No. 20-1104

IN THE

Supreme Court of the United States

MAUMEE INDIAN NATION,
v.
WENDAT BAND OF HURON INDIANS

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT

BRIEF ON THE MERITS OF PETITIONER, MAUMEE INDIAN NATION

TEAM 1027

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QUESTIONS PRESENTED

In deciding this appeal, the Court need only address the following issues:

1. Under *McGirt*, Congress can only diminish a tribe's boundaries if it clearly expresses its intent to do so. Congress did not clearly express its intent to diminish the Maumee's boundaries when it signed the Treaty with the Wendat or its subsequent allotment acts. Did Congress diminish the Maumee reservation?

2. A state retains taxing authority within Indian Country if neither federal nor tribal sovereign interests are violated. A state tax only violates federal interests if it interferes with a federal law or program. State taxes only violate tribal sovereignty if they burden the tribe's self-governance. New Dakota's tax does not violate federal or tribal sovereign interests. Does New Dakota have the authority to enforce its tax in the Topanga Cession?

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

A. A Fragile Promise: The Maumee, the Wendat, and the Wapakoneta River.

For many tribes, relocation and allotment provided a fragile promise—one that was later fractured, and only recently recast—but always fragile. This case results from not one, but four fragile promises.

The first promise is unequivocal. In 1801, The Maumee Indian Nation ("Maumee") agree to peace with the United States, which agrees to respect the boundaries of new reserved lands for the Maumee in the New Dakota Territory. Treaty of

Wauseon, Oct. 4, 1801, 7 Stat. 1404, art. V [hereinafter Treaty of Wauseon]. The treaty grants the Maumee exclusive jurisdiction on their new reservation. *Id*. The treaty also reserves "all lands contained within the said lines to the Maumee." *Id.* at art. IV.

Although the Maumee originally think this treaty safeguards their lands, the treaty proves delicate, not from government malfeasance, but from nature. In the 1830s, the Wapakoneta River—which marks the eastern boundary of the Maumee reservation—moves three miles to the west, into the Maumee's reservation creating what is now known as the Topanga Cession. R. at 5. Records following this change are barren and the Maumee are unsure if Congress is aware of this change. But the Maumee do know that Congress neither breaks nor reinforces its delicate promise with the Maumee by setting new boundary markers for the Maumee's eastern border. Congress says nothing and many Maumee remain settled in this segment, now on the eastern side of the river. R. at 7.

Then in 1850, the government creates a new promise, now with the Wendat Indian Nation ("Wendat"). Unlike the Treaty of Wauseon, this treaty is inattentive and Congress signs without considering the promises previously made to the Maumee. For instance, the Wendat agree to cede their lands throughout the area "excepting those lands East of the Wapakoneta River" but Congress fails to explain if this includes the lands previously reserved for the Maumee, now on the river's eastern side. Treaty with the Wendat, March 26, 1859, 35 Stat. 7749, art. I [hereinafter Treaty with the Wendat]. By the mid-1850s, when Congress signs the Treaty with the Wendat, Congress seeks to "assimilate the Indian" into a "prosperous farmer." *Cong. Globe*, 35th Cong., 2nd Sess.

5411–12 (1859). To further this end, Congress promised to erect a hospital on the Wendat reservation. Treaty with the Wendat art. VI.

Unlike the Treaty of Wauseon, the Treaty with the Wendat makes no mention of tribal jurisdiction, nor are the Wendat granted exclusive authority of "all lands" within the reservation. Treaty with the Wendat art. I. Also, unlike the Treaty of Wauseon, the boundaries are imprecise because the government fails to recognize what lands the Wendat already own to the east of the river. This imprecision compounds the Maumee's skepticism about their delicate promise as the tribes enter the Allotment Era.

B. New Promises for the tribes through allotment.

The third fragile promise occurs in 1892 when Congress passes an act to open over two million acres of the Wendat's lands to the public domain. 23 CONG. REC. 1777 (1892). The Act is passed hurriedly, with little debate on the floor because Congress is concerned that delay would "put back the settlement for one crop season" which Congress recounts caused disaster for the previous settlement of the Creek lands in Oklahoma. 23 CONG. REC. 1778–79 (1892).

The fourth fragile promise occurs in 1907 when Major Hans of the United States Indian Service meets with Maumee tribe on their reservation. 42 CONG. REC. 2345 (1908). Major Hans informs the Maumee that the state of New Dakota—formerly a territory surrounding the Maumee's lands—has grown and that the lands previously opened within the Wendat reservation are insufficient to stymie demand. *Id*. A government surveyor has also found that coal, a crucial fuel for American industry, sits in deposits beneath the soil in the Maumee reservation. *Id.* at 2346. Major Hans tells the

Maumee that they too can join these settlers in this exciting new expansion because the government will allot 160 acres from within the Maumee reservation to each Indian. *Id.* The state of New Dakota will also pay the Maumee for all Maumee lands containing coal and $5.05 an acre for building a school and administrative buildings in the area. *Id.*

These historical developments maintain, but never strengthen any of these four delicate promises. The modern implications of these promises remain unresolved.

C. Reevaluating a fragile promise for the Maumee in the Topanga Cession.

Today, the Topanga Cession includes lands sold as surplus under either the Maumee or the Wendat allotment Acts. R. at 7. Neither the Maumee, the Wendat, nor the federal government are certain which tribe possessed these lands before allotment. R. at 7. And resolving this issue remains unimportant until development begins in the Topanga Cession because New Dakota now collects a Transaction Privilege Tax for all commercial transactions within the state. This tax is used to fund the state's Department of Commerce, civil courts, roads, and other commercial purposes in the state. R. at 6. A portion of all transactions taxed within Door Prairie County that are not located in Indian Country is remitted to the Maumee in exchange for their concession of lands containing coal in their original reservation. 4 N.D.C. § 212 (6).

Tribes operating on trust lands within their own reservation need not collect this tax but all businesses operating beyond trust lands—including fee lands within a reservation—must obtain a license and collect a tax. 4 N.D.C. § 212 (5). Whether the Topanga Cession belongs to the Wendat or the Maumee is now important because the state will remit all proceeds from any entity—tribal or otherwise—operating within fee

lands of a tribe's reservation to the tribe whose reservation contains the business. 4 N.D.C. § 212 (5).

In 2013, the Wendat purchase a 1,400-acre parcel of fee lands from non-Indian owners in the Topanga Cession. R. at 7. The Wendat plan to construct a mixed-use commercial-housing development upon this parcel that would contain low-income housing, a tribal cultural center, and a shopping complex owned by the Wendat Commercial Development Corporation, a Section 17 Indian Reorganization Act Corporation. R. at 7.

II. STATEMENT OF PROCEEDINGS.

In 2015, representatives from the Maumee meet with the Wendat, reminding them that they considered the Topanga Cession to be part of the Maumee Reservation. R. at 8. This means that the Wendat would be required to pay New Dakota's tax and that this tax would be remitted to the Maumee. R. at 8. But the Wendat disagree. Instead, the Wendat argue that the Topanga Cession is Wendat territory because of their original treaty or because the Allotment Act in 1908 reverted the lands back to Wendat control as it diminished the Maumee Reservation. R. at 8. The Wendat also argue that the State of New Dakota lacks authority to collect the tax because the area is Indian Country so either federal law or tribal sovereignty prevents the state's taxing authority. R. at 8.

The Maumee ask a federal court to determine that the Wendat corporation is located within Maumee territory and would be required to pay the New Dakota tax. R. at 8. Alternatively, the Maumee ask the court to determine that the Topanga Cession was not Indian Country at all, meaning that a portion of the tax would be remitted to the

Maumee because it is located within Door County. R. at 8; 4 N.D.C. § 212 (6). The district court agrees with the Maumee and finds that the Topanga Cession was "clearly a part of the lands reserved by the Maumee Indian Nation in the Treaty of Wauseon." *Maumee Indian Nation v. Wendat Band of Huron Indians*, 305 F. Supp. 3d 44 (D. New Dak. 2018).

But the Wendat appeal to the United States Court of Appeals for the Thirteenth Circuit, which disagrees with the Maumee. Instead, the Thirteenth Circuit finds that the Maumee Reservation has been diminished and that the State of New Dakota lacks authority to enforce its tax because although all funds collected through the tax would be remitted to the Wendat through section 5 of the tax, merely collecting the tax violates Wendat tribal sovereignty. *Wendat Band of Huron Indians v. Maumee Indian Nation*, 933 F.3d 1088, 1089 (13th Cir. 2020).

Now, the Maumee ask this Court to respect the government's fragile promises to the Maumee by recognizing that the Topanga Cession remains within the Maumee Reservation and that the State of New Dakota may collect its tax from the Wendat corporation for the benefit of the Maumee.

SUMMARY OF THE ARGUMENT

This case boils down to one issue: what did Congress intend for the area now known as the Topanga Cession? The Wendat say Congress intended that the area belong to the Wendat without the annoyance of state taxation. We disagree. We argue that Congressional intent weighs in favor of the Maumee on both the issue of reservation disestablishment and taxing authority.

As to the Wendat's disestablishment argument, the Wendat fail to meet the necessary threshold under this Court's decision in *McGirt v. Oklahoma,* 140 S. Ct. 2452, 2477 (2020). Under *McGirt*, this Court found that a tribe can only be diminished when there is clear congressional intent in statutory text. *Id*. Neither the Treaty with the Wendat nor the subsequent Allotment Acts establish any congressional intent to convey the Topanga Cession from the Maumee to the Wendat. The legislative history is similarly barren of documentary evidence that Congress intended to diminish the territorial boundaries of the Maumee.

Next, the issue of New Dakota's authority to tax in Indian Country turns on whether or not this Court applies public interests balancing as it did in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156 (1980). If this Court invokes its categorical approach, the Wendat may operate their tribal corporation on Maumee lands without consequence. Yet, this Court should abandon its categorical bar on state taxing authority in Indian country in favor of public interest balancing as it did in *Washington*. *Id.* To reach public interest balancing of federal, state, and tribal interests, the Maumee need only raise two arguments. First, the tax is enforceable against non-Indians engaging in transactions with the Wendat corporation because the administration of the tax imposes only a minimal burden on the Wendat under *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 467–68 (1976) (per curiam). Second, the Maumee can establish that the true legal incidence of the tax falls on non-Indians, meaning the categorical bar becomes unjustifiable, as this

Court suggested in *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 462 (1995).

Preemption and infringement of tribal and federal interests will then be evaluated under this Court's balancing test and New Dakota's taxing authority will prove to be the best solution to satisfy state, federal, and tribal interests.

For these reasons this Court should preserve the fragile promises it made to the Maumee, find that the Topanga Cession is within the Maumee Reservation, and allow New Dakota to collect its Transaction Privilege Tax for the Maumee's benefit from all businesses operating within the Topanga Cession.

ARGUMENT

I. THIS COURT'S REVIEW IS DE NOVO BECAUSE IT INVOLVES TREATIES WITH INDIAN NATIONS.

When interpreting treaties between the United States Federal Government and Indian tribes, additional rules of interpretation apply, namely the Indian Canons of Construction. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). This means the Court may "look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties" to interpret treaties how the Indians would have understood them *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431–32 (1943). When applying the cannons, any ambiguities are to be decided in the tribe's favor. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973).

When this Court hears Indian law cases regarding diminishment of tribal boundaries, the Court cannot "extrapolate" diminishment lightly. American Indian Law Deskbook § 3.4 n.16 (2020). This Court must find clear congressional intent to change the boundaries of tribes. *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). This Court has always reviewed congressional intent "regarding reservation boundary diminishment" de novo. *Osage Nation v. Irby*, 597 F.3d 1117, 1122 (10th Cir. 2010). Diminishment cases regularly require an analysis of statutory construction in light of the historical record. *Id.* Consequently, questions of diminishment are mixed questions of law and fact. *Id.*

II. THE TOPANGA CESSION IS WITHIN THE MAUMEE RESERVATION BECAUSE CONGRESS NEVER CLEARLY EXPRESSED AN INTENT TO CONVEY THE TOPANGA CESSION TO THE WENDAT.

The Topanga Cession is within the Maumee Reservation because Congress never diminished Maumee's boundaries for two reasons. First, Congress cannot diminish Indian territory established through a treaty unless there is clear and plain language indicating its intent to do so. *McGirt*, 140 S. Ct. at 2477. Second, Congress' actions during the allotment era did not diminish Indian territory because Congress did not explicitly indicate otherwise. *Id.* at 2464. And even if this Court applies the diminishment standard the Wendat suggests, which would find that Congress diminished Maumee territory by conveying the Topanga Cession to the Wendat through the Treaty with the Wendat, the Wendat Reservation was subsequently diminished through the Wendat Allotment Act.

A. Congress cannot diminish Indian Territory established through a treaty without clear and plain language indicating its intent to do so.

There are two major inquiries in determining clear congressional intent. First, Congress can enact legislation stating, "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests." *Solem*, 465 U.S. at 470. Statutory text is the most probative evidence of Congress' intent. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344 (1998). Courts determine congressional intent by examining the language on the face of the act. *Mattz v. Arnett*, 412 U.S. 481, 505 (1973). If courts, "begin with statutory text" and it does not contain any "hallmark" language of cession, then the Court will almost certainly conclude Congress did not intend to diminish tribal boundaries. *Nebraska v. Parker*, 136 S. Ct. 1072, 1079–80 (2016). Even if statutory text includes isolated cession language with "hallmark" terms of diminishment, it is rarely dispositive of congressional intent. *Solem*, 465 U.S. at 475. Consequently, it is critical for this Court to begin its inquiry into diminishment with the statutory text.

Second, if an act is ambiguous and ascertaining the intent of Congress is dubious, this Court may rely on legislative history otherwise known as "historical context surrounding the enactment of legislation" to shed light on statutory text "at the time of enactment." *McGirt*, at 2468; *Oneida Nation v. Village of Hobart*, 968 F.3d 664, 677 (7th Cir. 2020). Relying on legislative history is imperative when there is evidence Congress negotiated with the tribe and when legislative reports are submitted to Congress. *Solem*, 465 U.S. at 471. When statutory text includes explicit language of cession and is coupled with clear commitments from Congress, then the Court must conclude Congress intended to diminish tribal boundaries. *Id.* at 450. An analysis of the statutory text and legislative

history provide the most compelling evidence for insight into Congress' purpose with tribal land.

1. The Treaty with the Wendat did not abrogate the Treaty of Wauseon.

In the Treaty of Wauseon of 1801, Congress declared the Maumee's boundary line, "shall be the western *bank* of the river Wapakoneta…" Treaty of Wauseon art. III (emphasis added). In the 1830s, the Wapakoneta River moved three miles west into Maumee territory, creating a segment now known as the Topanga Cession. R. at 5. Approximately twenty years after the river moved, Congress made a fragile promise in the Treaty with the Wendat that Wendat territory included "lands East of the Wapakoneta River…" Treaty with the Wendat art. I. Congress knew it had the opportunity to diminish the Maumee reservation through the Treaty with the Wendat by using the territorial marker of river "bank" as it used in the Treaty of Wauseon. However, Congress' omission of such detailed language in the Treaty with the Wendat signifies it never intended to diminish Maumee territory. In other words, if Congress intended to diminish Maumee territory, it would have used the boundary marker of "bank," other detailed language, or would have noted its intent to do so in the Treaty with the Wendat.

In the Treaty with the Wendat, Congress never made an "[e]xplicit reference to cession" of Maumee land nor did Congress include any language indicating Maumee's "total surrender of all tribal interests" in the Topanga Cession. This Court recently held that such reference to cession and surrender is an absolute necessity. *McGirt*, 140 S. Ct. at 2463. Furthermore, there is zero evidence of "hallmark" terms of diminishment. The

text of the Wendat treaty shows, unequivocally, that Congress had no intent to abrogate Maumee's right to the Topanga Cession.

2. The legislative history indicates Congress did not intend to abrogate the Maumee's rights in the Topanga Cession.

Even if this Court is unconvinced that the Treaty with the Wendat is unambiguous, the legislative history of the Treaty with the Wendat demonstrates Congress had no intention of abrogating the Maumee's right to the Topanga Cession. The legislative history shows the purpose of the Treaty with the Wendat was to "yield" as much land from the Wendat to the United States as Congress could. *Cong. Globe*, 35th Cong., 2nd Sess. 5411–12 (1859) (statement of Sen. Foot). But Congress not once discussed the Wendat's river boundaries with the Maumee. *Id.* During the 19th century, Congress was fully cognizant of its ability to completely terminate or abrogate treaty rights. *Mattz*, 412 U.S. at 504. But, if "clear termination language" was not used, then it is undeniable that Congress never intended to abrogate its treaty with an Indian nation. *Id.* The lack of clear termination language in the Treaty with the Wendat and its respective legislative history leaves no doubt that Congress never intended to abrogate the Maumee's claim to the Topanga Cession.

The Wendat argue that Congress abrogated the Treaty of Wauseon and conveyed the Topanga Cession to the Wendat. The Wendat point to their treaty with Congress, which states Wendat's territory included the "lands East of the Wapakoneta River…" Treaty with the Wendat art. I. But the language of this treaty does not explicitly or implicitly convey the land known as the Topanga Cession to the Wendat. The Wendat argue Congress impliedly intended to convey this land—and it is true Congress had a

"complete lack of… concern with boundar[ies]" and did not "detail precise changes to reservation boundaries." *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 629 (1977) (Marshall, J., dissenting); *McGirt*, 140 S. Ct. at 2488 (Roberts, C.J., dissenting). This Court, however, has repeatedly and unequivocally refused to ponder conjectures concerning general expectations about Congress' intent with tribal boundaries. *Solem*, 465 U.S. at 468–69 (collecting cases). Rather, this Court will only rule Congress abrogated treaty rights when this Court can discern a clear intent. *Id.*

Consequently, the Wendat are wrong that Congress intended to abrogate Maumee's rights in the Topanga Cession because Congress never established a clear intent to abrogate the Maumee's treaty. The Treaty with the Wendat omits the use of the boundary marker "bank." Treaty with the Wendat art. I. Not only is there a lack of clear specific intent to abrogate the Treaty of Wauseon, but it would be vastly unconventional to opine Congress impliedly intended to abrogate the Maumee's rightful claim to the Topanga Cession. Congress used precise language in the Treaty of Wauseon by establishing the Maumee's territorial boundary to be the western *bank* of the river. Congress did not use such clear and specific language with the Wendat.

B. Congress' actions during the Allotment Era did not diminish Indian Territory unless Congress clearly expressed in the Allotment Act's text and legislative history its purpose to do so.

In the 1880s, the period known as the Allotment Era, Congress planned to make tribes agree to abandon their communal tribal lifestyle by appropriating their lands to individual tribe members. 1 F. Cohen, *Handbook of Federal Indian Law* §1.04 (2012). Strong Allotment Act advocates in Congress eventually wanted to see Indians

assimilated, tribal autonomy destroyed, and surplus land given to white settlers. *Id.* Congress viewed allotment as a cultural instrument to thrust Indians into "mainstream society," regardless of the consequences for tribes. Kristen Carpenter, *Contextualizing the Losses of Allotment Through Literature*, 82 N.D. L. Rev. 605, 607 (2006).

Congress' legislative history with the Maumee and Wendat would indicate Congress had the general expectation to see the respective tribes assimilated. However, this Court for the past sixty years rejected arguments that "general expectations" of the Allotment Acts suffice for clear congressional intent to diminish tribal boundaries. *Solem*, 465 U.S. at 468–69 (collecting cases). Therefore, this Court has always taken a deeply analytical approach to determine whether the Allotment Acts have demonstrated clear congressional intent to diminish tribal boundaries. This analytical approach will exhibit that Congress had no intent to diminish Maumee territory.

1. The Maumee Allotment Act did not diminish Maumee territory.

By using *McGirt's* two tests in determining clear congressional intent, it is evident that Congress never diminished the Maumee territory with the Maumee Allotment Act. First and foremost, there are no "hallmark" terms in the statutory text of the Act which would indicate Congress had any intention of diminishing the Maumee. Maumee Allotment Act, Ch. 818 § 4 (1908). The Wendat point to the Maumee Allotment Act text, which declares that the eastern quarter of Maumee territory is "cede[d]" to the United States as "surplus lands" "where it may be returned to the *public domain* by way of this act" to demonstrate congressional intent to diminish Maumee territory. *Id.* (emphasis added). Previously, this Court had interpreted the phrase "resorted to the

public domain" as congressional intent to diminish tribal boundaries. *Hagen v. Utah*, 510 U.S. 399, 412 (1994). However, "isolated phrases" like "public domain" cannot alone "carry the burden of establishing an express congressional purpose to diminish." *Mattz*, 412 U.S. at 497–99. The Wendat have the burden to prove "public domain" is more than just an isolated phrase.

This Court in *Hagen* came to its conclusion, in part, because Congress provided payment of a sum certain to the Indians for their land. *Hagen*, 510 U.S. at 404. Nothing in the Maumee Allotment Act would indicate there was ever a sum certain. In fact, the Act states that "nothing in this law provides for an unconditional payment of any sum." Maumee Allotment Act, Ch. 818 § 4 (1908), whereas the Wendat Allotment Act expressly dictates that there is a sum certain. Wendat Allotment Act, Ch. 42 § 2 (1892). Not only is Congress' use of public domain in the Maumee Allotment Act isolated, but the Act lacks the necessary sum certain in exchange for land.

2. Historical context analysis indicates Congress did not intend to diminish the Maumee Reservation in the Topanga Cession.

Turning to the historical context of the enactment of the Maumee Allotment Act, Congress's legislative history demonstrates it intended the surplus lands in the eastern quarter of Maumee territory to remain Maumee reservation. This Court has interpreted legislative history to deduce Congress' intent regarding surplus land in diminishment cases. *Seymour v. Superintendent*, 368 U.S. 351, 356 (1962). The Act was to do, "no more than open the way for non-Indian settlers to own land on [that portion of] the reservation." *Id*. The legislative history of the Maumee Allotment Act exemplifies this Court's findings in *Seymour*. U.S. Representative Pray noted the purpose of the Maumee

Allotment Act was to give the "opportunity to hundreds of worthy [non-Indian] men and women" to settle on the Maumee Reservation. 42 Cong. Rec. 5349 (1908) (statement of Rep. Pray). The historical context of the Maumee Allotment Act shows Congress wanted to do "no more" than give non-Indians the opportunity to settle on Maumee territory.

Furthermore, this Court in *Seymour* identified that if the proceeds from the disposition of land are "deposited in the Treasury... to the credit of Indians," then it would "seem clear that the purpose..." of the Act is not to destroy the existence of the reservation. *Id.* In other words, the Federal Government wanted to act as a "trustee" of Indian territory, not diminish it. *Id.* In the Maumee Allotment Act, Congress mirrored the language it used in the Act reviewed in *Seymour*. All the proceeds accumulated from the disposition of land are to be, "deposited with the United States treasury to the credit of the [Maumee] Indians." Maumee Allotment Act, Ch. 818 § 4 (1908). Such expressed language in the text of the Act would clearly demonstrate Congress' sole purpose of the Act to be the permittance of non-Indian settlers to own land on Maumee reservation. The historical record of this Act further reflects Congress' intent to "open up..." the Maumee reservation to non-Indian settlers and not diminish the territorial boundaries. 42 Cong. Rec. 5348 (1908) (statement of Rep. Ferris).

C. Even if Congress diminished Maumee territory by appropriating the Topanga Cession to the Wendat, the Wendat reservation was subsequently diminished through the Wendat Allotment Act.

If this Court applied the diminishment standard the Wendat suggest, which would find the Maumee Reservation diminished through the Maumee Allotment Act, it is clear the Wendat Reservation was also diminished through the Wendat Allotment Act. Sixty

years of precedent has set the bar that a tribe will always be diminished if the tribe and Congress agreed to a sum certain in the Allotment Act. *DeCoteau v. Dist. Cty. Court for 10th Judicial Dist.*, 420 U.S. 425, 445 (1975). "Sum certain" language is "precisely suited" for Congress' termination of reservation status. *Id.* The United States directly paid the "sum of three dollars and forty cents for every acre" of "surplus land" in the entire western half of the Wendat reservation. Wendat Allotment Act, Ch. 42 § 2 (1892). This Court's precedent demonstrates the Wendat's trade of territory for money with the United States constitutes the most quintessential form of diminishment.

The Wendat argue this Court should solely rely on "cession" words to determine diminishment. They believe the Maumee Allotment Act contains "cession language" such as "public domain" which would result in Maumee territorial diminishment. Congress, however, also intended the western portion of Wendat territory to also be "public domain." 23 Cong. Rec. 1777 (1892) (statement of Rep. Mansur). Although, it is questionable and suspect to conclude that Congress' use of "public domain" in the Acts is a sign of Congress' intent to diminish the Maumee reservation, as "hallmark" terms are rarely dispositive of congressional intent. *Solem*, 465 U.S. at 475. While both Acts contain "cession language," only the Wendat Allotment Act contains the "precisely suited" diminishment language of sum certain. *DeCoteau*, 420 U.S. at 445.

It is contradictory for the Wendat to argue the Wendat Allotment Act does not diminish Wendat territory when the Wendat Allotment Act not only textually mirrors the Maumee Allotment Act but takes the additional step of appropriating a sum certain for

surplus land. The first test in determining clear congressional intent is to ascertain if there is indisputable express language. *McGirt*, 140 S. Ct. at 2468.

There are three distinct reasons why the express language of the Wendat Allotment Act confirms Congress intended the Wendat reservation to be diminished.

First and foremost, the Wendat Allotment Act uses the most prototypical language of diminishment by trading "surplus land" for a sum certain. *Solem*, 465 U.S. at 471. Second, the Wendat and Congress are plain and explicit with the territory the United States intended to compensate the tribe for. The Wendat Allotment Act details expressly that the United States was entitled to the entire western half of the Wendat reservation. Wendat Allotment Act, Ch. 42 § 1 (1892). This land includes the Topanga Cession. R. at 7. These two reasons indicate the Wendat ceded any claim it may have to the Topanga Cession. Third, there were zero Wendat tribe members who selected allotments in the Topanga Cession. R. at 7. Evidently, the Wendat Allotment Act accomplished its purpose of trading Wendat land for a sum certain.

Even if this Court does not find the Wendat Allotment Act to be unambiguous on its face, the historical context framed in the Act's legislative history makes it abundantly clear Congress intended to diminish the Wendat reservation. The Secretary of the Interior noted that the purpose of the Wendat Allotment Act was to "open" the reservation to "public domain." 23 Cong. Rec. 1777 (1892) (statement of Rep. Mansur). Furthermore, the Secretary of the Interior alongside two U.S. Representatives commented that the Wendat lands were intended to be opened to non-Indian "families awaiting the opening of these additional [Wendat] lands." *Id.* at 1777–79. The Act was additionally

unanimously approved by the Committee on Indian Affairs in the U.S. Senate. *Id.* at 1778. Congress plainly expressed intent to diminish the Wendat reservation.

Both the statutory text and historical context decisively establish that the western portion of the Wendat Reservation was diminished. Even if this Court believes the Wendat once had a claim to the Topanga Cession, the Wendat relinquished this territory with their Allotment Act. The Wendat's complete surrender of their territory would consequently result in the Topanga Cession belonging to Door County, New Dakota.

The Topanga Cession remains in Maumee territory under *McGirt*'s two tests because the Wendat fail to show that Congress ever had a clear intent to abrogate the Treaty of Wauseon or diminish the Maumee through the Allotment Acts. But even if this Court follows the diminishment standard the Wendat suggest, the Wendat's own reservation would also be diminished. This means that the Maumee would still be entitled to a portion of the New Dakota Transaction Privilege Tax proceeds because the Wendat corporation would be operating on a parcel within Door County. Thus, the Wendat's claim to the Topanga Cession fails.

III. NEW DAKOTA CAN TAX IN THE TOPANGA CESSION BECAUSE NEITHER THE DOCTRINE OF INDIAN PREEMPTION NOR INFRINGEMENT LIMIT NEW DAKOTA'S TAXING AUTHORITY IN INDIAN COUNTRY.

New Dakota's Transaction Privilege Tax is levied against the gross proceeds of sales or business within New Dakota. R. at 5. But the state will remit the full amount of any tax collected on an Indian reservation to the tribe that occupies that reservation. 4 N.D.C. § 212 (5). If this Court finds that the Topanga Cession is located within the Maumee Reservation, then the full tax collected from the Wendat corporation will be

remitted to the Maumee. R. at 8. But if this Court finds that the Topanga Cession is located within the Wendat Reservation, then all funds collected by New Dakota will be remitted back to the Wendat. R. at 8.

Under *Williams v. Lee*, 358 U.S. 217, 220 (1959), state regulatory authority is limited by the tribe's interest in making its own laws and the federal government's interest in exclusively regulating the relationship between the United States and Indian tribes under the Constitution. U.S. Const. art. I, § 8, cl. 3; *Blackfeet Tribe*, 471 U.S. at 764; *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973). The questions of state action infringing on tribal sovereignty and federal preemption of state authority in Indian Country are two interrelated inquiries because federal policy covers the outer limits of tribal sovereignty in Indian Country. *See, McClanahan*, 411 U.S. at 172; *see generally*, Cohen, *supra*, § 6.03(2)(a). For instance, federal policy generally prohibits state taxing authority in Indian Country because Indian governments were left with exclusive authority to regulate Indian country. *Bryan v. Itasca Cty.*, 426 U.S. 373, 375–76 (1976); Cohen, *supra* § 8.03(1)(b); *Chickasaw Nation*, 515 U.S. at 462. So, this Court has evaluated tribal sovereignty as a "backdrop" to the preemption analysis. *McClanahan*, 411 U.S. at 172.

Although the Wendat would be remitted the full amount of this tax, the Wendat argue that New Dakota lacks the authority to collect this tax in Indian Country at all. R. at 8. The Wendat argue that this Court should invoke its categorical prohibition of state regulatory authority over tribes and their members under *Chickasaw Nation*, 515 U.S. at 462. The Wendat claim that states lack taxing authority in Indian Country without

express congressional authorization and that there is no such authorization for New Dakota's tax. *See*, *Bryan*, 426 U.S. at 390. This finding would leave the Maumee's claim to the Topanga Cession toothless because New Dakota would no longer have authority to tax the Wendat corporation for the Maumee's benefit. R. at 8.

But this Court has recognized that a state can require that a tribe collect a tax from non-Indians in Indian Country if collecting the tax imposes only a minimal burden on the tribe. *Moe*, 425 U.S. at 467–68. When this exception is satisfied, this Court applies interests balancing, instead of the categorical bar on state regulation in Indian Country.

A. New Dakota's tax is enforceable for sales with non-Indians because it only imposes a minimal burden on the Wendat.

In *Moe*, this Court held that Montana could require tribes to enforce its statewide cigarette tax in Indian Country without express congressional authorization because the burden on the tribe was only minimal and enforcement was necessary to collect the tax from non-Indians. *Id.* at 483. This Court reasoned that because the only burden on the tribe under Montana's cigarette tax was that the tribe collect a tax on top of the sale price and keep records of cigarette sales, that the tax was not a tax at all because the tribes were not the target of the tax. *Id.* Because the tribal smoke shops were merely administering the tax, Montana could enforce the tax in Indian Country without frustrating notions of tribal self-government. *Id.*

The Wendat anticipate that non-Indians will enter the Topanga Cession to engage in transactions with the Wendat. New Dakota has regulatory authority over those transactions because collecting the tax imposes only a minimal burden on the Wendat, similar to Montana's tax in *Moe*.

The Wendat raise two objections to this. First, they say that the tax is not a minimal burden because the tribe must obtain a license. Second, they suggest that it would be difficult to administer the tax only on non-Indians because the tribe would have to determine Indian status before each transaction.

The Wendat's license objection fails because obtaining a license is not a substantial burden, especially if the tax will be remitted back to the tribe. The Wendat anticipate roughly $80 Million in yearly gross sales in the Topanga Cession but claim that the $25 license fee poses an intolerable burden on the Wendat. R. at 8. But New Dakota's licensing requirement is hardly comparable to the burden imposed in situations such as Itasca County, Minnesota's personal property tax imposed on trust lands where a Chippewa tribal member resided. *Bryan*, 426 U.S. at 375. In *Bryan*, the tax was imposed against trust lands held by the United States, rather than fee lands in this case and the tax would have been collected against a member of a tribe and the state statute did not include a remittance. *Id.* The Wendat can hardly justify a $25 license as a distinguishable burden.

The Wendat's administration argument also fails because there are suitable methods of administering the tax only to non-Indians without creating an unreasonable burden on the Wendat. The Wendat argue that they would need to obtain identification from customers before each transaction. For heavy sales volume locations, such as the Wendat's planned grocery store and pharmacy, this could be difficult. But the Wendat could elect to only impose the tax if the customer appeared non-Indian because the statute does not require a particular method of collection. In fact, this Court in *Moe* suggested

that ordinary issues that could arise from appearance-based taxing do not apply to situations involving "tax immunity for reservation Indians" because any "racial discrimination against non-Indians" passes the rational basis requirement for special treatment. *Moe*, 425 U.S. at 465.

Thus, because the tax only creates a minimal burden and is necessary for taxing non-Indians, New Dakota maintains taxing authority over non-Indians in the Topanga Cession. This means that the tax can at least be imposed on sales between the Wendat corporation and non-Indians. But for the tax to also be enforceable in sales with Indians, depends on this Court's application of its categorical prohibition on state regulatory authority over Indians or its more lenient balancing of preemption and infringement issues.

B. This Court should apply interest balancing of infringement and preemption instead of its categorical prohibition because New Dakota's tax incidence falls on non-Indians.

The Wendat argue that this Court should apply its categorical rule imposed in cases like *Chickasaw Nation*. The categorical approach prohibits state authority in Indian Country over Indians. *Chickasaw Nation*, 515 U.S. at 458; *City of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 258 (1992). But this Court should apply its more lenient balancing test as it did in *Washington v. Confederated Tribes of the Colville Indian Reservation*, because the tax incidence falls on non-Indians. 447 U.S. at 156.

This Court, according to the Wendat, has already applied the categorical rule to bar state taxing authority where states have attempted "to levy a tax directly on an Indian

tribe or its members inside Indian country." *Chickasaw Nation*, 515 U.S. at 452. But a tax is only levied against an Indian tribe if the state taxing statute places the tax's "legal incidence" on the tribe or its members. *Id*. at 462. The legal incidence of a tax falls on the party named in the statute as responsible for paying the tax to the state. *Id.*; *Moe*, 425 U.S. at 467–68. This responsibility does not include consumers' economic burden to pay a tax—whether members of a tribe or not—because New Dakota's statute does not impose any legal penalties on consumers for obtaining goods sold without tax. 4 N.D.C. § 212 (7); *see*, *Chickasaw Nation*, 515 U.S. at 462. Tribal corporations are also not required to obtain a license or collect the tax when operating on trust lands within their own reservation. 4 N.D.C. § 212 (4). And if a tribe operates a business on fee lands within its reservation, all proceeds from the taxes collected will be remitted back to the tribe. 4 N.D.C. § 212 (5). In fact, this taxing structure is exactly the format proposed by this Court in *Chickasaw Nation* for a state to avoid taxing tribes in Indian Country while maintaining a consistent statewide regulatory system. *Chickasaw Nation*, 515 U.S. at 460.

The Wendat argue that the legal incidence would fall on the Wendat because they would pay the tax if the Topanga Cession is within the Maumee Reservation. But *Chickasaw Nation* refers to the tribe whose Reservation the business is located on because the Court's reasoning was grounded in sovereignty. For instance, this Court clarified that the treaty did not confer "super-sovereign authority to interfere with another jurisdiction's sovereign right to tax..." *Id.* at 466. Thus, the Wendat have no claim to sovereignty from taxation on the Maumee Reservation.

New Dakota's taxing statute is not levied against a tribe or its members because its regulatory purpose is directed at retailers operating in Indian Country or throughout the state, not tribes. Thus, New Dakota's taxing authority is entitled to balancing under *Washington*, 447 U.S. at 156.

C. New Dakota wins interest balancing because state taxing authority in Indian Country produces the best outcome for tribal, state, and federal interests and does not violate federal law.

Preemption in the context of state regulatory authority in Indian country is distinct from preemption analysis between federal and state governments. Cohen, *supra* § 6.03. Under tribal preemption analysis, the Court gives weight to state regulatory interests and rarely grants "automatic exemptions" when dealing with state taxes. *Moe*, 425 U.S. at 481, n. 17. Through this analysis, the Court engages in a "particularized examination of the relevant state, federal, and tribal interests" and asks if federal law preempts the state's regulatory authority or if the state tax violates federal law or interferes with federal programs. *Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458 U.S. 832, 838 (1982).

1. New Dakota's tax does not directly violate federal law or interfere with federal programs.

The Wendat argue that Congress has already regulated the area of tribal taxation and that several federal programs would be affected by New Dakota's Transaction Privilege Tax. The Wendat first point to Congress' broad authority to regulate commerce with Indian tribes under the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3. According to the Wendat, this broad authority establishes a reason for the Court to find federal preemption over New Dakota's taxing authority. *White Mountain Apache Tribe v.*

Bracker, 448 U.S. 136, 145 (1980). But to establish preemption, this Court requires that the federal regulations be "comprehensive" to preempt state regulatory interests in Indian Country. *Id*.

For instance, in *White Mountain Apache*, where a tribe challenged Arizona's motor carrier and fuel use taxes against a tribal corporation operating exclusively on a reservation, this Court observed that the federal government issued "detailed regulations promulgated by the Secretary of the Interior" who is statutorily granted broad supervisory authority over Indian timber harvesting. *Id.* at 146–48. In the area of Indian timber harvesting, the Court recognized that the "federal regulatory scheme is so pervasive as to preclude the additional burdens" state taxes would impose. *Id*. at 148. In *White Mountain Apache*, Arizona also failed to show a regulatory purpose to "justify the assessment of taxes for activities on … tribal roads within the reservation." *Id.* at 148–49.

The Wendat argue that *White Mountain Apache* is analogous to this case because the Indian Reorganization Act intended to provide a business structure to protect tribes from state taxation in Indian country. But *White Mountain Apache* does not fit under these facts because New Dakota has an interest in regulating commerce throughout the state of New Dakota and raising revenues through a consistent taxing system. Even if the Indian Reorganization Act is a pervasive federal program, New Dakota's interests outweigh the federal interests to the extent that any interference could occur.

The Wendat suggest that the Internal Revenue Service's regulations leave no room for New Dakota to regulate. For instance, tribal corporations organized under section 17 of the Indian Reorganization Act of 1934—such as the Wendat's

corporation—are granted an exemption from federal taxation on their income, regardless of whether operating on or off a reservation. Rev. Rul. 94-16, 1994-1 C.B. 19; Indian Tribal Governmental Tax Status Act of 1982, 26 I.R.C. § 7871(a)(2). But both the Internal Revenue Code and the Indian Reorganization Act leave open the possibility that a state may impose a tax on a tribal corporation operating in Indian Country. *See e.g.*, Indian Tribal Governmental Tax Status Act of 1982, 26 I.R.C. § 7871(a); *see also*, Rev. Rul. 69-289, 1969-1 C.B. 34. This Court has also decided questions of state taxing authority over a particular parcel independent of deciding whether a particular reservation was diminished. *City of Sherril v. Oneida Indian Nation*, 544 U.S. 197, 216 n. 9 (2005).

The Wendat argue that this Court has previously granted an exemption to federal capital gains taxes where a tribe sold timber on United States trust lands. *Squire v. Capoeman*, 351 U.S. 1 (1956). In *Squire*, the Court considered the language of the treaty between the Quinaielts, which guaranteed the lands would be free of "charge or incumbrance." *Id.* at 7. The Court applied the Indian Cannons and found that "charge or incumbrance" "might be sufficient to include taxation." But any similarities with *Squire* are insufficient to help the Wendat.

In *Squire*, the Court reinforced its application of the cannons with The General Allotment Act, 25 U.S.C. § 349 (1887). Under section 349, the Department of the Interior is required to apply state law once the trust period expires. *Id.* This, according to this Court in *Squire*—and the Internal Revenue Service at the time—indicated congressional intent that state and local taxes apply to allotments after a transfer in fee. *Squire*, 351 U.S. at 8; T.D. 3570, C.B. III-1, 85 (1924); Rev. Rul. 60-96, 1960-1 C.B. 18; Rev. Rul. 56-

342, 1956-2, C.B. 20. Yet, section 349 does not provide for reactivating such an exemption if a tribe sells and then repurchases fee lands. Even if the Wendat were the original allottee, this Court has never held that a tax exemption from state and local taxes could reactivate. The Wendat argue that there is support for at least the expectation on the part of the tribes when they agreed to allotment that they could repurchase fee plots and regain a tax exemption. But the Wendat ignore that none of their treaties with the federal government guaranteed freedom from incumbrances, exclusive jurisdiction, or any other language that the Court considered in *Squire* before reaching the allotment language. *See generally*, Treaty with the Wendat.

2. New Dakota's tax is key to preserving competitive consistency throughout the state.

When evaluating a state's regulatory interests under the doctrines of preemption and infringement, states only need to show their interest is a "specific, legitimate, regulatory interest" in the area being taxed. *Ramah*, 458 U.S. at 186; *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 186–87 (1989). This Court has considered competitive consistency as a valid state interest when necessary to "prevent the Tribes from marketing their tax exemption to nonmembers." *Washington*, 447 U.S. at 157; *see, Moe*, 425 U.S. at 475–81. In other words, if enforcing the state tax everywhere except the reservations would lead to regulatory quicksand—because consumers rush to purchase from reservation businesses, and hence undermine the state's tax—then the state's interest can be particularly significant. *Washington*, 447 U.S. at 155. Here, if the 12 tribes in New Dakota are all opened up for non-Indian businesses to operate without taxation, this could severely undermine New Dakota's efforts to raise funds outside of Indian

Country for statewide commerce, infrastructure, and commercial regulation. R. at 6. Thus, New Dakota has a significant interest in taxing businesses in Indian Country.

3. The Wendat are wrong that their tribal interest in exclusive taxing authority outweighs the countervailing interests of the other 11 tribes in New Dakota.

First, the Wendat suggest that New Dakota's tax interferes with tribal sovereignty under *Williams*, 358 U.S. at 220. But the Wendat's claim can only succeed if New Dakota's tax infringes on the tribe's ability to "make laws and be governed by them." *Id.* The Wendat's claim, however, is ensnared: either the Topanga Cession is within the Maumee Reservation, meaning the Wendat corporation is without sovereign authority there, or the area is within the Wendat Reservation and the full amount of the tax is remitted back to the Wendat. In the latter scenario, the Wendat would be unable to show that New Dakota's tax infringed on their ability to achieve self-governance because they would not be deprived of the funds collected through New Dakota's tax.

Second, the Wendat claim that tribal interests preempt state regulatory authority in the Topanga Cession. Under its preemption analysis, this Court considers the impact of state regulations on tribal interests. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219 (1987). The Court will also consider the federal government's "overriding goal of Indian self-sufficiency and economic development." *Id.* at 216. This goal is best achieved through New Dakota's taxing authority.

The Wendat argue that its interests outweigh New Dakota's countervailing interest in taxing because the tax revenue is derived from tribal activities. Under *Washington*, tribal interests are strongest when the taxed revenue is generated from tribal

activities and the taxpayer receives tribal services. *Washington*, 447 U.S. at 156–57. The Wendat argue that the cultural components of the Wendat shopping center—such as sales of tribal cuisine—mean that the corporation is generating revenue from tribal activities. R. at 8.

Even if the cultural aspects of the Wendat's shopping center meet this Court's definition of "tribal activities" under *Washington*, the Wendat ignore the effect of removing New Dakota's tax on the interests of the other 11 tribes in New Dakota. Without New Dakota's taxing authority in Indian Country, the 12 tribes with reservations in New Dakota will have difficulty taxing non-Indian businesses operating on fee lands within their reservations to the extent currently provided under New Dakota's tax. This is because this Court's decision in *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 647 (2001) specifically excludes tribal taxing authority on non-Indian fee lands within Indian country. So a Wendat victory on the issue of state taxing authority would improve the Wendat corporation's balance sheet, but would drain the other 11 tribes of an important revenue stream because they would no longer receive remittances from taxes collected from non-Indian businesses operating on their reservations under 4 N.D.C. § 212 (5). Although New Dakota's tax affects the Wendat business in the Topanga Cession, the tax's positive economic utility to overall tribal interests overwhelms the Wendat's interests. Maintaining consistent taxing in Indian Country is the best way to preserve the fragile promises between the government and the tribes.

CONCLUSION

For these reasons this Court should REVERSE the decision of the United States Court of Appeals for the Thirteenth Circuit and find that the Maumee Reservation remained intact and that New Dakota has taxing authority in Indian Country.

Respectfully submitted,
/s/ Team No. T1027
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