No. 20-1104

IN THE
SUPREME COURT OF THE UNITED STATES
FEBURARY TERM 2021

MAUMEE INDIAN NATION
Petitioner,

v.

WENDAT BAND OF HURON INDIANS
Respondent.

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

BRIEF FOR PETITIONER

Team No. T1025

Counsel for Petitioner

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

STATEMENT OF THE CASE

I. STATEMENT OF PROCEEDINGS

The Maumee Nation ("The Maumee") and the Wendat Band of Huron Indians ("The Wendat") are two neighboring tribes in the State of New Dakota and dispute the ownership of the Topanga Cession, an area consisting of mostly surplus land declared by treaties with the Maumee and the Wendat. R. at 7. While the tribes have disputed the ownership of the cession for decades, they have until recently refrained from asking a federal court to resolve the dispute. *Id.*

After being notified that the Wendat were planning to construct a residential-commercial development on 1,400 acres bought in fee from non-Indian owners, the Maumee reminded the Wendat that the Maumee Nation considered the Topanga Cession to be its land, and that any dispute was resolved when the Wendat expected the shopping complex to pay to the State of New Dakota the 3.0% Transaction Privilege Tax. R. at 8. The tax would be remitted back to the Maumee Nation pursuant to §212(5) because of the Wendat corporation's operation on Maumee lands. *Id.* In response, the Wendat corporation stated that the Topanga Cession was part of the Wendat Reservation and had been since the Treaty with the Wendat in 1859. *Id.* On November 18, 2015, the Maumee Nation filed a complaint against the Wendat Band asking the federal court for a Declaration that any development by the Wendat corporation would require the procurement of a TPT license and payment of the tax because it's located on the Maumee Reservation. If the court would not grant a Declaration, the Maumee asked for a Declaration that the Topanga Cession was not Indian country at all. *Id.*

The United States District Court for the District of New Dakota found in favor of the Maumee Nation and held that the Topanga Cession is within the Maumee Reservation and that the Wendat Band is required to obtain a TPT license and pay tax to the State of New Dakota to be remitted to the Maumee Indian Tribe. R. at 9. The Wendat Band filed an appeal with the United States Court of Appeals for the Thirteenth Circuit. R. at 10. The thirteenth circuit reversed the District Court's decision and held that the Treaty with the Wendat made it clear that the Maumee Nation's claim to the Topanga Cession has been abrogated. *Id.* The court also held that the imposition of the TPT infringes on tribal sovereignty and should be subject to Indian preemption. R. at 11.

The Supreme Court of the United States granted certiorari to decide two issues: (1) whether the Treaty with the Wendat abrogated the Treaty of Wauseon and/or did he Maumee Allotment Act of 1908 diminish the Maumee Reservation, and if so, did the Wendat Allotment Act also diminish the Wendat Reservation or is the Topanga Cession outside of Indian Country; and (2) assuming that Topanga cession is still in Indian Country, does either the doctrine of Indian presumption or infringement prevent the State of New Dakota from collecting its Transaction Privilege Tax against a Wendat tribal corporation.

II. STATEMENT OF FACTS

This appeal arises from the Thirteenth Circuit Courts erroneous holding that the Maumee Reservation was diminished, and the Wendat Reservation was not. R. at 3. The Maumee Indian Nation dates its rights to the Treaty of Wauseon, which was ratified by Congress in 1802. R. at 4-5. This treaty reserved the lands to the west of the Wapakoneta River for the Maumee Indians. R. at 5. While the Wendat Band of Huron Indians (hereinafter "Wendat Band") reserved the lands to east of the Wapakoneta River in the

Wendat Treaty of 1859. *Id.* During the 1830s the Wapakoneta River moved approximately three miles to the West. *Id*. This left a sizeable tract of land in Door Prairie County which was west of the river prior to 1802 but is now on the east of the river by the time the Wendat Band signed their Treaty. *Id*. Both tribes have maintained exclusive right to these lands since at least 1937. R. at 5. For the last eighty years both tribes refer to this tract of land as "Topanga Cession". R. at 5. Due to the General Allotment Act, P.L. 49-105 (Feb. 8, 1887) both the Maumee Nation and the Wendat Band were paid exact sums for surplus lands that each tribe ceded. *Id*. The Maumee Nation was paid two million dollars for four hundred acres of surplus land while the Wendat Band were paid two hundred thousand dollars more for six hundred and fifty acres of surplus land. *Id*. Today Topanga Cession consists of land that was declared surplus under one of the allotment acts but both tribes disagree on which act specifically. R. at 6.

The Maumee Tribe has submitted uncontested evidence that it has received money in exchange for lands sold between 1908 and 1934 under the allotment act, but the Bureau of Indian Affairs has either lost or spoilt these records. R. at 7. Both tribes agree that virtually no member of either tribe selected an allotment within Topanga Cession. *Id*. Additionally, Indians who live there now either rent or have purchased their lands in fee from non-Indian homesteaders, the state of New Dakota or the U.S. *Id*. Because the two reservations share a border there has been contentious dispute as to who owns Topanga Cession. *Id.* However, both tribes have refrained from asking a federal court to resolve the dispute for at least eighty years. *Id.* There has been no commercial development in Topanga Cession to date. *Id*.

On December 7, 2013 the Wendat Band purchased 1,400 acres of land in Topanga Cession to develop a combination residential – commercial enterprise. *Id.* The development

will consist of public housing for tribe members and a nursing facility for elders. *Id*. Additionally, the development will consist of a tribal cultural center and tribal museum. *Id.* The Wendat Commercial Development Corporation (hereinafter "WCDC") which is owned by the Wendat Band and who receive 100% of corporate profits plans to build a shopping complex. R. at 8. The shopping complex will cater primarily to tribal residents with a focus on native foods and cuisine to prevent the area from becoming a food dessert for Indians. *Id.* The revenue from the shopping complex is estimated to be to be around eighty million dollars and this money is to fund the building of the public housing and nursing facility. *Id.* The Wendat plan to support at least 350 jobs for tribe members through this development. *Id.*

The state of New Dakota's Transaction Privilege Tax (hereinafter "TPT") is a tax levied on the gross sales or gross income of a business and is paid to the state for the 'privilege' of doing business in that state. R. at 5. The state requires a 3% tax on these funds after businesses pay for a TPT license. *Id.* The funds will be used to maintain an effective state commercial infrastructure and help expedite civil court proceedings. R. at 6. Section 6 of the statute recognizes the Maumee Nation gave up valuable mineral interests and as such any taxes collected on businesses in Door Prairie County that are not located in Indian country shall remit 1.5% back to the Maumee tribe. *Id.* The Department of Revenue recognizes that each tribe could collect the tax itself, but the state of New Dakota claims to provide the centralization and enforcement and therefore are the most efficient means of providing funds to tribes. *Id.* Failure to obtain a license or pay the tax is a class 1 misdemeanor. *Id.*

The Maumee Nation approached the Wendat Band to remind them that they still considered Topanga Cession their land and as such expect the Wendat Band to pay 3% taxes to the state per the statute. R. at 8. The Maumee Nation made a desperate plea to the Wendat Band for the funds because sustainable timber harvesting, is their largest source of income and has been greatly affected by climate change and reduced by at least 12%. *Id.* Additionally, the Maumee Nation explained they would like to provide scholarships for their members and invest in renewable sources of energy and other sustainable economic development to diversify tribal economy so that they can provide basic services and jobs for Maumee tribe members. *Id.* The Maumee Nation pointed out that the average income for a Maumee Indian is 25% less than that of their Wendat counterpart. *Id.* The Maumee Nation suggest that the additional revenue will encourage the Maumee to become avid consumers of goods and services of the development.

The Wendat Band claim the land is still theirs because they were not diminished and that the purchased lot for development is fee land that has not yet been taken into trust. *Id.* They also claim that because the land is still considered Indian country the state of New Dakota is Preempted by federal law or infringes on the Wendat Bands sovereign powers. *Id.* In response, on November 18, 2015 the Maumee Nation filed this complaint against the Wendat Band asking the federal court for a declaration that either the land in Topanga Cession belongs to the Maumee Nation and the Wendat should pay the taxes, or in the alternative that Topanga Cession is not Indian country and the Wendat should pay taxes. *Id.*

SUMMARY OF ARGUMENT

At the core of land disputes within Indian country lies the relationship between tribes and the United States. Within this complex legacy is the act of diminishment, where

Congress alters the boundaries of tribes in exchange for monetary payment. This action may only be done by Congress, and requires explicit congressional intent expressed in statutory language and legislative history, or a combination of language, history and contemporary circumstances to be interpreted by the Court.

The Court of Appeals for the Thirteenth circuit held that the Maumee Nation's boundaries were diminished through treaty abrogation and the Maumee Allotment Act of 1908. However, the statutory language of both the Treaty with the Wendat and the Maumee Allotment Act of 1908 is unclear and insufficient to prove diminishment of the boundary. On the contrary, the Wendat Allotment Act of 1892 is clear, and its statutory language, legislative history, and contemporary circumstances lead to a diminished Wendat reservation.

On the chance that the Topanga Cession would be considered Indian Country, the State of New Dakota would be pre-empted from imposing the tax on the Wendat Corporation. The state would also be infringing on the tribe's right to conduct business with each tribe.

ARGUMENT

I. The Maumee Indian Nation Land was neither abrogated nor diminished through allotment by the United States, but the Wendat Reservation was diminished through allotment, making the Topanga Cession outside of Indian Country.

a. Statutory language and legislative history indicate that treaty with the Wendat did not abrogate the Treaty of Wauseon.

The origins of this case, like many disputes regarding tribal issues heard before this court, emerge from the relationship held between the United States and the Indian tribes. Since the 19th century, the Court maintains that the relationship between tribes and the United States "is perhaps unlike that of any other two people in existence." *Cherokee Nation v. State of Georgia*, 30 U.S. 1 (1831). The Indian's right to the lands that they occupy have been described as "unquestionable" and a right that can be extinguished only by voluntary cession to the government. *Id*. at 2.

This relationship has been compared to the U.S.'s relationships with foreign nations, but this is not an accurate representation of the relationship between Indian tribes and the U.S. government. Considered domestic dependent nations, the U.S. considers tribes to occupy "a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases." *Id*. In this way, the Court sees the relationship between the U.S. and tribes as a "guardian-ward relationship." *Id*.

Despite this unique relationship, the United States and Indian tribes negotiate in similar way to international law, through treaty. The President of the United States has the power to make treaties with foreign nations, with advice and consent of two-thirds of Congress. U.S Const. art. II, § 2, cl. 2. All treaties made under this provision are the supreme law of the land and extends to all treaties before and after the provision was made.

Ware v. Hylton, 31 U.S. 199, 209 (1796). Congressional provisions passed in exercise of its constitutional authority must be upheld by the courts when clear and explicit, despite contradicting stipulations in an earlier treaty with a foreign power. *Fong v. United States et al.*, 149 U.S. 698, 720 (1893). However, certain circumstances permit Congress to adapt or eliminate promises made by a treaty. Although not considered a foreign power, in *U.S. v. Dion*, the Court concluded that Congress has the power "to abrogate the provisions of an Indian treaty … 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." 476 U.S. 734, 738 (1986). The intention to abrogate a treaty is not treated lightly; the Court requires that Congress' intention to abrogate Indian treaty rights be clear and plain. *Id*. This preference, not rigidly interpreted by the Courts, of the interpretation of clear intention to abrogate has been proven by looking at the statute's "legislative history" and "surrounding circumstances" in addition to "the face of the Act." *Id*. at 739. The essential component in proving Congressional intent to abrogate a treaty is 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 the conflict by abrogating the treaty. *Id.* at 740.

Here, Treaty with the Wendat and Treaty of Wauseon, the intention to abrogate Indian rights is not made clear by Congress. The Treaty of Wauseon was signed on October 4, 1801. The treaty recognized the Maumee living within the New Dakota Territory, and established a boundary line between the U.S. and the Maumee Nation. Article III states, "The boundary line between the United States and Maumee Nation, shall be the western bank of the river Wapakoneta, between Fort Crosby to the North and the Oyate Territory to the

South, and run westward from there to the Sylvania river." Treaty of Wauseon, Oct. 4, 1801, 7 Stat. 1404. Within the boundaries, the U.S. allotted all the lands to the Maumee to live and to hunt on. The Treaty with the Wendat of 1859 agreed to the cession of lands by the Wendat in exchange of payment to the Wendat an annuity of two-hundred thousand dollars for a twenty year term. Article I of the treaty states that "The Chiefs, Headmen and Warriors, aforesaid, agree to cede to the United States their title and interest to the lands in the New Dakota Territory, excepting those lands East of the Wapakoneta River; with the Oyate Territory forming the southern border and the Zion tributary forming the northern born. The eastern terminus of these reserved lands is the line bordering the New Dakota Territory and the Oyate Territory." Treaty with the Wendat, March 26, 1659, 35 Stat. 7749. In exchange for this land, article III of the Treaty states,

> In consideration of the cession aforesaid, the United States agree to pay to the Wendat Huron Indians, an annuity for the term of twenty years, of two-hundred thousand dollars; and will deliver to them goods to the value of one hundred thousand dollars, so soon after the signing of this treaty as they can be procured; and a further sum of ninety thousand dollars, in goods, shall be paid to them in the Year eighteen hundred and sixty, by the Indian agent at Fort Crosby.

Id. Based on the languages within both treaties, the Treaty with the Wendat did not explicitly abrogate the Treaty of Wauseon. Article I of the Treaty with the Wendat states that the Wendat "agree to cede to the United States their title and interest to lands in the New Dakota Territory, excepting those lands [E]ast of the Wapakoneta River." *Id*. Absent legislative history to understand the purpose of the treaty, surrounding circumstances indicate that the lands mentioned in the Treaty of Wauseon, which are located in "the western bank of the river Wapakoneta" were allotted to the Maumee. *Id*. Between the ratification of the two treaties by Congress, in the 1830s, the river moved approximately three miles to the west.

For the treaty with the Wendat to have abrogated the Treaty of Wauseon based on the geographical change of the land, the lawmakers would have had to acknowledge the three mile river shift as a conflict with the borders set in the Treaty with the Wauseon. The Treaty with the Wendat does not identify that conflict or suggest that this conflict should be resolved through land cession or remarking of the boundary. Based on the plain meaning of the treaty language, the western bank of the river is considered Maumee land, and was not in the possession of the Wendat. Therefore, the land supposedly ceded by the Wendat was not in the possession of the Wendat, despite the natural movement of the river three miles west. Therefore, the Treaty with the Wendat did not abrogate the Treaty of Wauseon.

b. Ambiguous statutory language and legislative history indicate that the Maumee Nation was not diminished through the Maumee Allotment Act of 1908.

The history of the surplus act begins with the American view that Indian tribes should abandon their nomadic lives on the communal reservations and settle into an "agrarian economy on privately owned parcels of land." *Solem v. Bartlett*, 465 U.S. 463, 466 (1984). This was fueled partly by the American belief that Indians should assimilate into American society. Id. This belief was adapted into national allotment policy by U.S. Congress, and leaves a modern legacy consisting of jurisdictional disputes between State and Federal officials, amongst other land issues. *See id*. at 467.

It is settled law that some surplus land acts diminished reservations and other surplus land acts do not, and the result of this complex legacy of reservation diminishment by Congress, is precedent established a "fairly clean analytical structure," looking to three factors within congressional action related to the allotment and diminishment of land. *Id.* at 469; *Hagen v. Utah*, 510 U.S. 399, 410 (1994). Acts that open reservation for settlement do

not automatically mean that the opened area loses its reservation. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587 (1977). Longstanding principle dictates that reservation diminishment is a matter solely for Congress. *Solem*, 465 U.S. 463 at 470. This principle establishes that Congress must clearly evince an "intent to change boundaries" before diminishment will be found. *Id*. The Court relies on several factors to determine clear diminishment of Indian reservations: statutory language, legislative history, historical context, and contemporary situations. Statutory language is the most probative evidence of diminishment. *Id.* The Court recognizes people who moved onto open reservation lands as relevant to deciding whether a reservation has been diminished by an act of Congress. *Id*. Historical context surrounding the passage of the surplus land acts may also be considered by the Court when interpreting Congress's action on reservation land. *Hagen*, 510 U.S. 399 at 411. The Court will resolve any ambiguities within statutory language in favor of the Indians. *Id*. A conclusive presumption that a reservation has been diminished would be found within congressional intent to diminish and sum of a certain payment was found in the legislation. *Id*.

The Court requires explicit statutory language that speaks to the diminishment of Indian reservations. The Maumee allotment act, formally titled "An Act to authorize the allotment, sale, and disposition of the eastern quarter of the Maumee Indian Reservation in the State of New Dakota and making appropriation and provision to carry the same into effect" was approved by congress on May 29, 1908. Maumee Allotment Act of 1908, Pub. L. 60-8107 (1908)**.** Section 1 of the Act permits the Secretary of the Interior to divide and allot lands to the Maumee Indians, and that "[u]nclaimed lands in the western three-quarters of the reservation shall continue to be reserved to the Maumee." Id.

Section 1 states that "[t]he 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 the public domain by way of this act." *Id***.** Explicit 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 opened lands. *Solem*, 456 U.S. at 470. The Court recognizes cession as "the voluntary surrender of territory or jurisdiction, rather than a withdrawal of such jurisdiction by the authority of a superior sovereign." *Rosebud*, 430 U.S. at 497. The Court acknowledges an "unconditional commitment from Congress to compensate the Indian tribe for its opened land." *Id*. Language that provides "for the total surrender of tribal claims in exchange for a fixed payment" evinces Congress' intent to diminish a reservation and "creates an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." Statutory provisions restoring portions of the reservation to "the public domain" signifies diminishment. *Nebraska v. Parker*, 136 S.Ct. 1072, 1079 (2016).

Respondent may argue that the section 1, which indicates the agreement of Indians to cede the entire eastern quarter surplus to public domain may be considered sufficient to establish explicit diminishment of the reservation; however, this is contrary to court precedent. The public domain is land owned by the government that was available for sale, entry, and settlement under homestead laws, or other disposition under body of laws. *Hagen*, at 412. When previously reserved lands were restored to the public domain, their previous public use was extinguished. *Id*. Congress has long considered, evidenced by statutes of the period, that Indian reservations were separate from the public domain. *Id*. The Court established that references to open areas being in the public domain are considered "isolated

phrases" and are hardly dispositive of a diminished status of Indian land. *See Solem*, 456 U.S. at 470. Further, it noted in *Solem* that "even without diminishment, unallotted open lands could be conceived of as being in the public domain inasmuch as they were available for settlement." *Id*. at 475. Reference to the public domain should appear in the operative language of the statute opening the reservation lands for settlement, which is the relevant point of reference for the diminishment inquiry. *Hagen*, at 966-967. For the purposes of this allotment act, the reference to the public domain is not sufficient enough to consider the lands diminished as a matter of law.

Section 2 of the Act declares that the disposed lands,

> "under provisions of homestead and townsite laws of the U.S., shall be open to settlement and entry by proclamation of the President, which proclamation shall describe the manner in which the lands may be settled upon, occupied, and entered by persons entitled to make an entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed in such proclamation: 'Provided, that prior to the said proclamation the Secretary of the Interior, in his discretion, may permit Indians who have an allotment within the area described in section one of this Act to relinquish such allotment and to receive in lieu thereof a sum of eight-hundred dollars.'"

Maumee Allotment Act of 1908. The prescribed provision in section 2 of the allotment act is not sufficient enough to convey explicit diminishment of the Maumee reservation. *Id*. Acts that survey and appraise disputed land and prepare them to be "open for settlement" and provided uncertain future proceeds of settler purchases are not considered acts that establish "hallmarks of diminishment." *Nebraska*, 136 S.Ct. 1072 at 1079. Despite the language related to the eastern portion of the Maumee land, and the indication of a potential sum paid to the Indians who decide to relinquish their allotted land, the language does not indicate an explicit cession required by the Indians to the U.S. to be considered a diminishment.

Therefore, the statutory language within the Maumee Allotment Act is not sufficient evidence that its language explicitly diminished the Maumee Reservation.

Legislative history also proves to be determinative of the Maumee Tribe's undiminished land status. Mr. Pray states for the record that the bill's purpose "is to provide for the survey of the lands of the Maumee Indian Reservation, situated in the State of New Dakota, and for the allotment of the lands in severalty to the Indians and for the sale and disposal of the surplus lands after allotment." 42 CONG. REC. S2418 (daily ed. May 29, 1908) (statement of Rep. Pray). In addition to this congressional purpose, other lawmakers expressed their own intentions for the passing of this bill. Mr. Ferris remarks that as someone who lived in Indian homestead country, "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 the reservation." *Id*. (statement of Rep Ferris). He hoped that through the passage of this policy, years after, "there will not be a single Indian reservation left in the borders of the whole country." *Id*. Mr. Pray, however, follows Mr. Ferris recognizing the trust relationship between the United States and Indians, where the country is "required to dispose of the lands and to expend and pay over the proceeds received from the sale of surplus lands in the manner and for the purposes provided in the bill." *Id*. (statement of Rep. Pray).

The valuation figure for the land, determined in the record, was a limited sum for only certain portions of the land. Mr. Pray reported, "the only appropriation the bill carries that is not reimbursable is the one providing for the payment of $5.05 an acre to the Indians on account of sections 16 and 36, granted to the State of New Dakota for school purposes." *Id*. This figure was not determined as the exact sum for the allotment. Further, the

unanswered question in the history regards the status of the land; Mr. Gaines said, "I understand that all lands unsold will continue to belong to the Indians is that right? Until there is payment the land belongs to the Maumee?" The terms of the allotment appropriation, set only for specific purposes, as well as the unclear answer of the status of the unsold lands, are unconvincing. The statements made by lawmakers within the legislative history indicates that the Maumee allotment act determined the parameters of the allotment act for the Maumee Tribe, stating a potential price for the allotted lands, reflected the intent of the act as a means of removing the reservation, but not explicitly declare that the boundaries of the land were explicitly diminished by the act.

The Maumee Tribe submitted uncontested evidence that the Bureau of Indian Affairs lost or spoiled the records that show exactly which parcels the Maumee Tribe was compensated for in their allotment acts. As of 2010, tribal census data indicates that the Maumee tribe members consist of 17% of the population within the Topanga Cession. R. at 7. This evidence would represent the compensation that the U.S. provided for the Maumee Tribe, but without the record, there is no documentation of the exchange to prove that diminishment occurred by Congress. These circumstances, including the statutory language, the legislative history, and the contemporary circumstances surrounding the lands of the Maumee Tribe, all reflect an undiminished Maumee reservation.

c. Statutory language and the legislative history surrounding the Wendat Allotment Act of 1892 subsequently diminished the Wendat tribal lands.

The statutory language and legislative history within the Wendat Allotment Act, as well as the sums payed by the U.S. Government, confirm the diminished status of the Wendat Reservation. Statutory language is key in determining the diminishment of Indian Reservation. Section 1 of the Wendat Allotment Act that Congress would,

> "as soon as practicable, formally continue the surveying of the western half of the lands reserved by the Wendat Band in the 1859 Treaty. After the survey is complete the Commissioners shall give every adult reservation Indian one year from which to pick an allotment of 160 acres for themselves; and one parent or guardian may select an allotment of their choosing of 40 acres for each minor not yet an adult. All lands not selected within one year of the survey's completion shall be directed surplus lands open to settlement. The eastern half of the lands reserved by the Wendat Band in the 1859 Treaty shall continue to be held in trust by the United States for the benefit of the Band."

Wendat Allotment Act, Pub. L. 52-8222 (1892). Congress indicates that the lands that are not selected by Indians within a year of the allotment period will be directed as surplus lands open to settlement. The U.S. also agreed "to pay to the Treasury, in the name of the Wendat Band, the sum of three dollars and forty cents ($3.40) for every acre declared surplus." *Id*. This payment would not exceed more than two-million two-hundred thousand dollars in full. *Id*. Section 3 creates a permanent fund for the Wendat which would consist of the money accrued from the disposal of the lands. *Id*. The act also includes that Congress may appropriate funds for the purpose of promoting civilization and self-support among the Wendat Indians, a portion that would not exceed five percent of the principal sum.

When determining the status of an Indian reservation, the Court looks to legislative history to gather historical context regarding the transaction. From the legislative history within the Wendat Allotment Act, the record refers to several different factors that put together, indicate a diminishment to the Wendat tribe land. The history indicates that the Wendat Indians refused to act until they received the payment agreed to in the allotment arrangements. At the time of the debate, 308 out of 1327 Indians received allotments, with 1064 left. 23 CONG. REC. (daily ed. Jan. 14, 1892) (statement of the Clerk). The lawmakers ask for a certain sum of $15,000 in exchange for 2,000,000 acres of "valuable land to be added to the public domain." *Id*.

Contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation, the Court has willingly inferred that the reservation would shrink as a result of the proposed legislation. Within the legislative history, Mr. Harvey expressed the purpose of the allotment to advance the public interest and shared that people had already congregated along the border, in anticipation to the settlement of the land. They also compared the current conditions to the Oklahoma settlement, which opened 900,000 acres and was taken by settlers within a day. The lawmakers expressed regret that they couldn't open the other settlements at the same time, due to allotment issues from the U.S. to the Indians that resided on the land. The history states: "the Secretary of the Interior states that for a full month, the Indians stood silent, stubborn, and obstinate, and would not have anything to do with the matter." *Id*. The record indicates that only 308 Indians received allotments at the time of the debate, and the record asked for the passage of the bill to appropriate $15,000 to complete the work of allotment. This bill indicates that the process of allotment was not completed at the time of passage. Besides the mention of past work that the U.S. completed in reducing the larger Indian reservations, through allotment or cession, there is no explicit language that determines the Wendat reservation had been diminished in the discussion between lawmakers.

The Court considers who actually moved onto open reservation lands as a means to determine whether a surplus land act diminished a reservation, and states that where non-Indian settlers "flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred." *Solem*, 465 U.S. at 471. As of 2010, Indians have populated less than 20% of the western half of the Wendat Reservation. R. at 7**.** These declining trends in

population, combined with the intent stated in the legislative history and the clear cession language within the statute, show a clear intention by Congress to diminish the Wendat Tribal lands.

II. Because Topanga Cession is located in Indian country, the doctrine of preemption and infringement prohibit the State of New Dakota from exercising its tax on the Wendat Tribal Corporation.

a. The State of New Dakota is pre-empted from imposing a tax on the Wendat Tribal Corporation, as it would frustrate Congress' intent stated within the treaty and allotment acts.

When federal law provides an overarching scheme for commercial activity on a reservation inuring to the benefit of the Indians, a state may not disrupt that scheme without a strong interest for doing so. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). The preemption analysis to determine the validity of the state's tax the court balances the states interests against those of the federal government and Indian tribes. *Id.* In order to determine each party's interests, they must be examined in light of the broad policies underlying relevant treaties and statutes. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2501 (2020).

The State of New Dakota's Transaction Privilege Tax requires businesses to acquire a $25 TPT License and should any business exceed $5,000 in either gross sales or gross income must remit 3% of either gross sales or gross income to the state. 4 N.D.C. § 212. Tribes who have land held in trust by the U.S. and are operating on their own reservation land are exempt. *Id.* (4). The statute recognizes that any businesses that do not fall under section (4) will be taxed. *Id.* Section (6) recognizes that the Maumee tribe ceded their interests in mineral lands now called Door Prairie County upon their settlement and as such half of TPT taxes collected on those lands are to be remitted to the Maumee tribe. *Id.* (6).

The purpose of the tax is to maintain a robust and viable commercial market infrastructure which includes funding civil courts to expedite enforcement of contracts and debt collection. *Id.* (1)-(3). The plain language of the statute allows the state to discriminate against and impose a privilege tax upon any tribal enterprise operating on any reservation land that is not legally recognized as their own, or land that is theirs but has not been taken into trust by the federal government. *Id.* (4). It is established that states have limited authority to tax non-Indians acting on tribal reservations. *Williams v. Lee*, 358 U.S. 217, 220 (1959). Here, the New Dakota statute would be applied to Indian businesses operating for the benefit of tribal members in Indian country for wholly unrelated tax purposes.

The 1801 Treaty of Wauseon between the U.S. and the Maumee Indians is a peace treaty which ratified the incorporation of the Maumee tribe as part of the United States through their residence in the New Dakota Territory. Treaty of Wauseon, Article II, 7. Stat. 1404. There was an exchange of tribal chiefs for the return of war hostages in furtherance of this peace. *Id.*, article I. The treaty identifies boundaries in jurisdiction between the U.S. and the Maumee and any non-Indian who violates these boundaries forfeits the protection of the U.S. Government. *Id.*, articles II, V-VI. The treaty states only upon crime of robbery or murder does the U.S. have jurisdiction over the Indian and only when he has been delivered to the U.S. by the tribe to the nearest post off the reservation. *Id.,* article VII. Additionally, the treaty states the Maumee ceded only their claim to the lands east, south and west of Article III in the treaty. *Id.*, article VI. Lastly, the U.S. distributed goods for Indians to promote their use and comfort. *Id.*, articles III, VIII. The purpose of the Wauseon treaty was to promote peace and in furtherance of that peace Congress negotiated the return of their

prisoners of war, established reservation boundaries and provided gifts in assurance of their commitment to support this process. *Id.*

The Allotment Act of 1908 authorized the allotment, sale and disposition of the eastern quarter of the Maumee Indian Reservation, with the intention that the U.S. shall act as trustee for said Indians to dispose of the said lands and to hold or expend the proceeds received from the sale to the Indian tribe. Maumee Allotment Act, sec. 9. The Maumee tribe agreed to consider the entire eastern quarter surplus and to cede their interest in the surplus lands to the U.S. where it may be returned to public domain. *Id.*, sec. 1. Sec. 2 states the President will enter a proclamation where the land shall be opened to settlement and prescribe the way people may enter. *Id.*, sec 2. Additionally, only at the discretion of the Secretary of the Interior may any Indian who has an allotment relinquish such allotment for the sum of eight-hundred dollars. *Id.* Lastly, Sec 2 authorizes and directs the Secretary of Interior to survey all lands within the reservation and examine the land for coal, and such land would be excluded from the allotment or disposition. *Id.* Sec 3 states the President shall have the lands inspected and appraised except for sections sixteen and thirty-six of each township into one hundred and sixty acre lots while the rest of the remaining land would be divided into classes. *Id.*, sec 3. The land was to be split into agriculture land of the first and second class, third was grazing land and timber land was fourth. *Id.* The fifth division was mineral land, which was not to be appraised. *Id.*

Section 4 states that nothing in the Act provides for unconditional payment and that the Indians shall only receive what was paid for the land and such payment shall remain with the United States Treasury for the benefit of the Indians. *Id.*, sec. 4. Only the Secretary of the Interior has the authority to expend funds on behalf of the Indians. *Id.* Section 5

authorizes the Secretary of the Interior to add or detract from the land's tracts for townsite purposes or for future public interests which he can have surveyed into blocks and lots and disposed of under such regulations as he decides. *Id*., sec. 5. Section 7 declares sections sixteen and thirty-six of each township will be reserved for the use of common schools and paid for by the United States. *Id*., sec. 7. Section 8 affirms the U.S. ability to pay for the land identified in section 7. *Id*., sec. 8.

The purpose of the Wendat Treaty was to lay out the terms of the Wendats cessation of all their lands except those on the eastern side of the Wapakoneta river to the United States, and the payment for such cessation. Additionally, the treaty shows the U.S. commitment to paying a sum certain for the debt incurred by the Wendat tribe and to provide for the Wendat tribe in the future including building them a hospital. *Id*. .

The Treaty with the Wendat of 1859 is a cessation Treaty as stated in Article 1 where the Chiefs, Headmen and Warriors agree to cede their title and interests to lands in the New Dakota Territory, except for those East of the Wapakoneta River. Treaty with the Wendat, article I. Additionally, Article II allows two reservations from the land mentioned in Art. I. for two people, one of which still lives on his land located in Door Prairie County. *Id., art. II.* Article III states the U.S. will pay the Wendat tribe in consideration of the cessation of their land in Article I for a definite sum to be paid to the Wendat by 1860. *Id.*, art. III. In Article IV the U.S. agrees to pay the Wendat tribal debt in total of $5,000,00.00. *Id.*, art. IV. Article V states the U.S. is committed to providing for the Wendat tribe at any time for multiple reasons in just proportion to their numbers. *Id.*, art. V. Lastly, Article VI states the U.S. agrees to build a hospital for the Wendat on their lands at the direction of the President. *Id.*, art. VI.

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The Wendat allotment act is a relief and civilization Act. Section 1 states that the survey needed for Indians to select a lot as stated from the Wendat Treaty forty years prior, needs to be completed and that Wendat tribal members will be given a year to select an allotment before the lands are declared surplus and are opened for settlement. Wendat Relief and Civilization Act, sec. 1. Section 2 states the amount the U.S. agrees to pay for each acre of land declared surplus, but that amount is not to exceed $2.2 million dollars regardless of how much land is measured in total. *Id.* at sec. 2. Section 3 states that the monies collected from the sale of lands will be held in the Treasury of the U.S. for the Wendat as a permanent fund for fifty years. *Id.* at sec. 3. For the purposes of promoting civilization and self-support among the Indians, Congress may appropriate a portion of the monies to the Wendat. *Id*. Lastly, section 4 permits a sum of $40,000.00 from the U.S. to the Secretary of Interior to pay for the final costs of survey and allotment to expedite the terms of the Wendat Treaty and to open the surplus lands to settlement. *Id.* at sec. 4.

The purpose of this Act is to provide relief to the Wendat due to the increased delay in surveying and allotment of land for settlement. This relief comes by way of an extra forty thousand dollars to be used for surveying the last of the land for allotment. *Id.*, sec. 4. Any land not claimed by Wendat within the year was to be declared surplus by the U.S. as agreed in the Treaty. *Id.*, sec. 1, Treaty with the Wendat.

When determining the interests of the federal government to promote tribal self-sufficiency and economic development, and that of the Indian tribes to be successful in these endeavors, the interest of the state to maintain state infrastructure efficiency is not only outweighed by but is also contrary to federal regulation. Additionally, the state puts the underlying Treaty policies of peace and self-governance at risk, frustrating Congress' clear intention, therefore the state of New Dakota is preempted from imposing their TPT tax on the Wendat tribal corporation for operating a business enterprise in Indian country.

b. The State of New Dakota's privilege tax infringes on the Maumee Nation's right to govern, and the Wendat's status does not affect the Maumee Indian tribes' right to govern tribal enterprises in the Topanga Cession.

The Wendat's status does not affect the Maumee Indian tribes' right to govern Tribal enterprises in Topanga Cession because it is in Indian country. Therefore, the State of New Dakotas' privilege tax infringes on the Maumee Indian tribes' right to govern and engage in economic enterprises on tribal land and it infringes on the rights of two tribes sharing a boundary, interfering with their ability to manage and minimize their own intertribal conflict and negotiate a payment standard amongst themselves without state interference.

Congress executed treaties with Indian tribes to establish and promote, *inter alia*, tribal independence and economic development and states may not impose laws contrary to such federal regulations. *White Mountain Apache Tribe*, 448 U.S. 136 at 144. "The validity of a state action that is contrary to Congress' intent depends on whether it infringes on the right of Indian tribes to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217 at 220. The infringement analysis examines the rights of Indians to rule and govern themselves in the context of surrounding Treaties and Statutes and whether the state tax infringes on this right to rule and govern their own affairs. *Id*. A state tax does not infringe

on the right of Indians operating on reservation land if it is non-discriminatory, the state has a substantial financial interest in that activity, where the sales tax is related to the enterprise and does not substantially burden a tribe. *See Cotton Petroleum Corporation v. New Mexico*, 490 U.S. 163 (1989). Additionally, a state tax does not always infringe on a tribes' ability to govern itself when it is directed at non-Indians engaging in business enterprises on Indian reservations. *Washington v. Confederated tribes of Colville Indians*, 477 U.S. 134, 151 (1980).

In *Cotton* the state imposed a tax on non-Indians who leased reservation land to extract oil and gas. *Cotton*, 490 U.S. 163, 189. *Cotton* challenged both the sales tax imposed by the tribe and the state. *Id*. The Court held that the tribe was justified in taxing reservation business on reservation land. *Id*. at 185. The Court also ruled that the state sales tax was also valid because it was directly related to Cotton's business. *Id*. Additionally, the state of New Mexico regulated aspects of oil wells on reservation land and invested millions of dollars to support both the tribes and Cotton's interest in oil and gas within the state therefore the tax was not discriminatory. *Id*. at 186. The Court held because the state tax did not prevent the tribe from imposing their own sales tax there was no burden put on the Indians. *Id*.

In the present case before you, the land on which the Wendat want to build their commercial enterprise is considered Indian country. 18 U.S.C.S. § 1551. Because the Maumee tribe was not diminished through their allotment Act with the U.S., they have jurisdiction over Topanga Cession. The Wendat tribe proposes to build both residential and commercial properties in Topanga cession. R. at 8. They plan to build public housing for tribe members and a nursing facility for elders. *Id.* They also propose to build a tribal cultural center and a tribal museum. *Id.* Additionally, the Wendat Commercial Development

Corporation (“WCDC”) who are wholly owned by the Wendat proposes to build a shopping complex plan consisting of at least five different businesses. *Id.* These include a Wendat cafe, and a grocery store which both focus on native cuisines and traditional foods prepared by native Indians. *Id.* This is a concentrated effort by the Wendat to prevent the area from becoming a food dessert. *Id.* The shopping complex is estimated to create around 350 jobs for the native community and eighty million dollars in profit annually. *Id*.

The purpose for the Wendat development is to fund public housing for tribal members and to fund the nursing facility for the elderly. *Id*. The purpose of the state tax is to maintain commercial infrastructure throughout the state and expedite civil court cases. 4 N.D.C. § 212 (3). The business of providing public housing and nursing care to tribe members is not directly or remotely related to the purpose of the states TPT tax. Additionally, the state of New Dakota provides no evidence that supports state investment in furtherance of public housing for Indians or for nursing care for Indians, therefore they are not invested in the proposed business as distinguished from the Cotton case.

If permitted to enact this statute the state would place a substantial burden on the Maumee Indians. The Maumee Indians are struggling to provide basic services and jobs to their tribe members. R. at 8. Due to decreased earnings in timber harvesting the Maumee rely on the ability to collect taxes on the development to boost not only their own economy but that of the Wendat as the development is surrounded by and would be utilized primarily by both tribes. *Id*. The Maumee Indians correctly assert their authority over the proposed development and like the Cotton case, tribes have authority over tribal businesses on Indian reservations and for the state to impose their taxes would be an infringement on that right. *Id*.

In *Colville*, the court held federal law bars the state from imposing state taxes on Indians on Indian land. *See Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 at 152. However, taxation of non-Indians is a legitimate interest of the states and does not infringe on the Indian right of self-governance. *Id.* at 157. This case involved the sale of cigarettes to non-Indians on reservation land. *Id.* at 141. The non-Indians were only being charged reservation tax and the state demanded that the tribe charge the state tax on non-Indians. *Id.* at 138. The court established that the state interest is the strongest when the tax is directed at off-reservation value and the taxpayer is a recipient of state services, and similarly, Indian tribes' interests are the strongest when the profits come from value generated activities involving the tribes and when the taxpayer is the recipient of tribal services. *Id.* at 156-157. This is in reference to the fact that cigarettes were bought wholesale to sell to people whether they lived on the reservation or were just passing through presuming the benefit of the tax could go in favor of either the state or the tribe. *Id.*

In this present case the interest of the state in the services being provided at the proposed development are weakest because most taxpayers will not be recipients of state services. *Id*. Topanga cession includes many non-Indians who would be subject to regular state taxation, but the focus of the proposed developments is on the taxpayer who is a recipient of tribal services. *Id*. There are only three stores in the entire proposed development that do not offer specific tribal services, but all 350 jobs created will give preference to hiring tribe members to support the tribal economy. *Id*. Activities involving tribes such as tribal museums or cultural centers generate value that states do not account for when evaluating their own interests. *Colville* , 477 U.S. at 156-57. In accordance with *Colville*, the state should be prohibited from enforcing its TPT tax on any tribal businesses

operating in Indian country, where tribal interests are at its strongest as is the case here. These interests are so pervasive that the state tax, if imposed on the Wendat, would infringe on the Maumee Indians right to treat with the Wendat and negotiate fair terms to accommodate the wellbeing of both tribes frustrating Congress' intent to regulate commercial activity on a reservation inuring to the benefit of the Indians.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the United States Court of Appeals for the Thirteenth Circuit and hold that (1) the Maumee Reservation was neither abrogated by the Treaty with the Wendat, nor diminished by the Maumee Allotment Act of 1908, and instead the Wendat reservation had been diminished; and (2) the State of New Dakota is preempted from exercising its tax on the Wendat tribe under the Indian Commerce Clause and its privilege tax infringes on the Maumee Nation's right to govern and engage in economic enterprises on tribal land, interfering with the tribe's ability to manage and minimize their own intertribal conflict.

Respectfully Submitted,

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