Court has cautioned, belongs to Congress alone." *McGirt*, 140 S.Ct. at 2462; *Lone Wolf*, 187 U.S. at 566-68 ("This Court long ago held that the Legislature wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties."). This Court, however, will not "lightly infer such a breach once Congress has established a reservation." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). Treaty abrogation requires clear evidence that Congress actually considered the conflict between its intended action and a tribe's treaty rights and chose to resolve that conflict through abrogation. *United States v. Dion*, 476 U.S. 734, 738-740 (1986). Similarly, clear congressional intent is required to prove diminishment of an Indian reservation. *McGirt*, 140 S.Ct. at 2463; *Solem*, 465 U.S. at 473.

Congress has twice demonstrated its clear intent to diminish the Maumee Reservation; Congress intended to diminish the Petitioner's reservation first in 1859 and, if not then, again in 1908. Although clear congressional intent supports the diminishment of Petitioner's reservation boundaries, neither treaties nor surplus Acts contain language sufficient to support a finding of clear congressional intent to diminish the Band's reservation. Thus, the Topanga Cession remains a part of the Wendat Band of Huron Indian Reservation and is Indian Country as defined in 18 U.S.C. § 1151 (1982 ed.).

A. The 1859 Treaty with the Wendat abrogated the 1801 Treaty of Wauseon.

The text of the Treaty with the Wendat of 1859, its legislative history, and the boundaries it plainly describes clearly evince Congress' intent to abrogate the Treaty of Wauseon and diminish Petitioner's reservation as not to include the Topanga Cession.

1. Treaties are the supreme law of the land.

Regardless of the federal government's past failures to enforce and deliver on the promises made to tribes, treaties nonetheless remain the "supreme law of the Land," standing on the same footing as federal statutes. *McGirt*, 140 S.Ct. at 2462 (The Supremacy Clause of the Constitution "directs that federal treaties and statutes are the 'supreme Law of the Land.' Art. I, §8; Art. VI, cl. 2."). Through these 19th century contracts among sovereign nations, both the United States and sovereign tribes secured for themselves unique rights and benefits including those concerning Indian lands, natural resources, and access to traditional cultural resources. *See id*. at 2460.

Treaties may be abrogated unilaterally by Congress, and they may be repealed or modified by later federal statutes. *The Cherokee Tobacco*, 78 U.S. 616, (1871) (upholding a federal tax on tobacco sold in the Cherokee nation and reasoning that an act of Congress may supersede prior treaty provisions). In *Lone Wolf*, this Court held the abrogation of an Indian treaty "will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so." 187 U.S. at 566. Again, in *United States v. Dion*, this Court clarified that "[w]hat is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Dion*, 476 U.S. at 738-740. Thus, whether abrogation occurred depends on whether Congress indeed intended to abrogate, or whether Congress' purposes would be better served by

implying exceptions to the statute that will prevent impairment of the treaty. *Id.*; *see Lone Wolf*, 187 U.S. at 566.

Given the federal trust responsibility, Congress' power to abrogate treaties "should therefore be judged by the most exacting fiduciary standards." *See Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). Charged with moral obligations of the highest responsibility and trust toward tribes, the federal government's trust responsibility ought to weigh heavily against implied abrogation of treaties. *Solem*, 465 U.S. at 472. Since clear congressional intent is required for abrogation and treaties must be interpreted in favor of Indian tribes, this Court has gone to great lengths to avoid the destruction of treaty rights where there is room for doubt as to congressional intent. *See McGirt*, 140 S.Ct. at 2464.

2. The Treaty with the Wendat, along with its legislative history, evinces Congress' clear intent to abrogate the Treaty of Wauseon and diminish the Maumee's reservation as not to include the Topanga Cession.

As supported by its legislative history and statutory text, Congress clearly intended to abrogate the Treaty of Wauseon of 1803 with its ratification of the Treaty with the Wendat of 1859. In accord with this Court's precedent, abrogation of a treaty and diminishment of a reservation, neither of which are taken lightly, both require a showing of clear congressional intent. *McGirt*, 140 S.Ct. at 2464; *Solem*, 465 U.S. at 470 (1984). On its face, the Wendat Treaty plainly describes the boundaries of the Band's reservation: "those lands East of the Wapakoneta River; with the Oyate Territory forming the southern border and the Zion tributary forming the northern born." Treaty with the Wendat of 1859 art. 1, March 26, 1859, 35 Stat. 7749. Petitioner disputes the Band's claim over the Topanga Cession because of the 1830s movement of the Wapakoneta River that preceded the Treaty with the Wendat by at least two decades and had finished moving before any negotiations between the federal government and the Band took place. Further evincing the intent of the Band's treaty

abrogate the Maumee's treaty and diminish its reservation, Article VI of the Wendat Treaty again states that the "warriors of the Wendat Indians[] have hereunto set their hands at Wapakoneta River[.]" *Id.* art. VI. These assurances made to the Band, particularly that it be reserved the lands "East of the Wapakoneta River" in 1859, can be read no other way but to evince that Congress considered the conflict between the Treaty with the Wendat and Petitioner's treaty rights "and chose to resolve that conflict by abrogating [Petitioner's] treaty." *See Dion*, 476 U.S. at 738-740.

The legislative history of the Treaty with the Wendat further clarifies Congress' intent to diminish Petitioner's reservation's bounds as not to include the Topanga Cession. For instance, in Congress' Consideration of the Treaty with the Wendat, U.S. senators contrasted the Wendat's unwillingness to open its reservation as "the last Indians to yield their claims to the bulk of the territory[,]" with Petitioner's having already "slowly yielded their claims to the bulk of the territory," aiding in Fort Crosby's growth in commercial activity. Cong. Globe, 35th Cong., 2nd Sess. 5411-12 (1859). At the time, Congress understood that the Maumee Indians were quickly advancing and had already yielded their claims to much of their lands. In approving the Wendat Treaty, Congress both (1) understood that Petitioner the Maumee Indian Nation had ceded much of its lands; and (2) appreciated that the Wendat Treaty was "an expedient end to settle tensions on the frontier between our settlers and the Indians until our communities are numerically numerous enough to defend themselves from any unwanted Indian intrusion." *See id.* All together, the statutory text of the Wendat Treaty and its legislative history evinces Congress' intent to diminish Petitioner's reservation boundaries in favor of the Wendat in order to advance the federal policy with as few tensions as possible between and among Indians and settlers.

B. Even if the Treaty with the Wendat did not abrogate the Wauseon Treaty, Congress expressed its clear intent to diminish the Maumee Reservation in the Maumee Allotment Act of 1908.

Even if the Treaty of Wauseon was not abrogated by the 1859 Treaty with the Wendat, the Maumee Allotment Act of 1908 diminished Maumee's claim to the Topanga Cession as the Maumee Act contains clear cession language sufficient to diminish Petitioner's reservation. *See McGirt*, 140 S.Ct. at 2464.

1. Disestablishment of an Indian reservation requires clear congressional intent.

Like the abrogation of Indian treaties, disestablishment of an Indian reservation, or the diminishment of its boundaries, "will not be lightly inferred" and requires clear congressional intent. *See Solem*, 465 U.S. at 470. Congress alone holds the authority to determine whether a tribe continues to hold a reservation, *McGirt*, 140 S.Ct. at 2462; *Solem*, 465 U.S. at 470, and must "clearly evince an intent to change boundaries before diminishment will be found." *Solem*, 465 U.S. at 470 (quoting *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 615 (1977) (internal quotations omitted). While disestablishment of an Indian reservation does not "require[] any particular form of the words," clear congressional intent of diminishment – "commonly[,] an explicit reference to cession or other language evidencing the present and total surrender of all tribal interests." *McGirt*, 140 S.Ct. at 2463 (internal quotations omitted). But when an Act and its legislative history are ambiguous and "fail to provide substantial[,] compelling evidence of a congressional intention to diminish Indian lands, [courts] are bound by our traditional solitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening." *Solem*, 465 U.S. at 473.

The federal government's Allotment Era (1887-1934) policies, which managed affairs on a reservation-by-reservation basis, have often proved a source of confusion in interpreting

Federal Indian law. *See id.* at 467. Thus, discerning whether a reservation's boundaries have been diminished depends on the particular "surplus land Act employing its own statutory language, the product of a unique set of tribal negotiation and legislative compromise." *Id.* at 467. "The effect of any given surplus land Act depends on the language of the Act and the circumstances underlying its passage." *Id.* at 469. In *Solem v. Bartlett*, 465 U.S. 463 (1984), this Court held that "the statutory language used to open the Indian lands" is most probative of Congress' intent. *Id.* at 470. This Court further explained, "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted open lands." *Id*. In addition to statutory language, the events surrounding the passage of a surplus land Act (i.e., "the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress") and, to a lesser extent, the events that occurred after the passage of a surplus land Act (i.e., Congress, Bureau of Indian Affairs, and/or local judicial authorities' treatment of the affected areas) may aid in discerning Congress' intent. *Id.* at 471-72.

Nearly forty years later in *McGirt*, this Court underscored the same analysis in *Solem* but placed "a greater focus on statutory text, making it even more difficult to establish the requisite congressional intent to disestablish or diminish a reservation." *Oneida Nation v. Village of Hobart*, No. 1:16-cv-01217, slip op. at 2-3 (7th Cir. July 30, 2020) (citing *McGirt*, *supra*). Importantly, the *McGirt* majority emphasized that "it's no matter how many other promises to a tribe the federal government has already broken. If Congress wishes to break the promise of a reservation, it must say so." 140 S.Ct. at 2462.

2. Congress expressed its clear intent to diminish and/or disestablish Petitioner the Maumee Indian Nation's reservation with Petitioner's surplus land Act.

In the alternative, even if the Topanga Cession continued to be a part of the Maumee Reservation after 1859, the Maumee Reservation was later diminished by the Maumee Allotment Act in 1908 and the Topanga Cession reverted back to the Band's control pursuant to the 1859 Treaty with the Wendat. Consistent with Congress' intent behind the Maumee Allotment Act, any claims to the Topanga Cession that Petitioner might have retained following 1859 were relinquished upon the diminishment of its reservation in 1908. Once Petitioner disposed of and ceded its rights to those surplus lands comprising, in part, the Topanga Cession, the Cession reverted back to the Band in accord with the treaty promises that the Band's territory be bound on the West by the Wapakoneta River and that the Indians be able to continue to "set their hands at Wapakoneta River." *See* Treaty with the Wendat art. VI, March 26, 1859, 35 Stat. 7749.

Although allotment alone is not sufficient to prove disestablishment of a reservation, *see McGirt*, 140 S.Ct. at 2486-87 (Roberts, J., dissenting);, Petitioner's reservation, as made clear in statutory text and legislative history of the Maumee Allotment Act, has been diminished and no longer includes the Topanga Cession. The text of the Maumee Allotment Act itself explicitly provides that whereas "[u]nclaimed lands in the western three-quarters of [Petitioner's] reservation shall continue to be reserved to the Maumee" Indian Nation, "[t]he [Maumee] Indians have agreed to consider the entire eastern quarter surplus and to *cede their interest in the surplus lands* to the United States where it may be returned [to] the public domain by way of this act." Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908). Moreover, the surplus act elaborates "[t]hat the lands shall be disposed of . . . and shall be opened to settlement." *Id*. Again in section 9, Congress makes clear that "the intention of this Act [is] that the United States shall act as trustee for said Indians to dispose of said lands[.]" *Id*. The Maumee Allotment Act and its legislative history are analogous to that of other

surplus land Acts that this Court held sufficiently demonstrate clear congressional intent to disestablish or diminish an Indian reservation. *See, e.g., Rosebud Sioux Tribe, supra* ("The Acts of 1904, 1907, and 1910 did clearly evidence congressional intent to diminish the boundaries of the Rosebud Sioux Reservation."); *DeCoteau v. District County Court*, 420 U.S. 425 (1975) (finding a termination of the Lake Traverse Reservation by an 1891 surplus land Act, which contained express cession language and ratified a previously negotiated agreement with the Tribe).

In addition to the statutory text, the legislative history of the Maumee Allotment Act clarifies Congress' intent to disestablish Petitioner's reservation. The record provides that the Act's purpose is "for the sale and disposal of surplus lands[.]" 42 Cong. Rec. 2345 (1908) (statement by Rep. Pray). Further, as noted by Representative Hackney, the Maumee Indians were "capable now of assuming the duties of citizenship." Congress saw that Petitioner and its members were, thus, now owed "the power of the ballot and [] other powers of citizenship that entitle them to the other enlightened and beneficent conditions that White people enjoy." *Id. at* 2348. Congress saw fit that the Maumee Reservation be diminished for Petitioner's benefit – to free its members from being "huddled together" on the reservation and so that the federal government can give the "respect" owed to the Nation. *See id.*

Petitioner Maumee Indian Nation not only knew that its reservation was diminished upon the passage of the Act but also agreed with the federal government to cede and dispose of its interests to those surplus lands including the Topanga Cession. Petitioner's negotiations with Major Hans and its agreement made prior to the Maumee Allotment Act make clear that Petitioner understood the Act and had agreed to cede its interest to the Topanga Cession and other surplus lands its reservation previously encompassed. *See DeCoteau,* 420 U.S. at 445 ("[N]egotiations leading to the 1889 Agreement show plainly that the Indians were willing to

convey to the Government, for a sum certain, all of their interest in all of their unallotted lands."). After the bill's introduction, even further "amendments were made to the bill, to conform more fully to the agreement entered into with the Indians . . . in the summer of 1907," 42 Cong. Rec. 2345 (1908) (statement by Rep. Pray), "regard[ing] the disposal of this reservation." *Id.* at 2347 (statement by Rep. Hackney). Again, before the House Committee on Indian Affairs, Major Hans added further suggestions to ensure "this bill could be made to conform in every respect to the wishes of the Indians, as expressed in the agreement." *Id.* at 2345-46 (statement of Rep. Pray). The Maumee Allotment Act was not only thoroughly crafted and approved by the Indian Bureau, the Secretary of the Interior, and Representatives from New Dakota, but it was deemed "satisfactory . . . to the [Maumee] Indians" as well. *See id.* at 2349 (statement by Rep. Hackney).

On the whole, the statutory text and the legislative history of the Maumee Allotment Act make explicitly clear Congress' intention to diminish Petitioner's reservation. More than just opening Petitioner's reservation to non-Indian settlement, the Maumee Allotment Act was intended by Congress to diminish Petitioner's reservation and was understood – by Petitioner, its members, and Congress – to effect the cession and disposal of surplus lands.

C. Petitioner fails to establish that the statutory text, legislative history, or surrounding circumstances evinced Congress' clear intent to diminish the Band's reservation, and, thus, the Topanga Cession remains within the bounds of the Wendat Reservation and is Indian country.

Without clear congressional intent, the Wendat Reservation cannot be diminished, and Petitioner the Maumee Indian Nation is unable to bear its burden to show that Congress had clearly expressed its intent to disestablish the Band's Reservation. Consistent with the Treaty with the Wendat of 1859, the Band's reservation includes the Topanga Cession. Even if the Wendat Allotment Act divested the Band's reservation of the Topanga Cession, as

Petitioner's contend, the Cession reverted back to the Band in accord with the 1859 Treaty upon the Maumee Allotment Act of 1908.

Since the Treaty with the Wendat of 1859, the Topanga Cession has remained a part of the Wendat Band's Reservation, and Congress has not since expressed the clear intent sufficient to disestablish the Band's Reservation. As "supreme law of the Land" and the equivalent to federal statute, the 1859 Treaty established that the Band's reservation was to be bound on the West by the Wapakoneta River, abrogating Petitioner's prior treaty and diminishing Petitioner's reservation. In accord with this contract between two sovereigns, the Band has relied on this 161-year-old promise in exercising its sovereignty over its lands and developing the WCDC complex.

The Wendat Allotment Act and its legislative history do not support a finding of clear congressional intent to diminish the Band's reservation, which includes the Topanga Cession. Despite Congress' passage of surplus land Acts in anticipation of "the imminent demise of [] reservation[s]," this Court "has never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations with the passage of every surplus land Act." *Solem*, 465 U.S. at 468-69. While some surplus land Acts diminished reservations, many others have not contained language – either in the Acts themselves or their legislative history – sufficient to evince Congress' clear intent to diminish a reservation. *See id.* at 469. Thus, while the Maumee Allotment Act diminished Petitioner's reservation, the language of and circumstances surrounding the Wendat Allotment Act, at most, demonstrate only Congress' intent to open the Band's Reservation to non-Indian settlement. *See McGirt*, 140 S.Ct. at 2464.

The overall statutory text provides that the Band's reservation was not diminished by the Wendat Allotment Act. Whereas the Maumee Allotment Act outlined that surplus lands

would be "disposed of," the Wendat Allotment Act contains no such language that evinces Congress' intent to diminish the Band's reservation. Instead, the Wendat Allotment Act declared that surplus lands be open to settlement. The Wendat Allotment Act does also provide, at most, that policymakers may have hoped to later disestablish the Band's reservation, but such language is not sufficient to diminish the Wendat's reservation. *See id.* Thus, the Act did not diminish the boundaries of the Band's reservation; rather, it "simply permitted non-Indians to settle within existing reservation boundaries." *See Solem*, 465 U.S. at 464.

Legislative history further reveals that Congress did not intend that the Wendat Allotment Act diminish the Band's reservation. In considering the bill for the Act, members of the House were especially concerned with the Band's progress toward becoming "civilized," and noted that "the Indians refused to act until they received the per capita appropriated by the act, saying 'they would travel but one road at a time[.]'" 23 Cong. Rec. 1777 (Jan 14, 1892). Congress only intended at the time to open the lands to "speedily" allow outsiders from other states to settle in time for the Spring planting season in an area that Congress hoped would one day become the State of New Dakota. *See id.* at 1778-80. Discussions among the House make clear that Congress presumed the Band were still "wholly and savage wards," not yet prepared for its reservation's disestablishment and to become full citizens of the state and federal governments. *Cf. Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 356 (1962) ("The Act did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards."). Under these circumstances, particularly the Band's "silen[ce], stubborn[ness], and obstina[nce]," the House only determined with the Act "whether

allotment ought to go on, in order to enable the Administration to open the remainder to settlement." 23 Cong. Rec. 1779-80 (Jan 14, 1892); *cf. Nebraska v. Parker,* 136 S.Ct. 1072, 1079 (2016) ("[This] Act falls into another category of surplus land Acts: those that merely opened reservation land to settlement and provided that the uncertain future proceeds of settler purchases should be applied to the Indians' benefit.") (internal quotations omitted); *Mattz v. Arnett*, 412 U.S. 481, 497 (1973) (The Act's "provisions [] do not differ materially from those of the General Allotment Act of 1887, and . . . do not, alone, recite or even suggest that Congress intended thereby to terminate the Klamath River Reservation . . . [A]llotment under the . . . Act is completely consistent with continued reservation status.").

This Court has considered other, less probative factors in determining Congress' intent behind a given surplus land act, such as the events surrounding and occurring after the passage of a surplus land Act. *Solem*, 465 U.S. at 471-72. Even if Petitioner seeks to prove disestablishment by pointing to other ways Congress intruded on the Band's promised treaty rights, Congress' intent as provided in statutory text and legislative history of the Wendat Allotment Act "plainly . . . left the [Band] with significant sovereign functions over the lands in question." *See McGirt,* 140 S.Ct. at 2466. That most of the Topanga Cession's population is non-Indian is also of little consequence since there are often individually owned, including non-Indian owned, lands within reservations' boundaries. *See id.* at 2464. Consistent with this Court's previous decisions, the Band's reservation has not been diminished because the Wendat Allotment Act neither "include[s] explicit reference to cession or other language evidencing the present and total surrender of all tribal interests [n]or an unconditional commitment from Congress to compensate the Indian tribe for its opened land." *See Parker,* 577 U.S. at 1079 (internal quotations omitted) (quoting *Solem*, 465 U.S. at 470).

II. The doctrines of Indian preemption and infringement prevent the State of New Dakota from collecting the Transaction Privilege Tax against the Wendat Commercial Development Corporation.

The Thirteenth Circuit correctly held that the doctrines of Indian preemption and infringement prevent the State of New Dakota from taxing the Band and, therefore, the state's application of the Transaction Privilege Tax on the Band's development on its reservation (i.e., Indian country) is unlawful. The Topanga Cession remains part of the Wendat Reservation, so the WCDC is required neither to register for a TPT license nor pay the tax. Rather, 4 N.D.C. § 212 wholly does not apply to the Band, and the Maumee Nation shall not be remitted funds from the Wendat Band's development on its own reservation.

The federal government has a deep-rooted policy of leaving Indian tribes free from state jurisdiction and control as the federal government holds exclusive authority over relations with Indian tribes. U.S. Const. art. I, cl. 8; *McClanahan*, 411 U.S. at 168. Indian tribes have long been recognized as "distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of soil, from time immemorial." *Worcester v. Georgia*, 31 U.S 515, 559 (1832). Further, they are recognized as distinct, sovereign nations with powers over their territories and members, and to regulate their internal affairs and social relationships. *White Mountain Apache Tribe*, 448 U.S. at 142. This principal doctrine of Indian sovereignty protects tribes from the reach of the state. *See McClanahan*, 411 U.S. at 164.

Recognizing this sovereignty, this Court has repeatedly found that Indian tribes are generally exempt from state taxation within their own territory. *Blackfeet Tribe of Indians*, 471 U.S. at 764. For these reasons, the TPT is unlawful because it is preempted by federal law through the Treaty of Wendat and Allotment of Wendat, which has deemed the Band to have exclusive authority over its reservation and members. The TPT also infringes on the

Band's ability to self-govern by creating a barrier towards its goal of developing a self-sustaining tribal business on its own reservation to sustain its economy.

A. State authority to tax is preempted by federal law unless Congress has expressed clear Congressional intent to grant such authority.

Congress alone determines the authority over Indian tribes and, through federal enactments, to clarify states' authority to impose taxes on tribes. *See McClanahan* 411 U.S. at 177; *e.g.* The Buck Act, 4 U.S.C. § 104. This Court has consistently held that Indians tribes, whether an individual member or a tribal corporate entity, shall be exempted from state taxes, and that exemption is only lifted when Congress has made its intention to do so unmistakably clear. *Blackfeet Tribe of Indians*, 471 U.S. at 765; *e.g.*, *Bryan v. Itasca Cnty.*, 426 U.S. 373, 390 (1976). This tax immunity is irrevocable absent the cession of jurisdiction or federal statutes permitting it. *Mescalero Apache Tribe v. Jones*, 411, U.S. 145, 147 (1973).

It is important to note that the language of 4 N.D.C. § 212 itself states that the TPT would be unlawful as applied to the Band. Section four of the act provides that no Indian tribe operating within its own reservation must obtain a license or collect a tax. 4 N.D.C. § 212(4). As explained in the previous issue, the Topanga Cession is within the Wendat reservation and the Band is not required to obtain the license or pay the tax as provided in section four. Aside from this provision, the TPT is unlawful as applied to the Band because of the absence of congressional intent to allow for such state authority over Indian country. Tribal governments have the authority over their member's conduct within their reservations absent congressional legislation specifying the limitations of tribal authority or the imposition of state authority. *See White Mountain Apache Tribe*, 448 U.S. at 143; *Williams*, 358 U.S. at 222.

This Court has historically ruled on Indian tax cases based on a categorical approach, factoring in various considerations. *Oklahoma Tax Comm'n,* 515 U.S. at 458. For instance, a

court may consider who bears the legal incidence of the tax. *Id.* If the legal incidence of the tax rests on a tribe or tribal member for sales made within Indian country, the tax may not be enforced absent clear congressional authorization. *Id.* at 459; *see, e.g.*, *Moe v. Confederated Salish and Kootenai Tribes of Flathead Indians*, 425 U.S. 463, 475-81 (1976). This Court may also consider treaties or regulations placed on the tribe by the federal government, searching for any intentional grant of state authority. *See, e.g.*, *Bryan*, 426 U.S. at 377-79. In addition to those considerations, this Court has construed statutes liberally and considered the wording of such acts as based in the unique trust relationship between the United States and sovereign Indian tribes. *Blackfeet Tribe of Indians*, 471 U.S. at 766. Promoting the policy of strengthened tribal self-sufficiency and development, this Court has favored Indian sovereignty and consistently held that states do not have authority to tax Indian tribes absent congressional intent. *See White Mountain Apache Tribe*, 448 U.S. at 143; *Moe*, 425 U.S. at 481.

1. There is no express language in any federal enactment concerning the Band that favors state taxing authority.

State laws generally are not applicable to Indians on a reservation except where Congress has expressly provided that state laws shall apply. *McClanahan*, 411 U.S. at 170. It follows that tribal members and trust property within an Indian reservation are not subject to state tax except by virtue of express authority conferred upon the state by act of Congress. *Id.* at 171. This Court has recognized that in the formation of a treaty between the federal government and an Indian tribe, the treaty cannot be read as if both parties had equal bargaining positions. *Id.* at 174. In the formation of treaties, Indian tribes often occupied a disadvantaged bargaining position; this power imbalance and tribes' complicated history with the federal government must be acknowledged in the current legal interpretation of treaties and acts of Congress. *See id*; 1 *Cohen's Handbook of Federal Indian Law* § 1.03 ("In

negotiating treaties with the United States, tribes moved from a position of relative equality to a position of far less strength.").

In *McClanahan*, the State of Arizona sought to tax a Navajo tribe member for income derived solely from within the reservation. 411 U.S. at 166. The treaty with Navajo Nation explicitly stated that the tribe and its members were to be free from state law and exempt from state taxes. *Id.* at 174. But this Court took into consideration the circumstances surrounding the treaty; in 1868, the Navajo were exiled people who were forced to move 300 miles from their original home. *Id.* This Court found that doubtful expressions would be resolved in favor of the ostensibly weak and defenseless Indians who were "wards" of the U.S. government and dependent upon its protection and good faith. *Id.* Absent explicit congressional language to allow state authority to tax, the treaty precluded extension of state law so Arizona's tax could not apply to Indians on the Navajo Reservation. *See id.* Similarly, in *Bryan*, this Court also emphasized statutory interpretation of Indian law must be read in favor of Indian tribes. *Bryan*, 426 U.S. at 392. Statutes passed for the benefit of Indian tribes and their trust relationship with the federal government must be liberally construed, with doubtful expressions being resolved in favor of the tribe *Id*. Congressional acts or declarations may only be terminated with express language on the face of the act or clear action from surrounding circumstances and legislative history. *Id.* at 393.

In accord with federal government policy promoting self-determination and this Court's precedents upholding tribal sovereignty, this Court should assess any language in the treaty with empathy toward the Wendat and give considerable weight to their promised right to tribal sovereignty. The Wendat Indians ceded much of their traditional homelands, and the Wendat Treaty on its face is silent to any grant of state authority. In the legislative history of the Treaty with the Wendat, Senator Grimes of Iowa recognized that the Wendat Indians

needed to be fairly and adequately compensated "for the loss of their lands." Cong. Globe, 35th Cong., 2nd Sess. 5411, 5411 (1859). Senator Foot of Vermont stated that he hoped that this treaty would secure peace with the Wendat and help them to reap all the "benefits of Christianity and civilization" which New Dakota citizens were capable of sharing. *Id.* at 5412. By this language, it is clear that the treaty of Wendat was meant to establish a reservation for the Wendat Indians to repay them for the loss of their original homelands and other rights they may have forfeited. *See, e.g.*, *McGirt*, 140 S.Ct. at 2452; *McClanahan*, 411 U.S. at 177. The federal government has a history of recognizing wrongs done to Indians and has upheld various grants of reservations to promote Indian sovereignty. *See McClanahan*, 411 U.S. at 166. Considering this background, and since there is an absence of such language and no clear intent to authorize such state authority, the TPT is unlawful as applied to the Wendat Band's development.

Historically, when Congress has intended to allow states taxing authority over tribes, Congress has enacted acts to establish such authority *See McClanahan*, 411 U.S. at 177. Thus, Congress has provided a method whereby states may assume jurisdiction over tribes and their members, with the consent of the tribe occupying the specified Indian country. 25 U.S.C. § 1322; *McClanahan*, 411 U.S. at 177. This Court stated that "Congress would not require the consent of Indians affected by an enactment if states were free to accomplish the same goal of authority unilaterally by their own legislative enactment." *McClanahan*, 411 U.S. at 178. For instance, another federal statute, the Buck Act, provides comprehensive federal guidance for state taxation on motor fuel on those living within federal areas. This Court held that though the act cannot be read as an affirmative grant of tax-exempt status to reservation Indians, absent express language to allow for the taxation of Indian, such taxing is prohibited. *Id.*; *Mescalero Apache Tribe*, 411 U.S. at 147. Congress would not have

zealously protected the sovereignty of Indian tribes against state impositions of power if states already had the residual power to impose such taxes. *See McClanahan*, 411 U.S. at 179.

Congress has explicitly elaborated when states are intended to have authority over Indian tribes, and when states lack the clear grant of authority to tax by Congress, then that state the tax as applied to tribes is unlawful. There has been no clear or express Congressional intent to permit New Dakota's tax on Indian reservations within the state, and New Dakota's acts of taxing the WCDC for their development within the Band's reservation's bounds must be found unlawful.

2. The legal incidence of the TPT falls on the Band.

When the legal incidence of a tax falls on an Indian tribe or its members within the Indian reservation, this Court has been reluctant to permit the state's taxation. *See, e.g.*, *Oklahoma Tax Comm'n*, 515 U.S. at 459; *McClanahan*, 411 U.S. at 177. In *Oklahoma Tax Comm'n*, this Court considered a motor fuel excise tax charged on the sale of fuel to tribal retail stores on Indian trust land. 515 U.S. at 453. This Court found that since this tax was levied on retailers, not on consumers, the legal incidence of the tax fell on the tribe and was therefore unlawful. *Id.* at 455; *see Moe*, 425 U.S. at 481. This Court clarified a state tax may be permitted if the legal incidence falls on a non-member consumer within Indian country so long as the tax places minimal burdens on the tribe for collecting the toll. *Oklahoma Tax Comm'n*, 515 U.S. at 459; *see Moe*, 425 U.S. at 481. Such is not the case for the Band. The New Dakota Transaction Privilege Tax requires that the Wendat Commercial Development Corporation pay the tax to the state for the privilege of being a business within its physical borders. 4 N.D.C. § 212 provides:

(2). Every licensee is obligated to remit to the state 3.0% of their gross proceeds

> of sales or gross income on transactions commenced in this state. Licensees with more than one physical location must report which tax came from which location so the proceeds can be appropriately parceled out to local partners.

4 N.D.C. § 212 (2). The tax is imposed on the licensee; here, the WCDC. The WCDC is wholly owned by the Band, with one-hundred percent (100%) of profits remitted to the tribal government.

Exercising its sovereignty since time immemorial, the Band has preceded the state and has been federally recognized since before the state's establishment. The state cannot enforce taxes on the tribe now, for simply existing within what is now recognized as the state of New Dakota. With this tax, the WCDC would be required to pay the tax merely for running its business on the Band's reservation that is within New Dakota. Further, since the profits of the corporation would be remitted to Petitioner's tribal government, the Band would be deprived of its means of economic independence and subsistence. Under this scheme of this state regulation, it appears that New Dakota will only permit business within the state if they pay the tax, like a grant of permission by payment. Imposing this tax on the Band is completely contrary to the policy of Indian sovereignty as it prohibits the Band from developing business within its reservation without notifying the state by registration and paying the TPT. Ultimately, the WCDC is a tribal corporation to be developed on the Wendat Reservation, so the state may not subject the Band to the TPT.

Even if the Topanga Cession was within Petitioner's reservation as it purports, the state of New Dakota has no authority to tax the Band's development. This Court has not based precedent considering which tribe controlled the land of which is subject to tax, but only considered state tax being imposed on Indian reservations generally. Therefore, whether the Topanga Cession belongs to the Band or the Maumee tribe should not matter in ruling the TPT unlawful. Reservation lands held by Indians in common and in severalty are exempt

from state taxation. *Blackfeet Tribe of Indians*, 471 U.S. at 764 (quoting *In re Kansas Indians*, 72 U.S. 737, 742 (1866)). To allow the tax, even if the Topanga Cession were to be considered a part of the Maumee reservation, runs afoul to the principle doctrine of Indian tribal sovereignty that this Court has long upheld. *See e.g., Worcester*, 31 U.S. at 561; *White Mountain Apache Tribe*, 448 U.S. at 143. If New Dakota's tax was permitted, other states might be encouraged to interfere in tribal matters concerning land ownership and taxes, and this Court would be granting the states increased authority over Indian tribes, something which only Congress has the authority to determine.

3. The State of New Dakota has failed to identify any regulatory function or service that would justify imposition of the tax.

This Court has also considered the interest of the state when assessing whether a state tax is lawful as applied to an Indian tribe. *E.g.*, *White Mountain Apache Tribe*, 448 U.S. at 144; *Oklahoma Tax Comm'n*, 515 U.S. at 458. When a tribal member's on-reservation conduct 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. *White Mountain Apache Tribe*, 448 U.S. at 144; *Moe*, 425 U.S. at 463. Though consideration of the state interest is not necessary here because of the absence of express congressional intent, and due to the fact that the Band bears the burden of the tax, New Dakota has no legitimate interest in imposing this tax on the Band. *See Oklahoma Tax Comm'n*, 515 U.S. at 458. In *Bracker*, the state's interest in the tax was the general desire to raise revenue. *White Mountain Apache Tribe*, 448 U.S. at 150. This Court found that this interest did not invoke a responsibility or service that justified the assertion of taxes on the reservation. Federal legislation has been designed in a way to leave the states with no duty respecting the reservation Indians, the federal regulatory scheme is so pervasive that there is no room for state taxes to interfere with the federal regulatory scheme. *Id.* at 148.

The State of New Dakota's only interest in imposing TPT on the Band is to centralize the state's taxing collection system and ensure enforcement of the tax. This interest cannot outweigh the Band's promised right to self-governance *See McGirt,* 140 S.Ct. at 2465. The TPT itself recognizes that Indian tribes may collect this tax themselves. 4 N.D.C. § 212(5). The desire for a centralized tax system cannot override the Band's ability to govern itself pursuant to its sovereign authority as recognized by the federal government. To enforce this tax on the Band would upset and disarrange the complex statutory framework that Congress designed – one in which Indian tribes are free to govern themselves as domestic sovereign nations. *Warren Trading Post Co. v. Arizona State Tax Comm'n*, 390 U.S. 685, 691 (1965). Consistent with Congress' plenary authority over Indian tribes, Congress has designed a strict and all-inclusive framework of regulations clearly preempting any state interest or authority, and has recognized this scheme in regard to state taxing authority on Indian reservations. *See White Mountain Apache Tribe*, 448 U.S. at 148, *Warren Trading Post Co*., 488 U.S. at 688. To suddenly allow for states to tax tribes based purely on administrative purposes would not only open the door to state authority for other types of austere regulation, but also blur the line between federal and state control over tribes. The state's interest is generic, while the Band's interest cuts to the heart of its existence and ability to govern itself as a sovereign nation. The intent of granting tribes reservations has been to promote their self-sufficiency and economic development. *See White Mountain Apache Tribe*, 448 US. at 143-44. To let states interfere with tribal affairs on reservation and lands and cut away at tribes' self-determination by expanding states' authority would completely contradict the federal government's policy of self-determination and halt efforts tribes have made in reliance on this long-standing policy. *See McClanahan*, 411 U.S. at 168.

B. The TPT unlawfully infringes on the Band's promised right to self-government.

Courts have often focused on federal preemption as a bar to state authority. *McClanahan*, 411 U.S. at 172. This Court has consistently held that tribes are entitled to autonomy as sovereign nations and that any exertion of state court authority interferes with a tribe's promised right to self-government. *Williams*, 358 U.S. at 222; *see McGirt*, 140 S.Ct. at 2465. A state law cannot infringe on the right of a tribe and its members to make its laws and be governed by them. *Williams*, 358 U.S. at 220. The Indian sovereignty doctrine focuses on the infringement of tribal self-government and sovereignty, against which applicable treaties and federal statutes must be read when analyzing federal preemption of state law. *McClanahan*, 411 U.S. at 172. Rather than focusing solely on federal intent and federal documents, this infringement analysis necessarily recognizes and gives weight to tribal sovereignty and tribes' participation and history in the formation of those federal documents. The TPT is preempted by federal law as imposed on the Wendat tribe, but the law also infringes on the Band's right to self-government, which further highlights why this Court must find that the TPT is unlawful and cannot be enforced against the WCDC.

1. The TPT imposes state authority on the tribe, directly burdening the Band's ability to self-govern.

A tax cannot be imposed on a tribe if it burdens the tribe's ability to govern itself. *Moe*, 425 U.S. at 481. For instance, in *Moe*, this Court held that a cigarette tax imposed on shop owners within the reservation was lawful as applied to non-Indians and presented only a minimal burden on shop owners to tax non-Indians within the reservation. *Id.* This Court concluded the burden was solely on the retailer, not on the tribe or the tribal government, and that an Indian retailer within a reservation as an agent for the collection of taxes owed by non-Indians, was not a gross interference with the tribe's freedom from state regulation or the ability to self-govern. *Id*.

The TPT is clearly distinguishable from the cigarette tax in *Moe*. Here, the tax is not on the consumer. In *Moe*, the tax fell on the consumer, and it was the burden of the retailer to collect the tax from a non-Indian customer. *Moe*, 425 U.S. at 467-68. The tax on the WCDC is on the WCDC itself, not any individual customer who may partake in the services to be provided by the WCDC complex. Since the TPT is on the WCDC, a tribal corporation, whose profits are remitted back to the tribal government, this tax burdens the tribal government and its ability to self-govern. Without the income of the WCDC, the Band will not be able to exercise sovereignty over its members and affairs and, at worst, may cease to exist. Although Petitioner claims it needs the proceeds the TPT would provide, its financial struggle does not permit the state to infringe on the Band's development, or on the Band's profits, even if it would be used for the laudable goal of supporting Petitioner's economy. Nor does it give the state the authority to deprive the Band of that income by any percentage of tax as that would force the Band into economic surmise. All governments need money and income to exist, the states are well aware of that, and tribal governments may not be taxed by states when the tax jeopardizes the existence of their government, and therefore, their ability to self-govern.

The State of New Dakota also intrudes on the Band's ability to settle its own dispute with the Maumee Nation. Petitioner attempts to enforce the tax to be remitted those payments by the Band, but the state has no authority to act as a middle party between these two tribes. One of the most principal tasks of a sovereign body is to communicate and settle disputes with other bodies of government. By attempting to enforce the tax, New Dakota – acting as a dominating third-party and attempting to assert powers over tribes that only Congress holds – deprives the Band of its voice in attempting to repair and strengthen its relationship with Petitioner. The state has no authority to partake in a dispute between two Indian tribes and

their reservations. Here, New Dakota's actions not only infringe on the Band's ability to self-govern, but the Maumee Nation's sovereignty as well.

2. Enforcement of the TPT places a financial burden on the tribe that makes self-sufficiency impossible.

Current congressional policy favors the self-determination of Indian tribes. General federal policy encourages tribes to revitalize their self-government and to assume control over their business and economic affairs. *White Mountain Apache Tribe*, 448 U.S. at 149. In *White Mountain Apache Tribe*, Arizona sought to apply a motor carrier license and fuel tax on a non-Indian company that did business in timber operations with the Fort Apache Reservation, which reimbursed the company for the paid tax. These timber operations accounted for ninety (90%) of the tribe's profits, and since the tribe was required to reimburse the company for the paid taxes, this Court found that the tax was unlawful absent clear congressional intent. *Id.* at 147. This Court reasoned that it is the tradition of Indian sovereignty over their reservation and tribal members that is reflected and encouraged in a number of congressional enactments, which demonstrates a firm federal policy of tribal self-sufficiency and economic development. *Id.* at 143; *Moe*, 425 U.S. at 475-79.

The New Dakota tax is contrary to federal policy intention of tribal revitalization and self-sufficiency. In the Legislative History of the Allotment Acts of Wendat, Congressman Pickler stated that the Wendat Indians were "very little civilized,' to which Congressman Mansur replied that they are "wholly wild and savage." The intent of allotment of the Wendat land was to make the tribe more civilized, with the hope that they may be "assimilated by the good example" of residents of neighboring lands. Cong. Globe, 35th Cong., 2nd Sess. at 5412. Here, 100% of the WCDC's proceeds is remitted back to its tribal government. The tribal government would be directly impacted by the TPT because any financial loss from the WCDC's profits deprives the Wendat tribal government of the finances it needs as a

sovereign nation. *See White Mountain Apache Tribe*, 448 U.S. at 149. Lack of such income would deprive the tribal government of funding necessary to sustain its government.

The TPT would also make the development, and self-sufficiency, nearly impossible. The WCDC development is to include the creation of various tribal businesses including a nursing care facility, public housing, a cultural center, tribal museum and shopping complex. These facilities will provide at least 350 jobs, and the income derived from the development plans is intended to "fund the tribal public housing and nursing care facility, whose operating costs would otherwise pose a financial hardship to the Band and could not be constructed." *Maumee Indian Nation*, 305 F. Supp. 3d at 49. These plans are not only to ensure a profit for the tribe, but to provide jobs for tribal members and create housing and facilities for tribal members in need. Plainly, the Band's plans are to create facilities and jobs to care for its tribal members and remain self-sufficient as a nation. New Dakota's imposition of the TPT on the Band, whether paid to the state or to Petitioner, would make development of these plans impossible and, in turn, deprive the tribal government of its self-sufficiency, making self-governance unattainable.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the United States Court of Appeals for the Thirteenth Circuit and hold that (1) the Treaty with the Wendat abrogated the Treaty of Wauseon, the Maumee Allotment Act of 1908 diminished the Maumee's reservation, and the Topanga Cession remains within Indian Country because Congress has not diminished the Wendat Reservation; and (2) both the doctrine of Indian preemption and infringement prevent the State of New Dakota from collecting its Transaction Privilege Tax against a Wendat tribal corporation on its reservation.

Respectfully Submitted,

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