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

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BRIEF FOR RESPONDENT

Team T1032

Counsel for Respondent

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QUESTIONS PRESENTED

1. Whether Congress intended to disestablish or diminish the Wendat reservation or remove the Topanga Cession from the reservation's borders, thereby withdrawing the land's character as Indian Country?

2. Whether the State of New Dakota may enact a tax on an Indian-owned corporation that operates exclusively in Indian Country?

STATEMENT OF THE CASE

STATEMENT OF THE PROCEEDINGS

The Maumee Indian Nation filed suit on November 18, 2015 in the United States District Court for the District of New Dakota, claiming the Topanga Cession was within the boundaries of its reservation and that it was owed appropriate tax remittance under New Dakota law. The Wendat Band argued that the State of New Dakota was prohibited from levying its tax on them through the doctrines of preemption and infringement. In the alternative, the Wendat Band argues that the land is within its reservation and therefore any tax collected is remitted back to the Wendat Band per state law. In 2018 the District Court granted a decision in favor of the Maumee Indian Nation. For two years the case was on hold until the Supreme Court decided *McGirt v. Oklahoma*. Shortly after *McGirt* was decided, the Thirteenth Circuit Court reversed the decision of the District Court, finding that the Wendat Band reservation had included the Topanga Cession. (R. 4, 9-11.) The Thirteenth Circuit also found that the doctrines of preemption and Indian infringement precluded New Dakota from imposing its Transaction Privilege Tax (TPT) on the Wendat Band. The Maumee Tribe now appeals.

STATEMENT OF THE FACTS

In 1801 Congress entered a treaty with the Maumee Nation, creating the Maumee reservation. The reservation's eastern border was marked by the Wapakoneta River. At some point before 1859, the river shifted roughly three miles to the west, creating a strip of land referred to as the Topanga Cession. Congress, fully aware of the river's movement, entered an agreement with the Wendat Band of Huron Indians (hereinafter the 'Wendat Band') in 1859. (R. 5). This treaty was signed at the Wapakoneta River and clearly states that the Wendat Band's reservation lies to the east of the Wapakoneta River. The river, therefore, served as a natural western border. This was the standing of the matter for nearly thirty years.

Despite the promises made by the United States in its treaties with the Indian nations across the country, Congress began allotting reservations in the late 19th century. Allotment opened both Maumee and Wendat reservations to settlement by non-Indians. No member of either the Maumee Nation or Wendat Band selected an allotment from the area known as the Topanga Cession. (R. 5, 7). Both tribes received funds for the lands that were declared surplus, although exactly how much is unknown. The agreed upon estimates for this case are $2,200,000 for the Wendat Band and $2,000,000 for the Maumee Nation. (R. 5). The Indian population of both reservations and the Topanga Cession decreased precipitously after allotment in relation to the non-Indian population. (R. 7). The tribes disputed ownership of the Topanga Cession for nearly a century, but no legal action arose.

In December of 2013, the Wendat Band purchased a 1400-acre parcel of land in fee from non-Indian owners located in the Topanga Cession. In June of that year, the Wendat Band announced its intention to create the Wendat Commercial Development Corporation (hereinafter WCDC) as a section 17 IRA corporation wholly owned by the tribe. (R. 7-8). The Wendat Band proposes to offer several unique services, such as a museum, cultural center, and a grocery store with traditional foods and fresh produce. Additionally, the WCDC will have a pharmacy, a bookstore, a café, and salon, and is estimated to create 350 jobs and generate $80 million in gross sales annually. These funds will be used to develop the Wendat Band's citizens, provide nursing centers for the elderly, and low-income public housing. (R. 8).

The Maumee Nation approached the Wendat Tribal Council on November 4, 2015, claiming the land was theirs by treaty, that the Wendat land was diminished by the 1892 Allotment Act, and that the WCDC would be subject to the New Dakota Transaction Privilege Tax (TPT). The Wendat Band appropriately noted its own Treaty signifying that ownership of

the Topanga Cession had been granted to the Band, and also pointed to allotment as terminating the Maumee claim. The Wendat Band also stated the tax was precluded under the doctrines of preemption and infringement. Unable to find a compromise, this action was launched in federal court. (R. 8).

SUMMARY OF THE ARGUMENT

This Court must affirm the decision of the Thirteenth Circuit. The appellate court correctly held that Congress did not terminate the Wendat reservation and that it includes the Topanga Cession. (R. 10). The Circuit Court also correctly held that New Dakota was preempted from levying a tax on a tribal entity in Indian Country by prevailing federal law. Additionally, such a tax is precluded because it infringes on the Band's right to govern itself exclusive of state interference.

Only Congress can create, alter, or destroy reservation boundaries. However, Congress must clearly intend to do so and must manifest this intent in statute. Congress did not clearly intend to terminate either the Maumee or Wendat reservations by statute. However, Congress did intend to diminish the Maumee reservation when it negotiated the borders of the Wendat reservation. At that time, the Wendat reservation included the Topanga Cession regardless of any tribe's prior claim to the area. Additionally, the land that comprises the Wendat reservation retains its character as Indian Country under federal law.

Furthermore, the prevalence of federal law and exclusive plenary power of Congress preempts a state from enacting a tax against a tribal organization that operates only in Indian Country. The WCDC is a tribal corporation that operates solely within the Topanga Cession, which is Indian Country. Therefore, the State of New Dakota has no jurisdiction to tax the Wendat Band or the WCDC.

Even if the state was not preempted by federal power, an attempt to tax a tribal government or corporation would infringe on a tribe's sovereignty. Since the WCDC is effectively owned by the Wendat Band government, the State of New Dakota's tax scheme cannot be enforced because it infringes on the Wendat Band's inherent right to govern itself.

ARGUMENT AND AUTHORITIES

CONGRESS DID NOT DISESTABLISH THE WENDAT RESERVATION

Congress created two reservations by treaty. The first was for the Maumee Nation, created by the Treaty of Wauseon in 1801. Treaty of Wauseon, Oct. 4, 1801, 7 Stat. 1404. The second was for the Wendat Band, created by the Treaty with the Wendat of 1859. Treaty with the Wendat, March 26, 1859, 35 Stat. 7749. When Congress ratified these treaties, it gave its solemn promise that the tribes would be free to govern themselves and exclude encroaching white settlers from their lands. This promise, however, was broken.

The Treaty with the Wendat Band abrogated the Treaty of Wauseon, diminishing the Maumee Nation claim to the Topanga Cession and transferring that land to the Wendat Band. Yet, both reservations survived the intervening years of destructive federal policy, including allotment. The Wendat reservation therefore retains its original boundaries, including the Topanga Cession.

Furthermore, federal law designates all land within the boundaries of a reservation as Indian Country. 18 U.S.C. § 1151(a). Because the Topanga Cession is within the boundaries of the Wendat reservation, and since that reservation has not been terminated, the Topanga Cession is Indian Country.

This Court must affirm the decision of the Thirteenth Circuit because law and fact provide no other course of action. The appellate court correctly held that the Wendat reservation remains intact. (R. 10). The Thirteenth Circuit also correctly found that the Wendat reservation includes the Topanga Cession, which was severed from the Maumee reservation by the Treaty with the Wendat of 1859. (R. 10). Since the Topanga Cession remains a part of the Wendat reservation, it retains its status as Indian Country.

A. CONGRESS CAN CREATE INDIAN RESERVATIONS, WHICH ARE CLASSIFIED AS INDIAN COUNTRY ACCORDING TO FEDERAL LAW

Since the earliest days of the Republic, Congress has maintained plenary power over Indian affairs. Congress derives this power from the Constitution, which explicitly grants the authority to "regulate Commerce . . . with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3; *see also* Gregory Ablavski, *Beyond the Indian Commerce Clause*, 124 Yale L. J. 882 (2015). This plenary power, the Court has further recognized, can be utilized by Congress to establish and disestablish Indian reservations, to modify reservation boundaries, and to go back on its word, among other extraordinary abilities.

Plenary power in the context of Indian affairs has two meanings. First, Congressional authority over Indian nations within the boundaries of the United States is absolute. Second, Congress maintains authority to treat with Indian nations exclusive of other sovereigns, such as the individual states. The Supreme Court recognized the extent of this endowment in *Cherokee Nation v. Georgia*, holding that Indian nations were "domestic dependent nations," subject to the power of the United States, but which retained some aspects of inherent sovereignty. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). The first facet of Congressional plenary power that must be broached here is the ability to negotiate with and establish reservations for Indian tribes.

The Supreme Court has recognized that no specific formula or magic words are required to find that Congress created a reservation for an Indian nation. The Court has stated, for example, that "in order to create a reservation, it is not necessary that there should be a formal cession or a formal act setting apart a particular tract." *Minnesota v. Hitchcock*, 185 U.S. 373, 390 (1902), *see also Spalding v. Chandler*, 160 U.S. 394 (1896) (holding that a reservation may be established either by "direct authority of [C]ongress. . . or indirectly through the

medium of a duly-authorized executive officer."), *Menominee Tribe of Indians v. U.S.*, 391 U.S. 404 (1968) (holding that grant of land "to be held as Indian lands are held" created a reservation). The Court recently reiterated the low threshold for finding that a reservation was established in *McGirt v. Oklahoma*, where it stated that "[j]ust as we have never insisted on any particular form of words when it comes to disestablishing a reservation, we have never done so when it comes to establishing one." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2475 (2020).

Once a reservation has been established, the lands contained within it become Indian Country under the definition of 18 U.S.C. § 1151.[1] Specifically, subsection (a) of the statute applies the designation of Indian Country to "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent." 18 U.S.C. § 1151(a).

Indian Country also includes land belonging to "dependent Indian communities," 18 U.S.C. § 1151(b), and "all Indian allotments," 18 U.S.C. § 1151(c). However, these varieties need not be explored here. The former applies to a small subsection of Indian tribes that escaped the scope of original federal reservation policies, such as the Pueblo Nation, and schools or other locations dedicated to use by and for tribes. *See U.S. v. Sandoval*, 231 U.S. 28 (1913) (holding that Pueblo Indians were a dependent Indian community); *U.S. v. McGowan*, 302 U.S. 535 (1938) (holding that "colonies" established for Indians were dependent Indian communities); *C.M.G. v. State*, 594 P.2d 798 (Okla. Crim. App., 1979) (holding that a school staffed and attended primarily by Indians was a dependent Indian community). The latter refers to the process of allotment, which required tribal members to select individual sections within

[1] See Appendix 1 for full text of 18 U.S.C. § 1151.

a reservation's land, to receive said land in fee simple. After all the members of a tribe had selected their allotments, the U.S. government would open the "surplus" unallotted land for settlement by non-Indians. Although both the Wendat and Maumee reservations were allotted, no member of either tribe selected an allotment within the contested Topanga Cession. The crux of the controversy rests, therefore, solely in the application of § 1151(a).

When Congress ratified the Treaty of Wauseon, it created the Maumee reservation. The text of the treaty states that the lands in question were reserved for the Maumee Nation "to live and to hunt on, and to such of the Maumee Nation as now live thereon." Treaty of Wauseon, Oct. 4, 1801, 7 Stat. 1404. The treaty also provides clear definitions of the boundaries between the Maumee reservation and the United States and provides that each area would be governed by the laws of the controlling sovereign. *Id.* According to the treaty's terms, the eastern border of the Maumee reservation was the Wapakoneta River as it flowed in 1801. This language is more than sufficient to create a reservation according to Supreme Court precedent. *See Menominee*, 391 U.S. at 404; *Minnesota v. Hitchcock*, 185 U.S. at 390; *McGirt*, 140 S. Ct. at 2475.

Likewise, when Congress ratified the Treaty with the Wendat it created the Wendat reservation. The text of the treaty provides that the Wendat Band should "cede to the United States their title and interest to lands in the New Dakota Territory, excepting those lands East of the Wapakoneta River." Treaty with the Wendat, March 26, 1859, 35 Stat. 7749. The treaty further explicitly recognized that "[t]he eastern terminus of these *reserved lands* is the line bordering the New Dakota Territory and the Oyate Territory." *Id.* (emphasis added). This language, like that of the Maumee Nation's treaty, is more than sufficient to create a

reservation. Moreover, the text indicates that the western border of the Wendat reservation runs tangentially to the Wapakoneta River as it flowed at the time of signing.

When Congress created reservations for the Maumee and Wendat tribes, the land within those reservations became Indian Country. Federal statute leaves no room for ambiguity here. The land within the reservations fell solidly within the designation of Indian Country provided in § 1151(a). This fact is crucial here because the designation of reservation land as Indian Country creates a host of special criminal and civil regulatory jurisdictional issues, the latter of which is central to these proceedings.

The next question that must be answered then is whether, in the years since the establishment of the Maumee and Wendat reservations, Congress terminated either of them. If Congress did so, then none of the land contained within the reservations would currently classify as Indian Country. However, if the reservations remain extant then the non-diminished land located within will retain the status of Indian Country.

B. CONGRESS HAS NOT MANIFESTED ANY CLEAR INTENT TO DISESTABLISH THE WENDAT OR MAUMEE RESERVATION

Reservation disestablishment is not a new question for the Supreme Court. *See generally Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), *U.S. v. Celestine*, 215 U.S. 278 (1909), *Seymour v. Superintendent*, 368 U.S. 351 (1962), *Mattz v. Arnett*, 412 U.S. 481 (1973), *DeCouteau v. Dist. Cty. Ct. for Tenth Judicial Dist.*, 420 U.S. 425 (1975), *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), *Solem v. Bartlett*, 465 U.S. 463 (1984), *Hagen v. Utah*, 510 U.S. 399 (1994), *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), *Nebraska v. Parker*, 136 S. Ct. 1072 (2016), *McGirt*, 140 S. Ct. 2452. When a court has found that Congress terminated a reservation, most often Congress manifested its intent through the process of allotment. Allotment, however, is neither necessary nor sufficient to terminate a reservation. As the Court

recently reiterated "[f]or years, States have sought to suggest that allotments automatically ended reservations, and for years courts have rejected the argument." *McGirt*, at 2464.

Termination of a reservation abrogates the treaty or statute through which the reservation was created. Due to its plenary power in Indian affairs, Congress possesses the power to unilaterally "abrogate the provisions of an Indian treaty, though presumably such power will be exercised only. . . in the interest of the country and the Indians themselves." *Lone Wolf*, 187 U.S. at 566. Moreover, the judiciary does not have the authority to question Congressional motives in abrogating a treaty, nor refute a presumption of good faith in Congressional action involving Indian tribes. Such decisions are "solely within the domain of the legislative authority, and its action is conclusive upon the courts." *Id*. at 568.

The Supreme Court created a simple test to determine whether a reservation has been disestablished or diminished. To wit, "[t]o determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress." *McGirt,* 140 S. Ct at 2462. The traditional rules of statutory interpretation, however, "do not have their usual force in cases involving Indian law." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

When interpreting the provisions of federal law pertaining to Indian affairs, the Court uses three canons of construction. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). First, "treaties, agreements, statutes, and executive orders [must] be liberally construed in favor of the Indians." 1 Cohen's Handbook of Federal Indian Law § 2.02 (2019). Second, "all ambiguities are to be resolved in their [the Indians'] favor." *Id.* Third, "treaties and agreements are to be construed as the Indians would have understood them." *Id.*

The foundation of a termination analysis starts with the Acts of Congress, as addressed in the Court's holding in *Solem v. Bartlett. Solem*, 465 U.S. 463 (1984). The *Solem* Court held that "only Congress can divest a reservation of its land and diminish its boundaries." *Id.* at 470. However, such intent "will not be lightly inferred." *Id.* If Congress decides to abrogate a treaty and disestablish a reservation, it must clearly intend to do so. The Court then established three criteria by which Congressional intent to terminate a reservation might be gauged.

First, plain language of cession, relinquishment of claims, forfeiture of ownership, or other unambiguous statutory language is the "most probative evidence of congressional intent." *Id.* Second, the legislative history behind a statute that purports to alter the reservation's boundaries can indicate Congressional intent to disestablish it. *Id.* at 471. Third, demographic change, or rather, "who actually moved onto opened reservation lands is also relevant" to a disestablishment analysis. *Id.*

The Court has noted that "[h]istory shows that Congress knows how to withdraw a reservation when it can muster the will." *McGirt*, 140 S. Ct at 2462, *see also Mattz*, 412 U.S. 481 (holding that "Congress was fully aware of the means by which termination could be effected"). For example, in disestablishing the Pawnee reservation of Oklahoma, the Congressional appropriation stated that "the sum of eighty thousand dollars. . . is hereby appropriated. . . to pay the Pawnee tribe of Indians in Oklahoma . . . for all their right, title, claim, and interest of every kind and character in and to all that tract of country." Appropriations, Indian Dep't, ch. 209, 27 Stat. 612 (1893). Although certainly many contemporary Congressmembers wished the reservation system would end sooner rather than later through judicial action, "wishes don't make for laws, and saving the political branches the

embarrassment of disestablishing a reservation is not one of [the Court's] constitutionally assigned prerogatives." *McGirt*, at 2462.

When the statutory language is ambiguous as to Congressional intent to terminate a reservation, courts "will sometimes consult contemporaneous usages, customs, and practices to the extent they shed light on the meaning of the language in question at the time of enactment." *Id.* at 2468. However, this type of evidence is not sufficient to demonstrate a manifest intent to destroy a reservation absent some ambiguity in the statute.

The Court limited the holding of *Solem* in *Nebraska v. Parker* by holding that evidence of demographic change on a given reservation cannot, on its own, show that Congress intended to disestablish it. *Parker*, 136 S. Ct. 1072. The Court held that "evidence of the changing demographics of disputed land is "the least compelling" evidence in our diminishment analysis, for "[e]very surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the 'Indian character' of the reservation, yet we have repeatedly stated that not every surplus land Act diminished the affected reservation." *Id.* at 1082 (quoting *Yankton Sioux*, 522 U.S. at 365).

The Court further limited the holding of *Solem* when it decided *McGirt v. Oklahoma*. *McGirt*, 140 S. Ct. 2452. The *McGirt* Court held that absent an ambiguity in the text of a statute, neither subsequent demographic change nor contemporary understanding of the effect legislation might have on a reservation's status are sufficient to disestablish a reservation. *Id.* Legislative history, and demographic change may support textual findings, the Court held, but the "value such evidence has can only be interpretative – evidence that, at best, might be used to the extent it sheds light on what the terms found in a statute meant at the time of the law's

adoption, not as an alternative means of proving disestablishment or diminishment." *Id.* at 2469.

McGirt was a member of a federally recognized tribe charged with committing several felonies. He argued that the state lacked jurisdiction to convict him because the crimes he was charged with were allegedly committed in the Muscogee Creek Nation (MCN) reservation. He further argued that Congress did not terminate the MCN reservation and that 18 U.S.C. § 1153 grants exclusive federal jurisdiction over major crimes committed by Indians in Indian Country.

Oklahoma's argument in *McGirt* focused on the legislative history of the Creek Allotment Agreement and other legislation that progressively stripped the MCN of its right to self-rule. *Id.* at 2464. This history, the state implored, was sufficient to show that although the Creek allotment statute lacked plain language of cession and termination, Congress' intent to do so was manifested by contemporary practice.

The Court soundly rejected this argument, holding in part that while "Congress may have passed allotment laws to create the conditions for disestablishment. . . equat[ing] allotment with disestablishment would confuse the first step of a march with arrival at its destination." *Id.*, at 2465. Furthermore, the Court held that there is but one step of the *Solem* test in practice: whether Congress, in the statutory text, expressed a clear intent to terminate a reservation. *Id.*, at 2469.

Applying the test set forth in *Solem* and elaborated on in *Parker* and *McGirt* shows that neither the Wendat nor Maumee reservations were terminated. Both reservations were allotted, yet ambiguous language of cession is lacking in both allotment statutes, and clear textual evidence of an intent to disestablish either reservation is all but absent.

The clear absence of language of cession in the Wendat allotment statute indicates that Congress did not intend to terminate the reservation. Congress knew how to terminate a reservation, and while legislators may have harbored plans to do as much, "future plans aren't [laws] either." *Id*. at 2465. The explicit language of the Wendat allotment statute is silent as to disestablishment of the Wendat reservation.

Petitioners and the State of New Dakota may be tempted to point to the language of §§ 2 and 4 of the Wendat allotment statute to support their claims that Congress issued a sum certain payment for the surplus lands of the Wendat reservation. Wendat Allotment Act, P.L. 52-8222, § 2, 4 (Jan. 14, 1892). They may argue that this alleged payment is evidence of an intent to disestablish the reservation. This whimsical notion is defeated by the language of the statute itself, which only provides payment per acre of whatever is surplus after the allotment process is completed – a sum which was far from certain. That the final acreage was uncertain is clearly evidenced by the recognition in the text that "no matter how much land is ultimately in surplus" the payment to the Wendat would be capped at $2,200,000. *Id.* Reasonable minds can only conclude that, had the final costs been lower than this value, that lower value would have been paid out – a highly uncertain sum indeed.

Furthermore, clear Congressional intent to terminate the reservation cannot be found in the speeches given by contemporary Congressmembers. Congressmembers of the era believed, to a man, that reservations would vanish within a fleeting time after allotment. (R. 19-27). However, the Court has been unwilling to extrapolate the intent to terminate all reservations from this notion absent some additional indicators of Congressional intent.

Over the course of deliberations concerning allotment of the Wendat reservation, Congressmembers frequently point to the reservation of the MCN, which was "thrown open. .

. [in] 1889." 23 Cong. Rec. H1777 (daily ed. Jan. 14, 1892) (statement of Rep. Mansur). They consistently use the example of the MCN's allotment as both a warning and a guide for the allotment of the Wendat reservation.

However, as the Supreme Court held in *McGirt*, the MCN reservation was not terminated by allotment. Justice Gorsuch, writing for the majority, noted that the State of Oklahoma could point to no language of clear cession in the statute allotting the MCN reservation. Nor could language be found in the various ensuing statutes designed to abrogate treaties with the MCN and reduce the tribe's authority to be ruled by its own laws. Congress may have wished, even planned, for the demise of all reservations, including that of the Wendat Band. Yet, absent clear law saying as much, wishes and plans have no legal power to compel the Court to find termination in order to "sav[e] the political branches the embarrassment of disestablishing a reservation." *McGirt*, at 2462.

Likewise, the statute allotting the Maumee reservation explicitly recognizes the tribe's continued sovereignty over the "western three-quarters of the reservation," which "shall continue to be reserved to the Maumee." Maumee Allotment Act of 1908, P.L. 60-8107, § 1 (May 29, 1908). Not only does the allotment statute lack plain language of cession, but it also firmly indicates the opposite, that the Maumee reservation would remain intact.

Additionally, the statute rejects a sum certain payment to the tribe for surplus lands. Congress explicitly provided that "nothing in this law provides for the unconditional payment of any sum to the Indians." Maumee Allotment Act, § 4. The revenue generated by the sale of patents in the Maumee reservation instead would be "deposited with the United States treasury to the credit of the Indians." *Id.* A sum certain payment necessarily requires just that – a payment. Since the statute is abundantly clear that no such payment to the Maumee would be

forthcoming, assertions that Congress intended to terminate the reservation in this way must be regarded as misguided at best and outright fictional at worst.

Since there is no ambiguity in the text of the statute as to whether the Maumee reservation remained, there is nothing that contemporary understanding or demographic change can be interpreted to support. Certainly, the Congressmembers of the day entertained the idea that the lands of the Maumee, like all tribes, would soon be settled by an influx of settlers. (R. 19-27). However, neither the opening of reservations lands nor the flood of settlers afterward can alter the statutory language Congress used to ensure the Maumee reservation survived.

The allotment statute did cede the eastern quarter of the Maumee reservation to the United States, but this did not include the Topanga Cession. The Maumee claim to this area had already been subject to abrogation and diminishment when Congress ratified their treaty with the Wendat Band. By the time the Maumee reservation was allotted, the Topanga Cession had already passed to the Wendat Band and therefore was not within the eastern quarter of the Maumee reservation.

C. Congress abrogated the Treaty of Wauseon and diminished the Maumee reservation

Congress spliced the Topanga Cession from the Maumee reservation and ceded it to the Wendat Band by treaty. Congress clearly intended to diminish the Maumee reservation when it ratified the Treaty with the Wendat Band. When that treaty was ratified the Topanga Cession entered the Wendat reservation, where it remains to this day.

Assessing whether a reservation has been diminished utilizes the same analysis as termination. That is, only Congress can alter a reservation's borders and it must be clear in its intent to do so. If, and only if, a statute or treaty is ambiguous, the Court may look to the *Solem* factors to ascertain Congressional intent: clear language, legislative history, and demographic change.

The language of the Treaty with the Wendat unambiguously states that the western border of the Wendat reservation was the Wapakoneta River as it ran in 1859. Because there is no ambiguity in the statute, there is no need to decipher Congressional intent to diminish the Maumee reservation from surrounding circumstances. However, an analysis of these circumstances bolsters the fact that the Topanga Cession passed to the Wendat Band in 1859.

The Treaty with the Wendat of 1859, for example, was agreed upon and signed at the very banks of the Wapakoneta River. Treaty with the Wendat, § 6, March 26, 1859, 35 Stat. 7749. Since "duly-authorized executive agents" are capable of indirectly creating Indian reservations, *Spalding*, 160 U.S. at 404, Congress necessarily accepted the location of the river as it ran in 1859 by ratifying the treaty. Congress often relied on agents from the Bureau of Indian Affairs to negotiate treaty terms with tribes across the nation. These terms could be accepted or rejected by Congress as the body desired. Since the language of the treaty explicitly roots the western border of the Wendat reservation at the Wapakoneta River as it flowed in 1859, it is irrefutable that Congress understood this and intended to cede the Topanga Cession to the Wendat Band.

Senatorial debate on the treaty likewise suggests that Congress was fully aware that it fixed the western edge of the Wendat reservation at the Wapakoneta River. One senator acknowledged that the treaty was negotiated by "our faithful and dutiful Indian Agents and forwarded to us by President Buchanan and Indian Commissioner Cato Sells." Cong. Globe, 35th Cong., 2nd Sess. 5411 (1859) (speech of Sen. Grimes). Another noted that "beginning with the Maumee, the Indians of New Dakota have slowly yielded their claims to the bulk of the territory. . . . [And] in the many years since the first treaty was made at Wauseon, the Maumee have been reduced in number and no longer inhabit parts of their territory." *Id.* at 5412 (speech of Sen. Foot).

Reliance on duly-appointed executive officials to negotiate treaties with Indian nations was common in this era. That Congress was willing to accept the Agent's understanding of the treaty terms is not doubted here. The speech of Senator Foot likewise strongly suggests that Congress was not only aware of the extent of the Maumee reservation, but also that Congress intended to divest the sparsely-populated Topanga Cession from the Maumee.

The presumption that Congress acted in good faith and with full knowledge of the consequences when ratifying treaties with the Indian tribes is not rebuttable in the courts. As the Court held in *Lone Wolf*, "[w]e must presume that Congress acted in perfect good faith in the dealings with the Indians. . . and that the legislative branch of the government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation." *Lone Wolf*, 187 U.S. at 568.

While petitioners may have standing to question Congress' intent to abrogate a treaty when there is ambiguity on the matter, there is no such ambiguity here. *See Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1997). The intent to relieve the Maumee of their claim to the Topanga Cession is obvious from the text of the Treaty with the Wendat. Without statutory ambiguity, circumstances surrounding the ratification of the treaty need not be contemplated.

Treaties, moreover, must be interpreted as the Indians themselves would have interpreted them. While there is no indication that the Wendat representatives did or did not speak or read English. However, it can be fairly assumed that by agreeing to the treaty at the banks of the river itself, the Wendat representatives understood the reservation to include all the land east of the river as it flowed at the time of the treaty's signing. It is unlikely that the Wendat Band could have known of the previous grant of what is now the Topanga Cession to the Maumee.

Furthermore, it is nigh unfathomable the Wendat Band could have interpreted the terms of their treaty with the U.S. to implicitly exclude land that at the time of signing was east of the river, but which had been west of the river nearly sixty years previously.

Additionally, treaties must be liberally interpreted in favor of the Indians. While this canon of construction does not bind the Court to decide *all* cases in favor of tribal treaty parties, a favorable reading of the Treaty with the Wendat suggests only one reasonable interpretation: that the Wendat reservation marked its western border by the Wapakoneta River, notwithstanding Congress' prior promises to another tribe that the same land would be theirs.

Justice Black once famously wrote that "great nations, like great men, should keep their word." *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting). Despite wielding the awesome power of the world's foremost democracy, Congress failed to keep its word to the Maumee Nation. Yet Congress also unequivocally gave its word to the Wendat Band that the borders of their land would run along the Wapakoneta River. Congress gave no indication that previous claims might intrude on the treaty's terms. Congress has not broken the pledge it made to the Wendat Band in the century-and-a-half since the treaty was signed and there is no basis in law or fact for this Court to find otherwise now.

For the foregoing reasons, Congress clearly intended to abrogate the Treaty of Wauseon. By abrogating the treaty, Congress extinguished the Maumee claim to the Topanga Cession, fixing the western border of the Wendat reservation along the Wapakoneta River as it flowed in 1859. Therefore, the Topanga Cession remains a part of the Wendat reservation to this day.

D. THE TOPANGA CESSION IS INDIAN COUNTRY

When Congress abrogated the Treaty of Wauseon, the Topanga Cession became part of the Wendat reservation. Even prior to Congress' abrogation of the Maumee reservation, however, the Topanga Cession fell under the definition of Indian Country by 18 U.S.C. § 1151(a). This

distinction remains to this day because the Wendat reservation survived the legislature's brutal assaults on Indian sovereignty starting in the late 19th century.

The Wendat reservation, as described earlier, was never terminated through allotment or any other legislation. The Wendat allotment statute contains no plain language indicating Congressional intent to disestablish the reservation. Nor does any section of the statute evince ambiguity as to Congressional intentions towards the reservation. If Congress harbored any plans to terminate the Wendat reservation at some point after allotment, such a scheme bore no fruit in the plain language of the allotment statute. Lacking an ambiguity in the statutory text, contemporary understanding and demographic change have no probative value, and must be discarded as functionally irrelevant.

In conclusion, Congress did not intend to terminate either the Maumee or Wendat reservations. However, Congress did intend to diminish the Maumee reservation by the Treaty with the Wendat, which effectively ceded the Topanga Cession to the Wendat reservation. At no point did Congress intend to diminish the Wendat reservation. Finally, since the Topanga Cession lies within the still extant Wendat reservation, it is Indian Country for purposes of federal law.

The next question before the Court is whether the State of New Dakota is preempted from levying its Transaction Privilege Tax (TPT) on the WCDC. Since the Supreme Court has repeatedly held that Congressional plenary power and the prevailing federal statutory scheme do not allow state taxation of tribal entities in Indian Country, New Dakota is precluded from collecting the TPT against the WCDC. Additionally, collection of the TPT would infringe on the Wendat tribe's sovereignty and therefore must be precluded.

NEW DAKOTA IS PREEMPTED FROM LEVYING STATE TAXES IN INDIAN COUNTRY

The Topanga Cession remains within the boundaries of the Wendat reservation. The reservation, moreover, never lost its character as Indian Country because Congress never evinced a clear intent to terminate its boundaries. The Wendat Commercial Development Corporation (WCDC) operates exclusively on a 1,400 square acre portion of land located in the Topanga Cession. It is a Section 17 corporation created and owned by the Wendat Band. (R. 7). Therefore, the WCDC is a tribal entity operating exclusively within Indian Country.

The State of New Dakota proposes enactment of a Transaction Privilege Tax (TPT) against the WCDC. 4 N.D.C. § 212. Federal law plainly precludes states from implementing state taxes on tribal entities that operate in Indian Country. The Supreme Court has struck down state taxes identical to the one at issue here under the doctrine of Indian preemption. Therefore, New Dakota must be precluded from levying the TPT against the WCDC.

Additionally, the levying of a state tax on a tribal government or organization that operates wholly within the bounds of Indian Country infringes on the rights of tribes to "make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). Tribal sovereignty, as the Supreme Court has repeatedly made clear, is separate and protected from state intrusion. Since the TPT would dramatically infringe on the Wendat Band's right to self-government, New Dakota does not have the power to impose the tax on the WCDC.

This Court should find that the federal statutory and regulatory scheme precludes New Dakota from levying the TPT on the WCDC. Additionally, the tax infringes on the tribe's right to self-government, and so cannot survive according to Supreme Court precedent. Accordingly, the Court should affirm the decision of the Thirteenth Circuit. (R. 11).

A. FEDERAL LAW AND POLICY PREEMPTS NEW DAKOTA FROM TAXING THE WCDC

This Court should affirm the holding of the Thirteenth Circuit because the New Dakota TPT is preempted by the federal statutory and civil regulatory scheme of tribal self-sufficiency and economic development. The WCDC is an Indian corporation working within the boundaries of the Wendat reservation as set by Congress. (R. 7-8). The state's attempt to assert its civil regulatory jurisdiction is inapposite to the long history of federal policies and Supreme Court decisions that preempt state action in Indian affairs.

The Constitution delegates the power to regulate Indian affairs to Congress. U.S. Const. art. I, § 8 cl 3. The Supreme Court has consistently interpreted this power to be plenary – both absolute in scope and exclusive of other sovereigns. For centuries, Congress attempted to use this plenary power to destroy the Nation's tribes as political entities. The legislature was unsuccessful in these attempts. In the 1930s, Congress pivoted away from attempting to destroy tribes to establishing federal policy designed to encourage tribal self-sufficiency and economic development. *See* Indian Reorganization Act of 1934 25 U.S.C. § 5101; Indian Financing Act of 1974, 25 U.S.C. § 1451; Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 5301; Indian Child Welfare Act of 1978, 25 U.S.C. §§1901-1963.

Federal preemption of state authority is derived from the Supremacy Clause of the Constitution. The clause states that "[t]his Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." U.S. Const. art. VI, cl. 2. On this basis, the Supreme Court has held that state law that conflicts with the Constitution or federal law is preempted. *See Marbury v. Madison*, 5 U.S. 137 (1803); *McCulloch v. Maryland*, 17 U.S. 316 (1819); *Gibbons v. Ogden*, 22 U.S. 1 (1824).

The Court applied the doctrine of preemption to Congressional plenary power over Indian affairs in the foundational case of *Warren Trading Post*, holding that state taxes levied against

federally licensed Indian traders in Indian Country were preempted by federal authority. *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 688 (1965).

Since federal plenary power over Indian affairs is exclusive, Congress must explicitly grant the state the power to pass law, including tax law, governing the tribes. If a state was not delegated "duties or responsibilities respecting the reservation Indians" then "[the Court] cannot believe that Congress intended to leave to the State the privilege of levying... tax[es]" simply to raise state revenue. *Id.* at 691.

Even without express federal statute, regulation, or treaty provision, state laws may be preempted if the geographical area is solely within Indian Country and the tax obstructs the "backdrop" of tribal sovereignty, self-sufficiency, and economic development. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 148-49 (1980); *compare with Oklahoma Tax Commissioner v. Chickasaw Nation*, 515 U.S. 450 (1995) (stating that taxing locations off reservations is allowed). Protecting the tribal interests remains consistent with the unique guardian-ward relationship Congress has maintained with federally recognized tribes since the earliest days of the Republic. *Cherokee Nation*, 30 U.S. 1 (1831).

The Court, however, has rejected the notion that preemption is absolute. To wit, the Court noted in *Mescalero Apache Tribe* that it "reject[s] the broad assertion. . . that the Federal Government has exclusive jurisdiction over the Tribe for all purposes and that the State is therefore prohibited from enforcing its revenue laws against any tribal enterprise whether the enterprise is located on or off tribal land." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 147-48 (1973).

Yet this rejection of total preemption was not extended to the "special area of state taxation." *Id.* at 148. The Court held that "absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and *McClanahan*… lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent." *Id.*

In *McClanahan*, the Court noted the historical importance of tribal sovereignty, which "provides a backdrop against which the applicable treaties and federal statutes must be read." *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 172 (1973). The State of Arizona attempted to collect income tax from tribal members who lived and worked exclusively on the Navajo reservation. *Id.* at 175-77. The Court held that Indians living and working within the boundaries of an Indian reservation were exempt from state income tax. The reservation lands, considered Indian Country by federal law because the reservation had never been terminated, were "within the exclusive sovereignty" of the tribe. *Id.* at 175. Exclusive tribal sovereignty was, in turn "under general federal supervision." *Id.* Federal supremacy, operating to exclude state intrusion, coupled with the doctrine of tribal sovereignty, jointly "preclude[d] extension of state law – including state tax law – to Indians" on the reservation. *Id.*

The Court has additionally addressed the distinction between taxing members of the tribe and nonmembers while in Indian Country. *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation* made the distinction from *Warren Trading Post* stating that the "minimal burden" of Indian sellers collecting the state tax from ***nonmembers*** does not "frustrate tribal self-government". *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 483 (1976) (emphasis added). Sovereign immunity "does not excuse a tribe from all obligations to assist in the collection of validly imposed state ***sales*** tax." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 512 (1991) (emphasis added). There is an exception to the collection of state taxes by Indian sellers, however. This exception is if the items subject to state tax have gained "added value" on the reservation. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447. U.S. 134, 156-57 (1980). When a tax is nondiscriminatory and the items retain no "added value", or the only attraction is to avoid state taxes, preemption does not apply. *Id.* At 157-58.

Congress in its guardian role, has implemented federal policies to protect the tribal interests of self-sufficiency and economic development. In *Warren Trading Post,* the Court found that state authority to impose a gross sales tax was precluded due to the degree of federal regulations

to which Indian trader licenses were subject. *Warren Trading Post*, 380 U.S. at 688-91. Additionally, the Court held that allowing the state to enact a tax on the traders would burden the Indians and obstruct federal policy. *Id*. Although Congress had the power to enable the state to collect taxes on both the tribe and federally licensed Indian traders, Congress had not done so. *Id.* Therefore, the state's proposed tax was preempted.

In *Bracker* the State of Arizona attempted to levy a tax on non-Indian logging corporations that operated exclusively within the White Mountain Apache Tribe reservation. *Bracker*, 448 U.S. at 137-38. After listing the extensive federal regulations governing logging operations on and off the reservation, the Court concluded that the state was preempted from collecting the tax because the "federal regulatory scheme [was] so pervasive as to preclude the additional burdens sought to be imposed in this case." *Id.* at 148. The court also further elaborated on the importance of balancing federal, tribal and state interests. *Id.* at 145.

Alternatively, in *Colville*, the State of Washington demanded that the Colville Indian Reservation collect a 5.0% sales tax from nonmembers that were frequenting the Indian smoke shops and buying unstamped tobacco. *Colville*, 447 U.S. at 142. The "value marketed by the smoke shops" was found to be of no significant tribal interest, despite the proceeds being used for economic development within the reservation. *Id.* at 154-55. The smoke shops attracted nonmembers who tried to avoid paying the state sales tax. The Court found that preemption does not apply within the scope of the federal interests of tribal self-sufficiency and economic development to allow "tribal enterprises selling goods to nonmembers an artificial competitive advantage over all other businesses in a State." *Id.* at 155.

In applying the doctrine of preemption in the present case the analysis first requires an examination of the relationship between Congress and the Wendat Band. The Treaty of 1859 explicitly lists the arrangement between the United States and the Wendat Band. Treaty with the Wendat, March 26, 1859, 35 Stat. 7749. Nowhere in the treaty is the State of New Dakota delegated "duties or responsibilities" over the Wendat Band or its reservation. *Warren Trading Post*, 380 U.S. at 691. The Allotment Act's chapter 42 dealing with the Wendat Band further

states "…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 of the Band." (R. 15). Like *Warren Trading Post* the state has not been delegated an obligation or duty to the tribe and is imposing a tax for the sole purpose of raising revenue.

Like the non-Indian corporations in *Bracker,* the WCDC is operating on a reservation. However, unlike *Bracker*, the WCDC is a corporation created and wholly owned by the Wendat Band itself. While the WCDC is not governed by the degree of federal laws as the timber harvesters in *Bracker*, they are protected under the Indian Commerce Clause and the long-standing precedent of precluding state taxation of Indians in Indian Country.

When looking at the language of 4 N.D.C. § 212(2), the state tax is to be imposed on the WCDC, requiring they "remit to the state 3.0% of their gross proceeds of sales or gross income on transactions." (R. 5-6). This is a stark difference from *Colville*'s simple 5.0% sales tax on cigarettes. As noted in *Colville*, *Potawatomi,* and *Moe*, the state can only enforce the taxation of nonmembers in Indian Country. The New Dakota tax focuses on taxing the WCDC's gross income directly, not differentiating between sales made to members or nonmembers. To expect the WCDC to track all its offered services between members and nonmembers is a much more severe burden than the bookkeeping of a single item such as tobacco. Additionally, the general sales taxes of the tobacco cases differ from a specific tax aimed at the privilege of a business operating in Indian Country.

Further distinguishing from *Colville*, the WCDC adds significant value to its market, and is not an avenue for nonmembers to avoid a state tax. The tax is aimed at the WCDC directly, nonmembers are not taxed by this state provision. The WCDC's proposed complex is estimated to raise $80 million annually, all of which is being reinvested into the tribe (R. 8). The WCDC will have a diverse offering of services including a museum, cultural center, traditional Wendat Band foods cafe, a fresh market, salons, bookstores, and a pharmacy. (R. 8). These funds are also for more than mere economic development, as the funds focus on promoting the self-sufficiency of the Wendat Band by addressing the health needs of its citizens. The areas of

notable need are combating food deserts, providing low-income housing, and nursing care facilities for the tribe's elders. (R. 8). These needed services would not be possible without the income of the WCDC, and the 3.0% tax, or $2.4 million annually, severely cripples the Wendat Band's self-sufficiency and economic growth.

The New Dakota TPT should be subject to federal preemption as it goes directly against the federal policy of promoting tribal self-sufficiency, sovereignty, and economic development. Congress has not passed any law granting New Dakota the authority to implement a tax on the Wendat Band or its corporation in Indian Country, and the taxing of Indians in Indian Country has long been preempted by this Court. Additionally, the state has failed to show an interest that outweighs the tribal and federal interests at play. While the outcome may be different if the tax was targeted at nonmembers in Indian Country, the tax targets an Indian corporation in its own reservation. Therefore, this Court must affirm the decision of the Thirteenth Circuit.

B. THE NEW DAKOTA TAX INFRINGES ON THE WENDAT BAND'S SOVEREIGNTY AND SO MUST BE PRECLUDED

Indian nations are extraconstitutional entities that retain their inherent sovereignty. Congress, through its role as guardian and using its plenary power in Indian affairs, can limit tribal sovereignty. However, Congress, and only Congress, can allow a state to intrude on the federal-tribal relationship. Tribal self-rule, even absent a federal scheme of regulation so pervasive as to preempt state action, can still prohibit a state from asserting its power to tax Indian Country when that assertion infringes on the tribe's right to "make [its] own laws and be ruled by them." *Williams vs. Lee,* 358 U.S. 217, 220.

New Dakota's civil regulatory jurisdiction is not only preempted by federal and tribal policies and interests, but it also infringes upon the Wendat Band's inherent sovereignty. Tribes have the right to create laws that govern their citizens and their lands. Only the federal

government, absent a Congressional delegation of power to a state, can infringe on a tribe's power to enact its own laws. Without any explicit Congressional authorization to the contrary, the Wendat Band is free from state infringement on its power over its reservation. Any state law that would impose tax liability on the Wendat Band's operations within its own reservation is an infringement of tribal jurisdiction.

Williams v. Lee is the lodestar case for infringement. The Court stated in *Williams* that the "exercise of state jurisdiction. . . would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." *Id. at* 223. From this holding, the court has elaborated on the doctrine of infringement, which focuses on tribal sovereignty and federal interests.

In *Williams*, the Supreme Court dealt with a non-Indian store operator in the Navajo reservation who attempted to collect for goods sold to a Navajo family on credit. The State of Arizona was not delegated any jurisdiction over the Navajo Nation, and consequently the court found that the state jurisdiction was an infringement of the Navajo Tribal rights of self-governance and power within the Navajo territory. The Court found that a party being non-Indian was irrelevant. *Id.*, at 223.

Congress could, of course, abrogate treaties with a tribe or unilaterally abolish aspects of a tribe's inherent sovereignty. *Lone Wolf*, 187 U.S. 553. Absent a federal statute or treaty providing otherwise, however, a tribe's power of self-government will not be subject to conflicting state jurisdiction. The Court reiterated this doctrine in *Warren Trading Post*, highlighting that Congress must delegate jurisdiction to a state, after which state power over a reservation or tribe can be implemented. *Warren Trading Post,* 380 U.S. at 691. There, the Court addressed the issue of a state tax being imposed in Indian Country. The Court found that

the tax was not applicable as it ran contrary to the "statutory plan Congress set up to protect Indians" and would have burdened both Indian and non-Indian alike. *Id.* at 691. The Court also noted the state's lack of Congressionally-delegated jurisdiction over the reservation. Absent this delegation of authority, the Court held the state tax "cannot stand" because it infringed on the present federal interests of tribal self-governance. *Id.* at 691-92.

The Court has long held that states were precluded from levying taxes on tribal entities and/or reservations under the doctrine of infringement. In *Colville*, for instance, the Court held that the State of Washington was precluded from levying a motor vehicle tax on tribal residents of the Colville reservation for the "privilege of using [a] covered vehicle in the State." *Colville*, 447 U.S. at 162. *Colville* relied both on the holdings of *McClanahan* – discussed in the previous section – and *Moe*. *McClanahan*, 411 U.S. 164; *Moe,* 425 U.S. 463.

In *Moe*, the Court rejected the State of Montana's attempt to tax cigarette sales to Indians on a reservation. *Moe*, 425 U.S. at 478. However, the Court also held that state taxes on cigarettes purchased by non-Indians on the reservation were a valid exercise of the state's authority, notwithstanding tribal sovereignty, because non-Indians obviously do not claim membership in the tribe and so cannot be shielded by the tribe's laws.

In *Montana v. U.S.*, the Court considered the extent of *tribal* civil regulatory jurisdiction – that is, the power of a tribe to regulate non-Indians on its reservation. *Montana vs. United States*, 450 U.S. 544 (1981). The Court noted two occasions where a tribe can assert jurisdiction over non-members: (1) when a non-member enters a consensual commercial relationship with the tribe, and (2) when non-member action threatens the "political integrity, economic security, or health or welfare" of the tribe. *Id.* at 555-56.

Montana dealt with a dispute over the regulation of non-Indian hunting and fishing on non-Indian fee land within a reservation. The Court found that the outdoors enthusiasts were not "on Indian fee land" and therefore "do not enter any agreements or dealings" with the tribe. *Montana,* 450 U.S. at 566. Therefore, the state exercise of regulatory power was not an infringement.

Similar to the State of Arizona in *Williams,* Congress has not delegated New Dakota any jurisdiction over the Wendat reservation, nor has New Dakota entered into a compact or similar agreement with the tribe. Since Congress has not delegated New Dakota jurisdiction over the Wendat reservation, the state infringes on the Wendat Band's right to self-governance when it attempts to levy a tax on a tribal corporation. *Williams,* 358 U.S. at 222-23.

Additionally, as in *Warren Trading Post*, the Court found the lack of delegated jurisdiction barred a state tax from being implemented because it infringed on federal policies of self-sufficiency and economic development. *Warren Trading Post,* 380 U.S. at 688 (1965). Unlike in *Montana*, the complex expects non-Indians to enter the Wendat reservation in the Topanga Cession. The second provision of Montana applies to the Wendat Band because the WCDC offers several services to preserve and promote the tribe's political integrity, economic development, and health and welfare. Accordingly, the tribe may exercise its civil regulatory jurisdiction over the nonmembers who come to the WCDC to shop, and the state's exercise of such jurisdiction is an infringement.

C. THE WCDC AFFECTS THE BAND'S POLITICAL INTEGRITY, ECONOMIC WELLBEING, AND HEALTH AND WELFARE.

The WCDC's proposed complex offers several services that directly support the federal policies of promoting tribal economic wellbeing and health. For economic wellbeing, all

corporate profits are to be remitted quarterly to the tribal government. (R. 8). The complex is estimated to make $80 million in gross sales annually and to create at least 350 jobs. (R. 8).

Many, if not most, Indian tribes suffer from severe poverty, often reporting poverty rates drastically higher than the national average. The national average of citizens in poverty in 2018 was 11.8%. (U.S. Census Bureau, Income and Poverty in the United States: 2018 (2019). Some of the largest reservations in the nation reported much higher rates, for example the Pine Ridge Reservation at 38.5%, the Navajo Nation at 33.7%, and the Hopi Reservation at 29.9% (U.S. Census Bureau, My Tribal Area, https://www.census.gov/tribal/ (then search by state, and select reservation, hitting the economy tab)). While there is no data in the record indicating the poverty rate of the Wendat Band, a not insignificant portion of the Band's population is undoubtedly struggling with poverty as implied by the need for low-income housing for members. (R. 8).

Based on that severe need, the WCDC complex will provide low-income public housing for its members. Federal studies have shown that many tribal communities severely lack affordable housing options. (Diane K. Levy et al, *Housing Needs of American Indians and Alaskan Natives in Urban Areas: A Report From the Assessment of American Indian, Alaska Native, and Native Hawaiian Housing Needs*, 1-56 (2017) (https://www.huduser.gov/PORTAL/sites/default/files/pdf/NAHSG-UrbanStudy.pdf).

Additionally, the facility provides nursing care for tribal elders, who play a crucial part in preserving and teaching Native American culture (R. 7-8). By providing affordable housing and healthcare, the WCDC proposes to, quite literally, enable the continued existence of the Wendat Band, which further strengthens the Band's political integrity.

Few Indian reservations have opportunities like the proposed complex to raise capital and provide new jobs for their members. Often tribal capital is generated from energy resources and casinos, as seen with the Blackfeet of Montana with oil and gas, and the Southern Ute Tribe of Colorado. Terry Anderson, *The Wealth of (Indian) Nations* (Hoover Institution, D.C.) October 2016. These sources of income can be unreliable because markets are constantly rising and falling. To add further to the concern of investing in energy, resources can become scarce. The Maumee Nation notes just such a concern with timber harvesting on its reservation. (R. 8). The WCDC complex allows the Wendat Band to generate a consistent revenue stream and diversify its income, which is crucial for the economic wellbeing and political integrity of the tribe. Therefore, it is a vital pillar of the Wendat Band's economic welfare, which will in turn allow the Band to enhance the health and welfare of its citizens.

The complex will also address a problem that inconveniences most of the United States but is fatal in Indian Country: food deserts and the cardiovascular diseases (CVDs) that they inevitably cause. A report by the U.S Department of Agriculture found that 74.4% of Native Americans in the United States live in food deserts, far higher than the national average of 41.2%. (United States Department of Agriculture Economic Research Service, *Measuring Access to Healthful Affordable Food in American Indian and Alaska Indian Areas,* Economic Information Bulletin Number 131, (2014). Likewise, the largest cause of death in Native American communities is CVDs. (Khadijah Breathett et al., *Cardiovascular Health in American Indians and Alaskan Natives: A Scientific Statement From the American Heart Association*, 141 AHA Circulation 948, 948-59 (2020) (discussing the prevalence of CVD's in Indian communities)).

The WCDC complex will offer both traditional cultural foods and a fresh market, which will help remedy both problems. This helps to ensure the Wendat Band's community is healthy. A healthy community has more members on hand to further develop its economic growth and self-sufficiency.

The New Dakota state tax is a direct infringement on the rights of self-governance guaranteed to the Wendat Band through treaty and federal policy. The WCDC complex is an Indian business implemented to preserve and strengthen the Wendat Band's political integrity, economic wellbeing and health. Pursuant to the precedent established by this Court and the clear interests of Congress and the Band, this Court should find that the New Dakota tax is a direct infringement of the Wendat Band's sovereignty and right to self-governance and therefore should be precluded.

CONCLUSION

The decision of the Thirteenth Circuit must be affirmed. The appellate court correctly found that not only did Congress establish a reservation for the Maumee Nation when it ratified the Treaty of Wauseon, but that the treaty was abrogated by the Treaty with the Wendat. The Topanga Cession became part of the Wendat reservation through this abrogation. Although the Maumee reservation was partially diminished, neither it nor the Wendat reservation were terminated during the allotment period because Congress did not clearly indicate its intent to do so.

Since the Wendat reservation, including the Topanga Cession, is still extant, the entire area remains Indian Country. The WCDC is a tribal corporation operating exclusively within the Topanga Cession. Federal law preempts state civil regulatory jurisdiction over tribes in Indian Country absent an express Congressional grant of authority.

Here, this Court must affirm the Thirteenth Circuit Court's decision that the New Dakota TPT cannot be collected because it is preempted by federal law. Preemption is applied due to the tax going directly against the well-established federal policies of self-sufficiency and economic wellbeing. Furthermore, the WCDC is an Indian corporation within Indian Country, and therefore lacking evidence of a Congressional grant of authority, the state cannot impose this tax as it does not surpass the interests of the federal government and the Wendat Band. The WCDC proposed complex furthers the federal interests of economic wellbeing and the health or welfare of the Wendat Band.

Infringement is applicable because New Dakota lacks jurisdiction as they were never delegated responsibility for the Wendat reservation, and all areas of interest are within the reservation. Because the land is still Indian Country the state tax is barred from being enforced as it goes against the strong federal policy promoting tribal self-governance, and the Wendat Band's political integrity and economic welfare. Accordingly, this Court should affirm the decision of the Thirteenth Circuit Court.

Respectfully submitted,

Team #T1032
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APPENDIX 1

§ 1151. Indian country defined

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.