No. 20-1104

IN THE

Supreme Court of the United States

_____

MAUMEE INDIAN NATION,
Petitioners,
v.

WENDAT BAND OF HURON INDIANS,
Respondent.

_____

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

_____

Petition for Writ of Certiorari

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COUNSEL OF RECORD
MAUMEE INDIAN NATION

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QUESTION PRESENTED

(1) Did the Treaty with the Wendat abrogate the Treaty of Wauseon?

(2) Did the Maumee Allotment Act diminish the Maumee Reservation?

(3) Did the Wendat Allotment Act diminish the Wendat Reservation or is the Topanga Cession outside of Indian country?

(4) Does the doctrine of Federal Preemption prevent the State of New Dakota from collecting its Transaction Privilege Tax against a Wendat Tribal Corporation?

(5) Does the doctrine of sovereign infringement prevent the State of New Dakota from collecting its Transaction Privilege Tax against a Wendat tribal corporation?

STATEMENT OF THE CASE

1. Statement Of The Proceedings

The Maumee Indian Nation brought suit to enforce the States of New Dakota's Transaction Privilege Tax against the Wendat Band on land claimed by both tribes. The District Court concluded that the Maumee Reservation was not diminished and that the State of New Dakota was permitted to levy its Transaction Privilege Tax directly on a non-member tribal entity. *Maumee Indian Nation v. Wendat Band of Huron Indians*, 305 F. Supp. 3d 44 (D. New Dak. 2018). The Wendat Band appealed the District Court's decision to the Thirteentch Circuit Court of Appeals. A divided Thirteenth Circuit reversed, holding that the Maumee Reservation was diminished in the Topanga Cession and the State of New Dakota was prohibited from enforcing the tax on a Wendat tribal entity. *Wendat Band of Huron Indians v. Maumee Indian Nation*, 933 F.3d 1088 (13th Cir. 2020).

2. Statement Of The Facts

The State of New Dakota holds lands that are the subject of two treaties between the United States and two Indian tribes, the Maumee Indian Nation and the Wendat Band

of Huron Indians (Wendat Band). The U.S. ratified the Treaty of Wauseon with the Maumee Nation in 1802 and the Treaty with the Wendat with the Wendat Band in 1858. As per the treaties, the Maumee Nation holds land west of the Wapakoneta River and the Wendat band holds land east of the River. The River moved 3 miles west some time in the 1830s, giving rise to a tract of land known as the Topanga Cession (Cession). The Cession is land that was west of the River in 1802 and east of the River in 1859. Both the Maumee Nation and Wendat Band claim exclusive land rights to the Cession and call it by this name.

After 1887, both tribes were subject to individual allotment acts passed by Congress. Upon allotment of their respective lands, the Maumee Nation received a total of $2,000,000 and the Wendat Band received $2,200,000.

The State of New Dakota's statute 4 N.D.S. §212 levies a tax known as the Transaction Privilege Tax (TPT). The TPT taxes the gross proceeds of sales or gross business income generated in New Dakota; both the Maumee Nation and Wendat Band recognize the law to be generally legal in New Dakota.

> **4 N.D.C. §212 Provides:**
> (1). Every person who receives gross proceeds of sales or gross income of more than $5,000 on transactions commenced in this state and who desires to engage or continue in business shall apply to the department for an annual Transaction Privilege Tax license accompanied by a fee of $25. A person shall not engage or continue in business until the person has obtained a Transaction Privilege Tax license.
> (2). Every licensee is obligated to remit to the state 3.0% of their gross proceeds of sales or gross income on transactions commenced in this state. Licensees with more than one physical location must report which tax came from which location so the proceeds can be appropriately parceled out to local partners.
> (3). The proceeds of the Transaction Privilege Tax are paid into the state's general revenue fund for the purpose of maintaining a robust and viable commercial market within the state including funding for the Department of Commerce, funding for civil courts which allow for the expedient enforcement of contracts

and collection of debts, maintaining roads and other transport infrastructure which facilitate commerce, and other commercial purposes.
(4). In recognition of the unique relationship between New Dakota and its twelve constituent Indian tribes, no Indian tribe or tribal business operating within its own reservation on land held in trust by the United States must obtain a license or collect a tax.
(5). In further recognition of this relationship, the State of New Dakota will remit to each tribe the proceeds of the Transaction Privilege Tax collected from all entities operating on their respective reservations that do not fall within the exemption of §212(4). While the Department of Revenue recognizes that each Tribe could collect this tax itself, the centralization of collection and enforcement by the State of New Dakota is the most efficient means of providing these funds to tribes.
(6). Door Prairie County. In recognition of the valuable mineral interests given up by the Maumee Indian Nation, half of the Transaction Privilege Tax collected from all businesses in Door Prairie County that are not located in Indian country (1.5%) will be remitted to that tribe.
(7). The failure to obtain a license or pay the required tax is a class 1 misdemeanor.

The majority of the Cession is land deemed to be surplus under either of the allotment acts to which both tribes are subject. Both tribes agree that none of their members chose an allotment within the area covered by the Cession. Any Indian(s) living within the Cession either rent their accommodation or own the land in fee simple, purchased from a non-Indian person, New Dakota, or the United States. Almost all of the Cession is fee lands used for non-commercial reasons.

The Wendat Band's 1,400-acre land purchase within the Cession on December 7, 2013 led to the present conflict. The Wendat Band intends to develop and use the land for both commercial and residential purposes, including the construction of the Wendat Commercial Development Corporation's shopping complex. This business is projected to create 350 jobs and earn over $80 million in gross sales per year. The Maumee Nation expects the Wendat Band to pay 3% tax under New Dakota's TPT because it considers the Cession to be Maumee reservation land. If TPT is applied, New Dakota will collected

3% of the Wendat business's sales and remit it to the Maumee Nation because the business would be operating as a non-Maumee member business within the Maumee land under §212(5). The Wendat Band considers the Cession to be Wendat reservation land and, therefore, does not expect to pay New Dakota any tax under TPT.

The Maumee Nation filed a complaint against the Wendat Band seeking a Declaration from federal court that any of the aforementioned Wendat business development be subject to obtaining New Dakota's TPT license and paying the 3% tax. Maumee Nation alternatively filed seeking a Declaration that the Cession is not Indian country and, therefore, the Wendat Band is to pay 1.5% tax under §212(6).

SUMMARY OF ARGUMENT

Although Congress's plenary power allows it to abrogate treaty rights, the Treaty with the Wendat in 1859 did not abrogate the Maumee Nation's land rights asserted within the Treaty of Wauseon (Wauseon). The Treaty with the Wendat did not expressly abrogate Wauseon because the former treaty not only lacks compelling language identifying unequivocally that abrogation was to occur but also lacks any mention of the Maumee Nation entirely. Therefore, it cannot be concluded that any Congressional intent existed to abrogate the Maumee Nation's treaty rights. The Maumee Allotment Act of 1908 did not diminish the Maumee Reservation because the Act lacks express language diminishing the reservation and the legislative history unveils strong Congressional intent to protect Maumee Nation rights and interests. If abrogation of the Maumee Nation's treaty did occur and/or the Maumee Nation was diminished, then the Wendat Allotment Act diminished the Wendat Band's reservation because the Act shows Congress's intent to not give unallotted lands to the Wendat Band, to unconditionally pay a sum payment capped at $2,200,000 to the Wendat Band, to quickly move non-Indian settlers onto lands

previously reserved by the Wendat's treaty, and to prioritize non-Indian interests over Wendat interests. Alternatively, if abrogation or diminishment of Maumee Nation's rights is found, the Topanga Cession is not Indian country because it is not reservation land, a dependent Indian community, or an allotment held in Indian title.

The Wendat Band can not use federal preemption to avoid paying the TPT because the Topanga Cession is not on Wendat land. Non-members on an Indian reservation are not prempted from paying tax. The tax infringes on the rights of a sovereign Indian Tribe if this Court finds that in balancing the interests the Wendat Band's interest of self-government is greater than the interests of the Maumee Nation and the State of New Dakota. The Maumee Nation's interests are greater because it is more in need of funding. The Maumee Nation's interests are also greater because, as the tribe on whose land the Topanga Cession resides, it has the actual self-governmental interest.

ARGUMENT

I. THE MAUMEE RESERVATION, ESTABLISHED IN 1908, WAS NOT DIMINISHED OR ABROGATED BY THE WENDAT TREATY OR THE MAUMEE ALLOTMENT ACT.

"The United States may abrogate treaties with Indian tribes, just as it may abrogate treaties with fully sovereign nations. However, it may abrogate a treaty with an Indian tribe only by an Act of Congress that 'clearly express[es an] intent to do so'." *United States v. Washington,* 853 F.3d 946, 967 (9th Cir. 2017) (quoting *Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 202 (1999)).

The Treaty of Wauseon [Wauseon] is an agreement between the Maumee Indian Nation and the United States of America negotiated and signed in 1801, ratified in 1802. Treaty of Wauseon, Oct. 4, 1801, 7 Stat. 1404. It defined and established the Maumee

Reservation in New Dakota. According to Wauseon, the Maumee Reservation's eastern boundary is the Wapakoneta River's western bank. Wauseon established the reservation's eastern boundary line as the Wapakoneta River's western bank. Treaty of Wauseon, Oct. 4, 1801, 7 Stat. 1404. Wauseon established the reservation's other boundaries as Fort Crosby, the Oyate Territory, and the Sylvania River. All of these boundaries are capable of moving, yet the treaty does not show that Congress contemplated that the reservation's boundaries would change if any of these landmarks moved.

Decades later, Congress signed the Treaty with the Wendat in 1859 and established the reservation's western boundary as the Wapakoneta River's eastern bank. The treaties' boundary definitions make clear that the River is to define the separation between the Maumee and Wendat reservations. Given a treaty's legal supremacy, it may only be repealed by Congressional action. Legislative action is not restricted from amending, conflicting with, or abrogating treaties because Congress maintains plenary power over tribes. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903). Therefore, it is only Congressional action that would abrogate the Maumee Nation's land rights as set forth in Wauseon.

"It is unquestioned that Congress has the power to amend or completely abrogate Indian treaties." *Dennison v. Topeka Chambers Indus. Dev. Corp.*, 527 F. Supp. 611, 619 (10th Cir. 1984). However, precedent makes clear courts' hesitation to readily find existence of abrogation as to protect Indians' treaty rights. Id. "A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." Id. at 620. A narrow exception to the clear expression rule has been applied when a treaty itself shows Congress' contemplation that

the treaty right would end. *Herrera v. Wyoming*, 139 S. Ct. 1686, 1695 (2019) (discussing and interpreting this Court's holding in *Ward v. Race Horse*, 163 U.S. 504, 16 S. Ct. 1076 (1896)). However, Congress neither expressly nor impliedly abrogated Wauseon in passing the Treaty with the Wendat.

1. The Wendat Treaty Did Not Expressly Abrogate The Treaty Of Wauseon.

The Treaty with the Wendat did not expressly abrogate the Treaty of Wauseon because the former document does not contain any "clear and unequivocal" language stating Congress's intent to modify, add, or eliminate any terms of Wauseon. *Dennison v. Topeka Chambers Indus. Dev. Corp.*, 527 F. Supp. 611, 620 (10th Cir. 1984) quoting *Bennett County v. United States*, 394 F.2d 8, 11-12 (8th Cir. 1968). There are many methods by which Congress's intent is determined, but "all of the tests require the Court to make a careful study of the statutory language." Id. The *Dennison* Court was tasked with a goal similar to that which is present in this when determining if the 1860 and 1863 Congressional Acts, restricting the land alienation rights of individuals with half-Indian blood, abrogated the land rights of individuals with half-Indian blood enumerated in the Treaty of 1825 between the Kansas Nation and the United States. *Dennison* turned to the language of the Acts in search of express abrogation and found none when "nowhere in [the Acts was the right at issue within the] 1825 Treaty mentioned, [there was] no language in either piece of legislation flatly abrogating Article [granting the right], … nothing in the 1860 Act [talked] of abrogating any portion of the Treaty, … [and nothing] in the 1862 Resolution [addressed] abrogation of the 1825 Treaty. In fact, the Treaty [was] not even mentioned." Id.

Federal statutes and treaties both stand as the supreme law of the land, with equal legal footing and authority. U.S. Const. art. VI, cl. 2. Therefore, the standards by which the Court determined if a statute abrogated a treaty in *Dennison* should be congruently applied here in assessing if the Treaty with the Wendat abrogated Wauseon. The entire Treaty with the Wendat fails to mention the Treaty of Wauseon, flatly abrogate the Treaty of Wauseon, or and even mention the Maumee Nation. Treaty of Wauseon, Oct. 4, 1801, 7 Stat. 1404. Additionally, a treaty's ambiguities must also be interpreted in favor of Indians' rights. *Oneida Indian Nation of New York v. State of N.Y.*, 860 F.2d 1145, 1166 (2d Cir. 1988). This is accomplished by interpreting the Treaty with the Wendat's language as it would be understood by the Wendat Band of Huron Indians. *Worcester v. State of Ga.*, 31 U.S. 515, 582, 8 L. Ed. 483 (1832). Again, given the absence of the mention of the Treaty of Wauseon or the Maumee Nation altogether, the Treaty with the Wendat cannot be construed to abrogate the Treaty of Wauseon because it could not have been understood by the Wendat Band to accomplish such an end. Therefore, the Treaty with the Wendat does not expressly abrogate the Treaty of Wauseon, and the Maumee Nation preserves its reservation.

2. The Wendat Treaty Did Not Impliedly Abrogate The Treaty Of Wauseon.

Passage of the Treaty with the Wendat did not impliedly abrogate the Treaty with the Wauseon. *U.S. v. Dion* explored implied treaty abrogation when considering the conflict between the 1858 Treaty with the Yancton and the 1940 Eagle Protection Act restrictions. "The treaty did not place any restriction on the Yanktons' hunting rights on their reserved land." *United States v. Dion*, 476 U.S. 734, 737 (1986). However, the Act prohibited eagle hunting, causing Defendant Dion to face federal criminal charges when

he shot four eagles within the Yankton Sioux Reservation. Therein arose the conflict between federal statute and tribal treaty, each of which holding equal legal footing under the Supremacy Clause. The *Dion* court acknowledged that "Indian treaty rights are too fundamental to be easily cast aside." 476 U.S. at 739. Therefore, "in the absence of explicit statement [abrogating rights] the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress, but the preference for explicit language is not a per se rule. *Id.* (quotation omitted). Presence of "sufficiently compelling" legislative intent, legislative history, and circumstances may all established the existence of implied abrogation. *Id.* "What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other [and] chose to resolve that conflict by abrogating the treaty." *Id.* at 740.

Amongst many other rights, the Treaty of Wauseon establishes the Maumee Nation's land rights. Similar to the Yankton treaty, the Maumee Treaty identifies the reservation's boundary lines and asserts their rights of that land's use.

> The United States allot all the lands contained within the said lines to the Maumee, to live and to hunt on, and to such of the Maumee Nation as now live thereon; saving and reserving for the establishment of trading posts, six miles square at the Wapakoneta river where it meets Fort Crosby, and the same at the portage on that branch of the river into the Great Lake of the North.

Treaty of Wauseon, Oct. 4, 1801, 7 Stat. 1404.

Considering all rules above, the Treaty with the Wendat cannot be found to impliedly abrogate the Maumee's rights in the legislative history, intent, and circumstances found within the Congressional Globe in 1859. The legislative record unveils Senator Powell's desire for more cessions within the Territory of New Dakota for the United States, asking, "would it not be expedient to secure those concessions now when the price may

be lower than to allow the Indian to continue to cross upon lands destined for our settlement?" Cong. Globe, 35th Cong., 2nd Sess. 5411-5412 (1859). His statement may very well imply legislative desire to cede as much of New Dakota as possible from Indian tribes, therefore implying abrogation of the then-existing Maumee Nation. However, Senator Powell's request to Commissioner Sells to "secure further concessions from the Indians" clearly falls short. The request fails, and the record does not indicate any other party's agreement with Senator Powell's idea. Senator Chestnut Jr. states, "treaties with the Indians are an expedient end to settle tensions on the frontier…but nothing in [the Treaty with the Wendat], like any that have come before it, will prevent American frontiersmen from making use of the lands around them." *Id.* Although Congress's intent to obtain Indian lands is clear, the record does not display sufficiently compelling evidence of Congressional intent to override the existing Treaty of Wauseon with the Maumee Nation. Rather, the speech reveals intent to preserve and respect the continuance of existing reservations by encouraging U.S. development "around" reservation lands, not in lieu of them. *Id.* Therefore, the legislative history, intent, and circumstances do not impliedly abrogate the Treaty of Wauseon.

3. The Maumee Allotment Act Of 1908 Did Not Diminish The Maumee Reservation.

The Maumee Reservation continues to exist as defined under the Treaty of Wauseon in 1802 because Congress's passing the Maumee Allotment Act of 1908 did not diminish the Maumee Reservation. The Treaty of Wauseon undisputedly established the Maumee Nation's reservation in 1802. Within its realm of plenary power, Congress may also diminish a reservation without consent from the respective tribe. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). Similar to abrogation, diminishment may be an express

or implied act of Congress. However, the Maumee Allotment Act (MAA) of 1908 neither expressly nor impliedly diminished the Maumee Reservation because the MAA itself does not contain compelling language illustrating Congressional intent to expressly diminish and the MAA's legislative history fails to meet the factors used to imply Congressional intent to diminish.

"[Only] Congress can divest a reservation of its land and diminish its 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 reservation status until Congress explicitly indicates otherwise." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). "In determining whether a reservation has been diminished [by a surplus land act, precedent] in the area have established a fairly clean analytical structure." *Hagen v. Utah*, 510 U.S. 399, 410–11, 114 S. Ct. 958, 965, 127 L. Ed. 2d 252 (1994). *Solem* made clear that the Court has "never been willing to extrapolate [from past legislatures' assumption of reservations' future demise] a specific congressional purpose of diminishing reservations with the passage of every surplus land act. Rather, it is settled law that some surplus land acts diminished reservations… and other surplus land acts did not…The effect of any given surplus land act depends on the language of the act and the circumstances underlying its passage." *Solem v. Bartlett*, 465 U.S. 463, 468–69 (1984). "[Analysis] of surplus land acts requires that Congress clearly evince an intent to change boundaries before diminishment will be found…The most probative evidence of congressional intent is the statutory language used to open the Indian lands. Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all

unallotted opened lands… [Although not prerequisites,] when such language of cession is buttressed by an unconditional commitment from Congress to compensate the Indian tribe for its opened land, there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." Id. at 470 – 471. In looking at the statutory language within the Maumee Allotment Act of 1908, it is evident the Act is void of any explicit reference to or clearly intent towards the reservation's diminishment. Similar to determining express abrogation, here the absence of statutory language clearly erasing the Maumee Nation's reservation leads further to the conclusion that the reservation was never diminished.

Additionally, it cannot be determined that the Act harbors congressional intent to diminish the Maumee Reservation absent express statutory. Diminishment is not found frivolously nor inferred lightly. *Solem,* 465 U.S. at 470. Events surrounding the surplus land act, the manner of transaction negotiation with the Maumee, the "tenor of legislative reports… [and] the manner in which the Bureau of Indian Affairs and local judicial authorities dealt with unallotted open lands" are factors all weighed in the *Solem* balancing test for diminishment. *Id.* at 471. Therefore, the Allotment Act's provisions must be read in conjunction with the intentions revealed through Congressional record, neither being interpreted within a vacuum. Here, the 1908 Maumee Allotment Act's legislative history clearly establishes Congress's intent when they "[authorized the allotment, sale, and disposition of the eastern quarter of the Maumee Indian Reservation." Representative Pray. *Congressional Record* 42 (May 29, 1908) p. 2345. First, the *Solem* rule that any clear cession "buttressed" by an unconditional sum payment to Indians to be clear evidence of diminishment is absent here. The Maumee Allotment Act Sections 1

states the Maumee Indians ceded land rights of the eastern quarter of their reservation to the United States. Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908). Although this may be interpreted as express diminishment, the language is followed by clear language in Section 4 that "nothing in this law provides for the unconditional payment of any sum to the Indians." *Solem,* 465 U.S. at 470. Therefore, the *Solem* balancing test evidently concludes no diminishment occurred because statutory language opposes the rule finding an "almost insurmountable presumption" of diminishment. *Id.* Second, the Congressional Record unveils the transaction between the United States and the Maumee Nation was negotiated so that the Act "[conformed] in every respect to the wishes of the Indians." Representative Pray. *Congressional Record* 42 (May 29, 1908) p. 2345. Therefore, the legislative record favors a finding of no diminishment because the Maumee Indians' interests were prioritized by Congressional negotiations. Third, the legislative record highlights Congress's policy to "give some chance to get the real market value of this land for the Indians" by promoting fair land pricing, maintain Indians' rights over unsold land, and ensuring earned profits are given to the Maumee. Representative Gaines. *Congressional Record* 42 (May 29, 1908) p. 2345. This policy goal is a key aspect surrounding the statute, showing no intent to diminish the reservation but rather to preserve Maumee interests. "When both an act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, [the Court is] bound by [its] traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening." *Id.* at 472. *Solem*, 465 U.S. at 472. Lastly, the Act did not diminish because it (1) fails to expressly diminish the reservation (2) prohibits unconditional sum payment

in light of the Maumee's cession of the eastern quarter (3) exhibits Congressional intent to negotiate with the Maumee according to their expressed wishes and (4) promotes the Maumee's just compensation for land value and rights, the Act does not diminish the Maumee Reservation.

4. If The Maumee Allotment Act Diminished the Maumee Reservation Then The Wendat Allotment Act Diminished The Wendat Reservation.

The Wendat Allotment Act diminished the Wendat Reservation upon its passage in 1892 because the statutory language viewed in light of the relevant legislative history reveals Congressional intent to diminish the Wendat Band of Huron Indian's reservation. The *Solem* balancing test's many factors determine diminishment: express cession, presence of unconditional sum payment, policy and "tenor" of Congressional record, and surrounding circumstances.

First, the Wendat Allotment Act provides that the western half of the Wendat band's reservation is to be subject to Indians' selection for one year, after which any and all unclaimed lands are deemed "surplus lands and open to settlement" to non-Indian settlers. Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892). This provision does not provide that the Wendat Band agreed to cession or to any of the terms; the statutory language rather appears to be Congressional action void of promotion of Wendat interest, especially given that unclaimed lands are automatically taken from the Wendat. Id. Contrasting this fact to the Maumee Allotment Act, in which unclaimed lands retained Indian title until their purchase, it is evident that Congress intended the western half of the Wendat Reservation to lose its reservation status upon completion of the one-year period.

Second, Section 2 restricted the Wendat Band's monetary compensation for surplus lands by placing an unconditional payment cap of $2,200,000 total. Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892). The language signifying an unconditional sum payment plan reveals Congress disfavored the Wendat Band's interests and weighs in favor of diminishment.

Third, Section 4 encourages the Secretary of the Interior to "move the [Wendat] unto their allotments as quickly as possible and to open the surplus lands to settlement." Id. This language serves as clear evidence of intent to open the western half of the Wendat Reservation to the public. Because "a statute which restored to the public domain portions of a reservation [results] in diminishment," Section 4 tips the balancing test towards the conclusion that the western half of the Wendat's land was diminished of reservation status. *Hagen v. Utah*, 510 U.S. 399, 414 (1994).

Lastly, the Congressional record as related to the Wendat Allotment Act clarifies any ambiguities of the Act and reveals intent to diminish that land's reservation status. The record makes clear of Congressional intent to open over 2,000,000 acres of reservation into the public domain quickly within the following months by early spring to allow families waiting to settle in unclaimed surplus lands. Clerk. *Congressional Record* 23 (Jan. 14, 1892) p. 1777. *Solem* emphasizes the weight of legislative reports' "tenor" and the manner in which the Bureau of Indian Affairs deal with "unallotted open lands." *Solem,* 465 U.S. at 471. The legislative report focuses on the many people who "have been waiting all winter…from all of the States of the Union." Representative Harvey. *Congressional Record* 23 (Jan. 14, 1892) p. 1777. Representative Harvey pleads with his listeners to prioritize the non-Indian settlers by "speedily [resuming work to allot Wendat

land] in order to allow [non-Indians] to go on the lands in the early spring… and make their homes, so as to avail themselves of the planting season." *Id.* This tenor is inexplicably clear; legislative intent lies within the goal to diminish the land in question of Wendat reservation status and open the lands to public settlement.

The same record establishes that the Bureau of Indian affairs had been "proceeding with the tribes for a reduction of the reservations." Representative Ulrich. *Congressional Record* 23 (Jan. 14, 1892) p. 1777. Again, it is clear the Bureau desired the Wendat Reservation to shrink and for unallotted open lands to be made available to non-Indian settlers, all of which displays Congressional intent to diminish reservation status. Therefore, given the unconditional sum payment to the Wendat Band, the opening of unallotted Wendat lands to the public domain, and Congressional prioritization of non-Indians settlers' interests over Wendat interests, the *Solem* balancing test proves that passage of the Wendat Allotment Act diminished the Wendat Band's reservation.

a. **If The Topanga Cession is Not Maumee Land, Then It Is Outside Indian Country.**

The Topanga Cession is outside of Indian country if the Court finds the land is not Maumee reservation land and because the Wendat Allotment act diminished any Wendat reservation status of the Cession. Indian country is defined as land within (a) a reservation, (b) a dependent Indian community, and (c) an Indian allotment are all Indian country. 18 U.S.C. § 1151. Although 18 U.S.C. § 1151 was created for criminal jurisdiction purposes, its definition of Indian country is congruently applied to civil matters. *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998). If the Court finds the Treaty with the Wendat abrogated the Treaty of Wauseon or the Maumee Allotment Act of 1908 diminished the Maumee Reservation, then it follows that the

Wendat Allotment Act also diminished the Wendat Reservation. Therefore, the Topanga Cession does not hold reservation status.

A dependent Indian community exists when "clusters of Indians grouped together in their own special communities on land owned by a tribe or held in trust for them and arguably outside an established reservation." *Blatchford v. Sullivan*, 904 F.2d 542, 546 (10th Cir. 1990). For example, dependent community status has been found when lands "[gave] the 'same protection' [to non-reservation Indians] as that given Indians on reservations." *Blatchford,* at 545 (quoting *McGowan,* 302 U.S. at 538). Here, the Topanga Cession is not a dependent Indian community. Lands allotted via the Maumee and Wendat Allotment Acts were in severalty to the respective Indians and, therefore, are not owned by the Maumee or Wendat tribe or held in trust by the United States. Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908). Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892). Therefore, the Topanga Cession cannot be a dependent Indian community.

The Topanga Cession is not Indian country as an allotment under 18 U.S.C. § 1151(c). "An Indian allotment may be either a parcel held in trust by the federal government for the benefit of an Indian (a trust allotment) or a parcel owned by an Indian subject to a restriction on alienation in favor of the United States (a restricted allotment) …whether they are on or off an Indian reservation." *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1022 (8th Cir. 1999). However, "lands that are owned in fee without such restrictions on alienation do not qualify as Indian country under §1151(c)." *Id.* Because the Allotment Acts allotted the lands in severalty to the respective Indian individuals, and the unallotted lands were to be surplus available to the public, any land owned by either a

Maumee or Wendat Indian within the Topanga Cession is held in fee simple and not Indian country as an allotment. Therefore the Topanga Cession is not Indian country because it does not qualify as (a) a reservation (b) a dependent Indian community or (c) an allotment as defined under 18 U.S.C. § 1151.

II. THE STATE OF NEW DAKOTA MAY ENFORCE THE TRANSACTION PRIVILEGE TAX ON THE WENDAT BAND'S BUSINESS VENTURE IN THE TOPANGA CESSION.

The Maumee only have standing to argue in favor of the State's tax if they have something to gain from its imposition. The first scenario under which the Maumee have standing is if the Topanga Cession is on the Maumee reservation, then the Maumee will receive the full 3% tax. The second scenario giving the Maumee standing is if the Topanga Cession is not in Indian country, then the Maumee will receive half of the tax imposed. This Court has limited the parties to assuming that the Topanga Cession is in Indian country for this argument.

A parcel can only be in Indian country if it is a) within an Indian reservation, b) within a dependent Indian community, or c) within an unextinguished Indian allotment. 18 USCS § 1151. The Topanga Cession is not a dependant Indian community because it was subject of an allotment and is not under federal superintendence. *See Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527, 118 S. Ct. 948, 953 (1998).[1] Therefore the area in question is either unextinguished allotment land or part of a reservation. No other tribe or reservation other than the Maumee and Wendat are known

[1] "[T]he term 'dependent Indian communities'. . . refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements--first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence."

to have a claim of aboriginal title or unextinguished allotment other than the Maumee Tribe and the Wendat Band.

Accordingly, the only way the land is in Indian Country is if it is part of either the Maumee or the Wendat reservation. Both tribes contend that the Topanga Cession is within its respective reservation. *See Supra.* If the Topanga Cession is on the Wendat Band's land, then the Maumee will not receive any of the collected tax. 4 N.D.C. §212(5), (6). Therefore, the Maumee only have standing to argue in favor of the TPT if the Topanga Cession is on the Maumee reservation.[2]

Accordingly, the Maumee has no standing and therefore will not address the legality of the tax if it were imposed off of the Maumee reservation. The logical result is that the Wendat Band's rights are limited in this discussion. The Wendat Band are not members of the Maumee Tribe and are considered non-members when on the Maumee reservation. Accordingly, this Court may only address whether the State's tax infringes on Wendat Band's tribal sovereignty or is preempted when it is imposed on sales made by the Band's business operating on the Maumee Reservation.

1. The Transaction Privilege Tax Is Not Preempted By Federal Law.

Congress has the power to regulate commerce with Indian Tribes. U.S. Const. Art. 1, f Art. I, § 8, cl. 3. Congress shows clear intent to render land subject to state tax when it makes the land freely alienable. *Cass Cty. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 115, 118 S. Ct. 1904, 1911 (1998). Federal laws under "the broadest reading to which they are reasonably susceptible, cannot be said to preempt [a state's] power to impose its taxes on Indians not members of the Tribe." *Washington v.*

Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 160, 100 S. Ct. 2069, 2085 (1980). A court must find out who the tax falls on, because a state is generally preempted from taxing a tribe on its own reservation. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458, 115 S. Ct. 2214, 2220 (1995). Indian lands taken in trust by the United States are exempt from state taxation. *25 USCS § 5108*.

The Wendat Band purchased the subject land in fee from non-Indian owners. Uncontested Facts of the Case p. 7. The Wendat Band is a separate recognized tribe from the Maumee Nation. The Uncontested Treaty Facts p.4. The Wendat do not claim to be members of Maumee Nation. On the Maumee Reservation, the Wendat are considered non-members. The Wendat concedes that the land in question has not been taken into trust by the United States. Uncontested Facts of the Case p. 8. For these reasons, federal laws do not preempt the State's power to impose the TPT on the Wendat Band when they operate on the Maumee Reservation.

2. The TPT Does Not Infringe The Wendat Band's Sovereignty As Applied To The Band's Operation On Maumee Land.

State regulation, such as the imposition of a tax, is not allowed to interfere with tribal self-government. *Williams v. Lee*, 358 U.S. 217, 220, 79 S. Ct. 269, 271 (1959).[3] Without a clear act of Congress this Court asks "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.* Accordingly, this Court allows taxation of nonmembers on an Indian reservation after balancing "the respective state, federal, and tribal interests." *Ariz. Dep't of Revenue v.*

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[2] See the previous sections for arguments as to why the Topanga Cession is, in fact, on the Maumee Reservation.

[3] "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."

Blaze Constr. Co., 526 U.S. 32, 36-37, 119 S. Ct. 957, 960 (1999) (quoting *Cotton Petroleum Corp.* v. *New Mexico,* 490 U.S. 163, 177, 104 L. Ed. 2d 209, 109 S. Ct. 1698 (1989)). A state's regulatory interest is likely minimal and cedes to the interest of self-government when the regulated conduct is on a reservation and involves only Indians. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144, 100 S. Ct. 2578, 2584 (1980).

The State's primary purpose for collecting the TPT is to maintain a robust and viable commercial market by funding the Department of Commerce, civil courts, maintaining transportation infrastructure, and other commercial purposes. 4 N.D.C. § 212(3). Creating a robust commercial market is a purpose that the state shares with the tribes who also have an interest in maintaining economic viability. The State applies the TPT to businesses on Indian reservations, but remits the proceeds to the tribe because, though a Tribe could collect the tax itself, the State's collection and enforcement is more efficient. 4 N.D.C. § 212(5).

The State recognizes a unique relationship with all the State's constituent Indian Tribes but recognizes a specific obligation to the Maumee Nation because of the valuable mineral interests that the Maumee gave up. 4 N.D.C. § 212(4), (6). An Indian tribe operating on its own reservation is not subject to the tax. 4 N.D.C. § 212(4). The Maumee Nation would use the funds to pay for scholarships, renewable energy, and sustainable economic development for its members. Uncontested Facts of the Case p. 8. The Maumee's need for the money is higher than the Wendat's because on Maumee members make 25% less income on average than Wendat members. Uncontested Facts of the Case p. 8.

The Wendat Band's interest in the land is to open and operate a commercial and residential business remitting all profit to the Wendat Tribal Government. Uncontested Facts of the Case p. 7–8. The Wendat expects to build housing for low-income Wendat members, nursing facility for Wendat elders, a Wendat cultural center, museum, and shopping complex. Uncontested Facts of the Case p. 7. The Band expects that the proceeds from the shopping complex, museum, and cultural center will make the housing and nursing facilities financially possible. Uncontested Facts of the Case p. 8.

The federal interest is primarily in seeing that the tribes are self-governed. The Maumee Nation could self-impose the tax but agrees that the State is more efficient than the tribe would be at processing the tax. Accordingly, the State's interest in this case is in accordance with the Maumee's interest of self-government. The federal interest in allowing the Wendat to self-govern its own business on the Maumee reservation is weak, because the Wendat have no right to levy a tax on the Maumee reservation. The Wendat likely have a stronger self-government argument in the portions of the business that do not include non-tribal members. However, once again this is tantamount to usurping the Maumee's self-government when on the Maumee reservation.

Although conduct involving Indians in Indian country is generally self-governed by the tribe, the interests in this case allows the State to impose its tax. Here, the Maumee has the strongest interest in self-government as the Tribe owning the land, and it is in favor of the State's imposition of the tax. The Wendat should not be allowed to use this Court to infringe on the Maumee interest on its reservation.

CONCLUSION

For the foregoing reasons, this Court must reverse the lower decision and hold that the State of New Dakota may enforce the TPT against the Wendat Band and remit the proceeds to Maumee Nation.