NO. 20-1104

IN THE

SUPREME COURT OF THE UNITED STATES

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 THE PETITIONER

29TH ANNUAL MOOT COURT

NATIONAL NATIVE AMERICAN LAW STUDENT ASSOCIATION

ATTORNEYS FOR THE PETITIONER: TEAM T1029

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

QUESTIONS PRESENTED

1. Whether the Treaty with the Wendat abrogated the Treaty of Wauseon and/or whether the Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908) diminished the Maumee Reservation; if so, whether the Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892) diminished the Wendat Reservation leaving the Topanga Cession outside of Indian Country.
2. If the Topanga Cession is still in Indian Country, whether the doctrine of Indian preemption or infringement prevents the State of New Dakota from collecting its Transaction Privilege Tax against a Wendat tribal corporation.

STATEMENT OF THE CASE

I. Statement of the Proceedings

The Maumee Indian Nation ("Maumee Nation") filed suit against the Wendat Band of Huron Indians ("Wendat Band") in the United States District Court for the District of New Dakota on November 18, 2015. R. at 8. The Maumee Nation first asked the court for a Declaration that any development by the Wendat Commercial Development Corporation (WCDC) in the Topanga Cession would require the WCDC to secure a Transaction Privilege Tax (TPT) license and payment of the tax under 4 N.D.C. § 212 because it is located on the Maumee Indian Reservation. *Id.* Alternatively, the Maumee Nation asked the court for a Declaration that the Topanga Cession was not in Indian country at all. *Id.* The District court found for the Maumee Nation on both issues raised.

First, the District Court relied on principles to determine Congressional intent to diminish a reservation established in *Solem v. Bartlett,* 465 U.S. 463 (1984), to find that the

WCDC complex would be built on Maumee Nation land. The court explained that it found no clear evidence of Congressional intent in the Treaty with the Wendat or its legislative history to abrogate the Treaty of Wauseon, which established the Maumee Reservation, leaving the Maumee's claim to the Topanga Cession intact. R. at 9. The court supported this finding by explaining that the Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892) clearly paid a sum certain for surplus lands and therefore diminished any claim the Wendat Band has to the Topanga Cession. *Id.* Second, the court determined that the state of New Dakota could still levy the TPT within the Topanga Cession. Relying on *Williams v. Lee,* 385 U.S. 217 (1959) and *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980), the court explained that it found no infringement or preemption that would justify denying New Dakota the ability to levy the TPT tax in the Topanga Cession. *Id.*

The Wendat Band subsequently appealed the District Court's holding to the Thirteenth Circuit Court of Appeals, where it was held awaiting the Supreme Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). The Thirteenth Circuit found in favor of the Wendat Band on both issues. First, the court concluded that the Topanga Cession was located on the Wendat Reservation, stating that the Treaty with the Wendat of 1859 made clear that the Maumee Nation's claim to the Topanga Cession was abrogated and did not find any explicit cession language on the face of the Wendat Allotment Act. R. at 10. Next, while the land purchased for the WCDC had not yet been taken into trust, the court found the Wendat Band's arguments for exemption from the TPT persuasive. The court explained that Indian preemption established in *Bracker* does apply, and the fact that the TPT would otherwise remit back to the Wendat Band was an infringement on tribal sovereignty as

recognized in *Williams*. *Id.* Thereafter, the Maumee Nation timely filed for certiorari, which this Court granted on November 6, 2020. The standard of review for both issues is *de novo*.

II. Statement of the Facts

In 1802, Congress ratified the Treaty of Wauseon reserving lands west of the Wapakoneta River for the Maumee Indian Nation. R. at 4. In 1859, Congress ratified the Treaty with the Wendat, reserving lands east of the Wapakoneta River for the Wendat Band of Huron Indians. R. at 5. Additionally, both the Maumee Nation and the Wendat Band were subject to the Generally Allotment Act, P.L. 49-105 (Feb, 8, 1887). The Maumee Nation was compensated about $2,000,000 for approximately 400,000 acres of land. The Wendat Band was paid about $2,200,000 for approximately 650,000 acres of land.

Sometime during the 1830s, the Wapakoneta River shifted three miles westward. This created a tract of land in Door Prairie County that is now known as the Topanga Cession. R. at 4. Since the Wapakoneta River was used as a boundary line in both treaties, the Maumee Nation and the Wendat Band have disputed the ownership of the Topanga Cession for over eighty years. The Maumee Nation seeks to resolve the conflicting claims today with the ultimate goal of revitalizing its economy.

On December 7, 2013, the Wendat Band purchased a 1,400-acre parcel of land located in the Topanga Cession in fee from non-Indian owners. R. at 7. The Band announced on June 6, 2015 that it planned to construct a residential-commercial development complex wholly owned by the WCDC. *Id*. The Complex would include a cultural center, museum, grocery store, salon and spa, a bookstore, a pharmacy, and was projected to gross over $30 million annually. R. at 8.

On November 4, 2015, representatives from the Maumee Nation approached the WCDC to remind them that the Maumee Nation considered the Topanga Cession to be its land since any claim the Wendat Band had to the land was extinguished by the 1892 Wendat Allotment Act. *Id.* Accordingly, the Maumee Nation expected the complex to pay the New Dakota Transaction Privilege Tax (TPT), which would be remitted to the Maumee Nation. The WCDC replied that the Topanga Cession was part of the Wendat Reservation since the 1859 Treaty with the Wendat, and any claim the Maumee Nation had was eliminated by the 1809 Maumee Allotment Act. *Id.*

The applicability of the TPT is at the center of this dispute. The TPT is a tax paid to the State of New Dakota which is applied to gross proceeds and income of a business. R. at 5. The New Dakota TPT is remitted to the state as a 'privilege' of doing business in New Dakota. *Id.* Authority for the TPT is codified in 4 N.D.C. § 212. Both Tribes accept that the TPT exists, as well as the overall validity of the TPT. However, the Tribes dispute the application of the TPT. *Id.*

The Maumee Nation considers the Topanga Cession to be its land. In 2015, The Maumee Nation filed a complaint requesting any development within the Cession by WCDC to comply with the requirements of 4 N.D.C. §212(1) and (2) of a TPT license and 3% remittance of gross proceeds to the state. R. at 8. If the court finds that that the 1,400-acre parcel purchased by the WCDC was on Maumee land, 4 N.D.C. § 212(5) applies, which requires the entirety of the 3% TPT to be remitted to the Maumee Nation. 4 N.D.C. § 212(5) provides, ". . . the State of New Dakota will remit to each tribe the proceeds of the [TPT] collected from all entities operating on their respective reservations that do not fall within the exemption." R. at 6. If the court finds the Topanga Cession is not on Indian Land, under 4

N.D.C. § 212(6), 1.5% of the TPT collected by the State from Door Prairie County would be remitted to the Maumee Nation. 4 N.D.C. §212(6) provides, ". . . half of the [TPT] collected from all businesses in Door Prairie County that are not located in Indian country (1.5%) will be remitted to that tribe." *Id.*

The Maumee Nation plans to use the tax remittance to pay for tribal scholarships and invest in new forms of sustainable economic development, since the Nation's largest source of revenue – sustainable timber harvesting – is currently declining by 12% annually. R. at 8. Additionally, the Nation believes these economic investments would improve the income of Maumee Nation citizens, whose average income is 25% less than the average Wendat Band citizen, who will then be more avid consumers of goods and services at the complex. *Id.*

SUMMARY OF THE ARGUMENT

The Maumee Nation's interest in this case turns on reasons of economics and sovereignty. Currently, the Maumee Nation's economy is in a state of transition and needs the support the Transaction Privilege Tax remittance provides to the Nation. The Maumee Nation primarily relies on sustainable timber harvesting that has been affected by climate change, resulting in revenues declining at the fast rate of 12% a year. R. at 8. The Nation is planning to use the funds generated from the remittance tax to not only invest in new forms of sustainable, diverse, economic development, but also to help pay for tribal scholarships. *Id.* Investing in economic development is necessary for the Nation to continue to provide basic services and jobs for Maumee citizens, while also improving the average income of citizens, which is 25% lower than Wendat citizens. *Id.*

The tax remittance is essential in supporting the Nation through this difficult time of transition and promoting a brighter future for all Maumee citizens. We ask the Court to consider the following arguments and reverse the decision of the 13th Circuit.

I. The Treaty of Wauseon was not abrogated, so the Wendat Community Development Corporation complex is located on the Maumee Reservation subjecting it to the 3% Transaction Privilege Tax. Alternatively, the Wendat Band's claim to the Topanga Cession has been diminished by the Wendat Allotment Act, subjecting it to the 1.5% Transaction Privilege Tax.

It is the Maumee Nation's position that the Treaty with the Wendat of 1859 did not abrogate the Treaty of Wauseon of 1802, and therefore the WCDC complex is in the Topanga Cession is in Maumee territory, and is subject to the 3% TPT under 4 N.D.C. §212(5). Congressional intent to abrogate a treaty must be clear, explicit, and plain. *US v. Dion*, 476 U.S. 734 (1986). If there is no explicit statutory language that suggests abrogation of a treaty, legislative history may be referenced, but the intention of Congress to abrogate or modify a treaty is not to lightly be inferred. *Washington v. Washington Commercial Passenger Fishing Vessel Assn*, 443 US 658, 690 (1979); *Menominee Tribe v. US*, 391 US 404, 413 (1968).

The main issue at play in terms of abrogation is the border between the two reservations, the Wapakoneta River, shifting during the 1830s – during the time between two treaties. The 1859 Treaty with the Wendat does not on its face or in its legislative history contemplate the shift of the river or the actual boundary it created, so this Court should not assume that Congress intended to grant the land to the Wendat Band. Instead, this Court

should uphold the language of the Treaty of Wauseon, which properly contemplated the river's actual boundary.

In the alternative, the Maumee Nation argues that the WCDC complex is not within Indian country because the Wendat Band's claim to the Topanga Cession has been diminished by the Wendat Allotment Act. This Court has established three principles to determine congressional intent to diminish a reservation in *Solem*. Ultimately, the Wendat Allotment Act contains a present and total surrender of all tribal interests in the Topanga Cession in exchange for two million dollars to be paid to the Wendat Band. As a result, the Wendat Band's reservation has been diminished, and their claim to the Topanga Cession eliminated. Therefore, the WCDC complex is not in Indian country and is subject only to the 1.5% TPT pursuant to 4 N.D.C. §212(6).

II. Assuming the Topanga Cession is located on the Maumee Reservation; the State of New Dakota can collect its Transaction Privilege Tax from the Wendat Community Development Corporation complex because it does not infringe upon Maumee Nation sovereignty nor is it preempted by federal law.

The Maumee Nation maintains that the Topanga Cession - which includes the 2015 Wendat purchased parcel - is located within Maumee Reservation boundaries. This position makes the WCDC development non-members on Indian land. Considering this, the court should apply the two-prong preemption and infringement analysis. Initially established in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) and *Williams v. Lee*, 358 U.S. 217 (1959). The analysis found in *Bracker* balances state, tribal, and federal interests and is prompted when a state asserts authority over non-Indian conduct on Indian land. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). To find the TPT is not preempted via the doctrine of Indian preemption, the court should examine the three commonly

analyzed *Bracker* factors to ultimately find that 1) The federal government has not undertaken comprehensive sales tax regulation on Indian Country so much so that their control is pervasive in the field 2) There are minimal policies that underly federal tax regulations of Indian Country that are threatened by the TPT and 3) the State has a specific interest in levying the TPT and remitting the 3% tax to the Maumee Nation. Considering the Maumee Nation's financial status, the TPT more than balances a potential intrusion into federal regulations which have a history of legislating in support of tribal self-sufficiency.

Additionally, the court should find there is no potential infringement upon tribal sovereignty under the second prong. *Williams v. Lee*, 358 U.S. 217 (1959). While the current state of the infringement test is uncertain under case law following *Williams*, the court has progressively reduced reliance on a finding of infringement. Of concern is the lack of clarity surrounding the necessity of this prong. Nevertheless, the Maumee Nation maintains that there is no infringement of tribal sovereignty under the rigorous restrictions of infringement prior to *Williams*. Alternatively, in the event that the court found a possibility of infringement on tribal sovereignty under the more rigorous standards of *Williams*, the Nation asks the court to consider most recent case law on the matter and ultimately resolve the issue in Maumee Nations favor.

The Maumee nation asks this court to find that the State of New Dakota's TPT does not infringe upon the Maumee Nations sovereignty, nor does the state TPT preempt federal law. Accordingly, the Nation asks the court to levy the 3% TPT upon the WCDC development, pursuant to 4 N.D.C. §212(5) remittable to the Maumee Nation.

ARGUMENT

I. The Wendat Community Development Corporation must pay the state of New Dakota's Transaction Privilege Tax.

a. The Treaty of Wauseon was not abrogated by the Treaty with the Wendat, so the Wendat Community Development Corporation complex is located on Maumee Land, subjecting it to the state of New Dakota's 3% Transaction Privilege Tax.

Treaty of Wauseon, establishing the Maumee Reservation, was not abrogated by the Treaty with the Wendat. Therefore, the WCDC complex is located within Maumee Territory and is subject to the 3% TPT pursuant to 4 N.D.C. §212(5).

The typical test for abrogation of treaty rights is that congressional intent to abrogate such rights must be clear and explicit. *Dion*, 476 U.S. at 738. This does not take an express declaration in every situation, so long as Congress's intent is clear and plain. *US v. Santa Fe Pacific R. Co,* 314. US 339, 353 (1941). In the absence of explicit statutory language, the Cour has been extremely reluctant to find congressional abrogation of treaty rights. *Washington Commercial Passenger Fishing Vessel Assn*, 443 U.S. at 690. The Court has stated, "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress." *Menominee Tribe v. US,* 391 U.S. at 413.

The Court has provided different standards for how a clear and explicit abrogation can be demonstrated. The Court has required an "express declaration" from Congress about its intent to abrogate treaty rights. *Leavenworth L., & G.R. Co v. US,* 92 US 733, 741-742 (1876). The Court has also looked to a statute's legislative history and surrounding circumstances in addition to the face of the statute. *Rosebud Sioux Tribe v. Kniep,* 430 US

584, 587 (1977). However, an explicit statement from Congress is preferable for purpose of ensuring legislative accountability for the abrogation of treaty rights. *Seminole Nation v. United States,* 316 US 286, 296-297 (1992). What is essential, however, is clear evidence that Congress actually considered the conflict between its intended action on the one hand, and Indian treaty rights on the other. *Dion*, 476 U.S. 740.

i. Nothing on the face of the Treaty with the Wendat clearly or explicitly abrogates the Treaty of Wauseon.

Article III of the Treaty of Wauseon provides, "[t]the boundary line between the United States and the 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 there to the Sylvania river." Treaty of Wauseon, 7 Stat. 1404 (1801). As for the Wendat reservation, article I of the Treaty with the Wendat provides, "lands East of the Wapakoneta River; with the Oyate Territory forming the southern border and the Zion tributary forming the norther border. The eastern terminus of these reserved lands is the line bordering the New Dakota territory and the Oyate territory." Treaty with the Wendat, 35 Stat. 7749 (1859).

The main point of controversy here is that the river boundary shifted in the 1830s, between the 1802 Treaty of Wauseon and the 1859 Treaty with the Wendat. Whether Congress knew about the river shift, and therefore whether it intended to give land that it originally granted to the Maumee Nation in 1802 to the Wendat Band in 1859, is not revealed on the face of the Wendat treaty. If there is anything to glean about Congress's intent, an examination of the Treaty with the Wendat legislative history must occur to see if the shift in the river was a point of discussion or consideration. If not, this Court must assume that

Congress did not intend to abrogate the Maumee Nation's rights to the Topanga Cession land.

ii. The legislative history of the Treaty with the Wendat and surrounding circumstances provide no insight into whether Congress had any intent to abrogate the Treaty of Wauseon.

Unfortunately, there is no indication of the legislative history of the Treaty with the Wendat that Congress had any knowledge that the Wapakoneta River had shifted, therefore Congress could not have knowingly intended to abrogate the Topanga Cession land from the Treaty of Wauseon. The only concern of the Treaty with the Wendat was creating an agreement with the Wendat Band so that the United States could move forward in establishing New Dakota's statehood. Senator James from Iowa stated, "[w]e should proceed to acquire the lands forthwith and provide new settlements with which to further grow the Territory of New Dakota. It won't be long until this body is admitting her to statehood as the newest member of our Union." R. at 29.

Even more, the legislative history of the treaty reveals that there was an interest in seeking further cessions from the Wendats. Senator Lazarus from Kentucky stated, "However I wonder if the Indian agent could have secured even more cessions from the Indians." *Id.* This shows that Congress may have even intended to diminish the Wendat's land further. Throughout all this discussion, there was no mention of the state of the Wapakoneta River or its shift that occurred since the Treaty of Wauseon in 1802. Since there is no mention of the river shift or how to address the Topanga Cession in relation to the two treaties, the Court must assume that Congress did not intentionally abrogate the Treaty of Wauseon, meaning the Topanga Cession is still Maumee Nation territory.

b. Alternatively, the Wendat Community Development Corporation complex is not within Indian country because the Wendat Band's claim to the Topanga Cession has been diminished by the Wendat Allotment Act, subjecting it to the state of New Dakota's 1.5% Transaction Privilege Tax.

If this Court agrees with the 13th Circuit that the Treaty with the Wendat did abrogate the Maumee Nation's rights to the Topanga Cession, the WCDC would not be in Indian country because the Wendat Band's claim to the cession was diminished by the Wendat Allotment Act. The WCDC would then only be subject to a 1.5% TPT pursuant to 4 N.D.C. §212(6).

We first recognize that only Congress has the power to diminish reservation boundaries: "Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots *within* the area, the entire block retains its reservations status until Congress explicitly indicates otherwise." *Solem,* 465 US at 470 (emphasis added).

It is important to note in this case, however, we are questioning what has happened to the boundaries of a reservation, not just land within it. In *Solem v. Bartlett*, this court established three principles to relevant to Congress's intent to diminish a reservation. First, the Court explained that congressional intent to diminish should not be inferred lightly and must be specifically stated. *Id* at 470. Next, the Court noted that if there is no specific language, congressional intent via legislative history can be pointed to. *Id* at 471. And finally, the Court noted that in some cases it may be appropriate to look to events that occurred after the passage of a surplus land or allotment act to determine congressional intent, including Congress's own treatment of the affected areas in the years following the opening, the way

the Bureau of Indian Affairs and local judicial authorities dealt with unopened allotted lands, and demographic changes in the opened lands. *Id.*

The present case has been pending before a decision in *McGirt v. Oklahoma*, which provided clarity on the principles established in *Solem.* The Court in *McGirt* clarified – in response to the State of Oklahoma's argument – that allotment on its own does not automatically terminate a reservation. Indian country is defined as "all land within limits of an Indian reservation . . . notwithstanding the issuance of any patent, including any rights-of-way running through the reservation" 18 U.S.C. 1151(a). The McGirt Court explained that this statute contemplates private land ownership within reservation boundaries, so allotment and sale of lands within Indian country is not dispositive of reservation termination. *McGirt v. Oklahoma*, 140 S.Ct. 2454, 2464 (2020). The Court also explained that subsequent historical treatment and demographic information are not enough to prove disestablishment without first pointing to ambiguous language, which the state of Oklahoma failed to do.

Using the principles provided in *Solem* and paying attention to the clarification of those principles provided in *McGirt*, the Wendat Band's reservation boundary has been diminished, therefore eliminating any claim it may have to the Topanga Cession.

i. The Wendat Allotment Act specifically states a present and total surrender of all Wendat Band interest in the Topanga Cession.

The Wendat Allotment Act provides on its face an intent to diminish the boundary of the Wendat reservation, eliminating its interest in the Topanga Cession. A "present and total surrender" of all tribal interest is required to be specifically stated in an allotment act for congressional intent to diminish to be gleaned. *Id.* When buttressed by unconditional commitment to compensate for the opened land, there is almost an insurmountable

presumption that Congress meant for the reservation to be diminished. *Solem*, 465 U.S. at 470.

Section one of the Wendat Allotment Act provides, "[a]ll lands not selected within one year . . . shall be declared surplus lands and 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 use and benefit for the Band." Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892). The phrase "open to settlement" is sufficient to show that Congress intended to remove all Wendat Band interest in the lands that were to be designated for settlement. Congress did so, however, while also intending to keep the eastern half of the Wendat reservation provided for in the 1859 treaty intact for the use and benefit of the Wendat Band specifically. Because the lands "opened to settlement" were designated specifically for settlement and not reserved for the "use and benefit" for the Wendat Band, the Wendat Allotment Act provides a clear, present and total surrender of lands that were not allotted to the Wendat Band outside of their 1859 treaty lands.

Furthermore, an unconditional commitment to compensate the Wendat Band for the land "open[ed] to settlement" is present in section two of the Wendat Allotment Act. "The United States hereby agrees to pay into the Treasury, in the name of the Wendat Band, the sum of three dollars and forty cents for every acre declared surplus . . . totaling two-million and two-hundred thousand dollars in total and complete compensation." *Id.* This section, in conjunction with the clear language opening the lands for settlement, creates a presumption that Congress meant for the Wendat reservation to be diminished through the Wendat Allotment Act.

ii. If the Court finds the language of the Wendat Allotment Act ambiguous, legislative history of the Wendat Allotment Act demonstrates congressional intent to diminish the Wendat Band's interest in the Topanga Cession.

If the Court is dissatisfied with the plain language of the Wendat Allotment Act and unconditional commitment to compensate for opened lands, the legislative history of the Wendat Allotment Act provides congressional intent to diminish the boundary of the Wendat reservation. In *Solem,* the Court explained that when "the tenor of the legislative reports presented to Congress . . . unequivocally reveal a widely held, contemporaneous understand that the affected reservation would shrink as a result of the proposed legislation" it has been "willing to infer that Congress shared the understanding that its action would diminish the reservation, notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remain unchanged." *Solem*, 465 U.S. at 470.

In the legislative history for the Wendat Allotment Act, the Secretary of the Interior stated, "by the opening of this reservation more than 2,000,000 acres of valuable land will be added to the *public domain*, equal to 12,500 homesteads of 160 acres each." 42 Cong. Rec. 1777 (1892). Additionally, the Secretary noted that, "there are many families awaiting the opening of these additional lands and the people already settled in New Dakota are greatly interested in this work being accomplished." *Id.* In addition to the "opening of the land" language that is present on the face of the act, this statement by the Secretary of the Interior also states that the two million acres of land will be added to the public domain. In *Hagen v. Utah*, the language "public domain" is noted to be understood as a marker of congressional

intent to withdraw a reservation. *McGirt,* 140 S.Ct. at 2462 (2020) (quoting *Hagen v. Utah,* 510 U.S. 399, 412 (1994)).

Additionally, multiple Congressmen spoke to the concern about passing the Allotment Act to open the surplus lands to non-Indian homesteaders looking to cultivate crops, and if there was any more delay it would result in a delay of the growing season by one year. This demonstrates that Congress understood that when the Allotment Act was passed, the Wendat Reservation would be diminished to what was allotted to each individual Wendat and their family members, and the surplus lands would be opened to new settlement. Congressman Mansur stated, "The opening of these lands has been looked forward to in that region with the greatest interest for long years, and unless this resolution is passed today and the money given to the Department for the purpose of allotting these Indians, it will put back the settlement for one crop season." 42 Cong. Rec. 1777 (1892).

After discussion, Congressman Peel stated, "It is now for the House to say whether this allotment ought to go on, in order to enable the Administration to open the remainder to settlement." *Id.* This quote makes it very clear that the House was deciding to diminish the reservation to allow surplus lands to be opened for allotment. If the Court does not find the face of the Wendat Allotment Act to demonstrate congressional intent to diminish the Wendat reservation, it may find this legislative history to be helpful in determining Congress's intent to diminish.

iii. Demographic changes and historical practices support the congressional intent to diminish found in the legislative history of the Wendat Allotment Act.

Historical practices and demographic changes in the Topanga Cession support the congressional intent found in the legislative history. Where non-Indian homesteaders flooded into the opened portion of a reservation and the area has long since lost its Indian character, the Court has acknowledged that diminishment may have occurred. *Rosebud Sioux Tribe*, 97 S.Ct. at 1364.

Demographic analysis based on Door Prairie County census records completed by both tribes in this case has shown that the percentage of American Indian or Alaska Native people living in the Topanga Cession has decreased significantly since 1880. The largest of these decreases, approximately 60%, occurred between 1900 and 1910 as a result of the allotment acts. R. at 7. Since 1910, there has been a steady decline through 2010, where the percentage of American Indian or Alaska Native people now sits at only 17.9%. *Id.* Additionally, both tribes have stipulated that almost no members from either tribe selected allotments in the Topanga Cession, and the only members who live there now live in rented accommodations or purchased lands in fee from non-Indian homesteaders, the state or the United States. *Id.*

As a result, the Topanga Cession has lost its distinct Wendat character. Coupled with the congressional intent to diminish found in the Wendat Allotment Act legislative history, has eliminated the Wendat Band's claim to the Topanga Cession.

II. Assuming the Topanga Cession is located on the Maumee Reservation, the doctrines of Indian preemption and infringement do not prevent the State of New Dakota from collecting its Transaction Privilege Tax from the non-member Wendat Community Development Corporation complex.

It is well settled case law that either a finding of Indian preemption or infringement upon Tribal sovereignty effectively prohibits a State from imposing a tax upon Tribal lands. R. at 11. Either an infringement test or Indian preemption test by itself can support a holding that state action is inapplicable. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). Nevertheless, The Maumee Nation maintains that the WCDC complex is within the Maumee Reservation and that the TPT levied upon WCDC does not impermissibly intrude upon the doctrine of Indian preemption, nor does it infringe upon the sovereignty of the Maumee Nation.

The Maumee Nation takes the position that the Treaty of Wauseon was not abrogated by the Treaty of Wendat, thus the WCDC complex is located on the Maumee Reservation. Indian preemption and infringement doctrines do not prevent taxation of non-member entities on Tribal Land. Consequently, pursuant to 4 N.D.C §212(5) WCDC must apply for an annual TPT license and remit 3% of their gross proceed to the State of New Dakota. Because WCDC operates on the respective reservation of the Maumee Nation and does not fall within an exemption of §212(4), the State of New Dakota will then remit the entirety of WCDC 3% TPT to the Maumee Nation. R. at 6.

a. The doctrine of Indian preemption does not prohibit the State of New Dakota from collecting its Transaction Privilege Tax from the Wendat Community Development Corporation complex located on the Maumee Reservation.

Under the United States Constitution, States generally have a broad ability to tax people within their state boundaries. 1 Cohens Handbook of Federal Indian Law § 8.03 at pg. 1 (2019). There are, however, limitations to a state's ability to collect a tax on Indian land. *Id*. The Supreme Court has held "the Constitution vests the Federal Government with exclusive authority over relations with Indian tribes….and in recognition of the sovereignty retained by Indian tribes even after formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985).

A State is wholly unable to tax tribes or members of a tribe within Indian Country. *County of Yakima v. Confederated Tribes & Bands of the Yakima Nation*, 502 U.S. 251, 258 (1992). "Indian Country" as a generally broad term that can include formal and informal Reservations. *Okla. Tax Comm'n v. Sac & fox Nation*, 508 U.S. 114, 125 (1993).

However, if a tax complies with the preemption analysis found in *White Mountain Apache Tribe v. Bracker* and its progeny, a state may potentially tax nontribal members within Indian Country. *See Generally, White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). The *Bracker* test applies when a state asserts authority over non-Indians for conduct on a reservation with members. *Id.* This loose balancing test considers state, federal, and tribal interests in determining if the states exerted authority violates federal law. Applied to a balancing test, state tax is likely impermissible if 1) "The Federal Government has

undertaken comprehensive regulation" on the matter, 2) "A number of policies underlying the federal regulatory scheme are threatened by the tax, or 3) The State is "unable to justify the taxes except in terms of a generalized interest in raising revenue". *Id* at 141-145.

i. The WCDC complex is located on the Maumee Reservation. The State of New Dakota may levy a 3% tax of gross proceeds made by non-member WCDC within the Maumee Nation Reservation.

The Maumee Nation maintains through an examination of legislative history that because the Treaty of Wauseon was not clearly abrogated the WCDC proposed complex is located on the Topanga Cession which is within the boundaries of the Maumee Reservation. R. at 8. While it is recognized that states generally have the ability to tax people within the state boundaries, federal law limits a state's ability to collect a tax on tribal lands. Vested authority from the Constitution retains the primary authority to regulate Indian tribes within the federal government. States are thus unable to levy a tax on a member of a tribe on their own respective tribal lands.

The Maumee Nation's contention that the Topanga Cession is on the Maumee Reservation is critical to the court finding that the TPT may be applied to WCDC. Though under conflict for eighty years and comprised of mostly fee lands, it is relatively clear that the Topanga Cession is within Maumee Reservation boundaries. Courts have loosely interpreted the meaning of "Indian Country" to include formal and informal reservations, as well as allotments. The Topanga Cession currently consists primarily of "fee-lands that have been used for non-commercial purposes." R. at 7. It is reasonable for the court to find that the Cession is within Indian Country, more specifically within the Maumee Reservation.

If the court were to find that the Topanga Cession was instead within the boundaries of the Wendat Band, the current suit would be null, WCDC would not be required to acquire a TPT license nor remit any taxes on the development. Alternatively, if the court finds that the Topanga Cession is on non-Indian land, the TPT will apply and 1.5% of the TPT will be remitted to the Maumee nation for their valuable mineral interests they bequeathed years ago.

Ultimately, in the likely event that the Topanga Cession is found to be within the Maumee Reservation, federal law would not prohibit a collection of the 3% TPT from WCDC because this would not impermissibly violate Constitutional authority given to the federal government to regulate tribes. Further, the State of New Dakota would be restricted under *Montana v. Blackfeet Tribe* from collecting the TPT of gross sales by members of the Maumee Nation on the Reservation.

ii. The Federal Government has not undertaken comprehensive tax regulation pertaining to Indian Country.

In abundant case law, Courts have made it clear that applying the Indian preemption analysis is individualized and the resolution is fully determined by the specific facts of the case. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989). The preemption analysis is activated by matters regarding non-members in Indian Country. The test weighing state, federal, and tribal interests begins by analyzing if the Federal government has undertaken comprehensive regulation over the matter in Indian Country. In *Bracker* the specific topic was logging. The court found that the Federal Government had undertaken comprehensive tax regulation regarding logging in Indian Country. In *Bracker* there were various existing regulations, acts of Congress, and day to day supervision over logging. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). Ultimately, the court

found that the state tax on logging was preempted because the federal regulation scheme was so pervasive as to occupy the field.

Bracker is distinguishable from the litigation at hand. the TPT from New Dakota is a state gross sales tax. Sales tax is managed exclusively through the state government. Sales tax from proceeds is very local and generally applied to the improvement of the community, locality, and state.

iii. Minimal policies underlying the federal tax regulations of Indian Country are threatened by the State TPT.

Currently, there are limited applicable federal tax regulations regarding the Maumee Nation. It is unclear how the TPT would interact with federal laws. Neither Treaty from either Tribe contains information about taxation, nor do the treaties provide exemption from tax. The federal taxation regulatory scheme over Indian Country is not pervasive enough to preclude the potential additional burdens in this case. *Id*. At 148.

Considering the disparity between the average income of a citizen from each Tribe, the potential burdens levied upon WCDC will be minimal in comparison to profits from the complex. The TPT will greatly benefit the Maumee nation if the WCDC prospect of Gross sales is fulfilled. Finally, the 3% tax is minimal compared to a potential for $80 millions a year in sales.

iv. The State has a public policy interest in self-sustaining Tribes which is more than a generalized interest in raising revenue. Thus, creating a sufficient balance to the potential intrusion of federal regulatory schemes.

In *Bracker*, the state only expressed a general interest in taxing to raise revenue. The state did not explicitly say exactly why the increase in revenue was needed or how it would be used. In weighing interests, a court must consider the state and tribal interests in deciding if a tax is worth the intrusion into federal regulations.

Distinct from a majority of case law on the matter, this case is regarding two tribal entities. There is no specific state interest primary or present in the litigation. However, the State of New Dakota does have more than a generalized interest in raising revenue. 4 N.D.C. §212(4)-(6) takes special protections regarding Indian tribes located in New Dakota. Under the TPT statute, the state explicitly strives to protect their relationship with the 12 Tribes within the state. R. at 6. §212(4) exempts Tribes from collecting the TPT on their own land. §212(5) provides TPT proceeds distribution to respective reservations. Id. Finally, § 212(6) sets aside 1.5% of proceeds for the Maumee Nation.

It is clear from the statute that the State of New Dakota has a public policy interest in levying the tax, which is more than a generalized interest in raising revenue through the TPT. The State is invested in sharing profits with rightful landowners, as well as ensuring the Maumee Nation is rewarded for their valuable mineral interests given up.

Additionally, assuming the WCDC complex is within the Maumee Reservation, the Maumee intend to use the remittance for desperate needs. The Nation plans to pay for tribal

scholarships and to invest in economic development needs to provide jobs for members. The impact of the TPT on the Wendat Band is offset by the fact that the Maumee Nation's average citizen income is 25% lower than the average income of a Wendat tribal member. R. at 8.

Finally, most recent Indian preemption caselaw shows a departure from finding federal law preempts taxation of non-members on Indian land. This departure is shown in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989). The court did not apply the *Bracker* balancing test yet ultimately resolved the case by not finding preemption. Various cases following have also concluded the same without applying the Indian preemption test. Thus, assuming that the WCDC development is within the Maumee Reservation, the 3% TPT is not preempted and should be collected by the State of New Dakota and fully distributed to the Maumee Nation.

b. The State of New Dakota may collect its Transaction Privilege Tax from the Wendat Community Development Corporation, because the TPT does not impermissibly infringe upon Tribal sovereignty of the Maumee Nation.

Under the infringement test expressed in *Williams v. Lee*, state TPT of the WCDC development located within the Maumee Reservation does not impermissibly infringe upon the Tribal sovereignty of the Maumee Nation. *Williams v. Lee*, 358 U.S. 217 (1959). Alternatively, if the court were to find the TPT did infringe on tribal sovereignty under the more stringent *Williams v. Lee,* the court should find that the TPT does not impermissibly infringe upon Tribal sovereignty under current case law.

i. Under the more stringent infringement test of *Williams v. Lee*, the TPT levied upon the WCDC development located on the Maumee Reservation does not infringe upon Tribal sovereignty.

Modern authority for the infringement test comes directly from *Williams v. Lee*, 358 U.S. 217 (1959). Though, it is clear the infringement test was influenced by *Worcester v. Georgia*. See American Indian Law Journal, Volume 1, issue 1, 2012, Nathan Quigley pg. 147-160. In *Williams*, the court seemingly expanded states ability to intervene with Tribes. *Id*. Under *Williams*, the court limited *Worcester* and slightly expanded state action rights. Id. *Worcester* held a presumption of invalidity of state action, where the *Williams* court merely questioned validity of state action when "a state action infringed on the right of reservation Indians to make their own laws and be ruled by them". *Williams v. Lee*, 358 U.S. at 220 (1959). Prior to *Williams*, tribal sovereignty could only be modified by Congress. AILJ at 151. Though, the *Williams* court found state action permissible unless it infringed upon the tribal reservations right to make their own laws. *Williams v. Lee*, 358 U.S. at 220 (1959).

Williams specifically held that an Arizona State court did not have jurisdiction to hear a matter regarding non-member collection of goods sold on credit to a Navajo Indian on the Navajo Indian Reservation. *Id*. Though it appears this departure from expansive Indian Sovereignty found in *Worcester* is miniscule, case law following *Williams* further degraded a clear bar of infringement upon tribal sovereignty.

Regardless of this departure, the court in this case should find that even under the most stringent test of infringement found in *Williams*, that the State of New Dakota's TPT is applicable to WCDC development and does not infringe upon tribal sovereignty. Assuming the development is within the boundaries of the Maumee reservation, the Maumee Nation is the Tribe that must be protected from impermissible infringement of tribal sovereignty. It is

important to the courts analysis that the Maumee Nation supports the TPT taxation of the Topanga Cession, which the Maumee maintains is within their reservation boundaries.

The Maumee nation could potentially levy their own taxes upon the WCDC if the court were to find the development is within their reservation boundaries. However, this tax would likely be hotly contested considering the eighty-year dispute regarding the boundaries and existence of both the Wendat Band and Maumee Nation. A Maumee tax directly levied upon the WCDC development would be complicated, difficult to enforce, and would not be timely. Unfortunately, due to the declining revenue from timber, the Maumee Nation needs financial relief urgently and thus, the Maumee Nation requests the court to find that the State of New Dakota's TPT does not infringe upon tribal sovereignty of the Maumee Nation to make and enforce their own laws.

ii. Tribal sovereignty is not impermissibly infringed pursuant to case law following *Williams v. Lee* which has diminished the infringement test and further blurred barriers to state action.

Currently, the strength and applicability of the infringement test is not entirely clear, though courts have repeatedly commented that it still must apply to the analysis of state taxation of non-members. It is likely the infringement test remains an "independent barrier to state taxation" and must still be analyzed by the court as part of the two-prong analysis of Indian preemption and infringement. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). However, following *Williams*, the court has significantly weakened the status of the infringement test and it is necessary to account for the changed status in the court's analysis. In four cases following *Williams*, the court continued to flesh out the analysis of the Infringement test. It is clear through the following case law that there has been a departure from broad and expansive protection of tribal sovereignty. The following cases inform the

departure from traditional notions of robust sovereignty of Indian Nations further transforming the infringement test.

McClanahan v. State Tax Commission of Arizona, 411 U.S. 164 (1973) held that the infringement test was only meant to be applied to "situations involving non-Indians." Further, the court purported a shift away from explicit infringement bars in favor of Indian Preemption analysis. *McClanahan v. State Tax commission of Arizona* 411 U.S. at 172 (1973). The McClanahan shift away from reliance on the infringement test in favor of the preemption analysis can inform the court today. The case makes clear that infringement is a diminished argument that is to be considered in case of uncertainties surrounding the Indian Preemption analysis.

Though *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976), the court decided taxation on Cigarettes, which has long been held as a valid state action, the court informed the infringement analysis with the addition of "implied divesture." The theory of implied divesture was formed by Justice Rehnquist and suggests that because of tribe's incorporation into the United states, tribes have impliedly lost some sovereign powers pertaining to jurisdiction over non-Indians. *Id.* The court further used the divesture theory to explain how sovereignty may be infringed if the state taxed tribal members but not if the state taxed non-members. *Id.*

Moe is applicable to the *Maumee Nation* argument and is vital generally to tribe's ability to self-govern members. *Moe* explicitly strengthened state action over non-members while retaining a limited sovereignty of self-government for tribes. The *Moe* decision informs the possibility that the Maumee nation might not be able to collect an independent tax upon the WCDC development, which bolsters an argument for the TPT's validity. Under

Moe, The TPT upon non-members does not likely infringe upon the Maumee Nations ability to self-govern.

In another Cigarette taxation case, *Washington v. Confederated Tribes of the Colville Indian Reservation* 447 U.S. 134 (1980) held that there was no infringement by state taxation on cigarette sales and laid the foundation of the *Bracker* test. AILJ at 154. In this foundation, the court took into consideration and ultimately intertwined the states interest in the analysis of infringement. *Id.* The concurrence by Justice Rehnquist also addressed state sovereignty. *Id.* Colville further limited tribal sovereignty while strengthening state rights. *Id.*

The decision on *Colville* applies to the Maumee argument that the TPT should be collected by the State of New Dakota. The court should take into consideration the Maumee Nations ability to self-govern as well as state rights to action without impermissible infringement in validating the TPT.

The *Bracker* decision came only days after the *Coleville* decision. *Id.* It is clear the decision was meant to continue the diminishment of the infringement test by expanding, defining, and applying the Indian Preemption balancing test more broadly.

The Maumee Nation compels the court to consider in their decision the clear diminishment of expansive limitations upon state action as shown through case law following *Williams*. Additionally, we request the court to follow precedent of increased reliance upon balancing state, federal, and Tribal interests in their decision. Ultimately, the Maumee nation asks the court to validate the TPT as it applies to the WCDC development and find that the land in dispute is within the Maumee Reservation.

CONCLUSION

The Maumee Nation is relying on the New Dakota Transaction Privilege Tax remittance from the tax placed on the Wendat Community Development Corporation

complex to help improve the lives of its citizens during a troubling time for its economy. The 3% tax should be imposed because the complex is located on Maumee land, since the Treaty with the Wendat did not abrogate the Maumee Nations claim to the Topanga Cession promised in the Treaty of Wauseon. If the Court finds otherwise, the 1.5% tax must be applied because the complex is not within Indian country, since the Wendat Band's claim to the Topanga Cession was diminished by the Wendat Allotment Act.

Further, Balancing interests of state, tribal, and federal parties, the court should find that the state of New Dakota's 3% Transaction Privilege Tax levied upon the WCDC development is valid because it is within the Maumee Reservation, thus making the Wendat development non-members of the Maumee Nation. In its decision, the court should follow extensive caselaw extending the state's ability to tax non-members on Indian land. Under current authority, state action upon a non-member withing Indian Country will not impermissibly infringe upon the sovereignty of the Maumee nation to self-govern. Additionally, the enforcement of the TPT does not disregard the doctrine of Indian Preemption set forth in the preemption balancing test in *Bracker*. The TPT paid by the Wendat Band to the State of New Dakota will be remitted to the Maumee Nation, which is in urgent need of economic relief.

For the reasons stated, we humbly ask the Court to reverse the 13th circuit, upholding the state of New Dakota's ability to levy the state's Transaction Privilege Tax on the Wendat Community Development Corporation's complex.

Respectfully submitted,

Team T1029

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