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

BRIEF FOR RESPONDENT

T1034

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QUESTIONS PRESENTED

I. Whether the Topanga Cession remains Indian country on the Maumee Reservation or the Wendat Reservation under the Treaty of Wauseon and the Treaty with the Wendat when the river defining reservation boundaries shifted westward before the Treaty with the Wendat was signed and both reservations were later subject to allotment?

II. Whether the State of New Dakota may be prohibited from levying its Transaction Privilege Tax against a Wendat tribal corporation under the doctrines of preemption and infringement when the development is located on fee land in Indian county?

STATEMENT OF THE CASE

Statement of the Facts

This case is about recognizing that Indian tribes and tribal corporations are best positioned to design and implement coherent economic development strategies and efficiently direct resulting revenues toward funding programs crucial to meeting the self-identified needs of tribal members.

The Maumee Indian Nation ("Maumee") and the Wendat Band of Huron Indians ("Wendat") are federally recognized tribes, each with 1500 to 2000 enrolled members, whose traditional land claims overlap. *Maumee Indian Nation v. Wendat Band of Huron Indians*, 305 F. Supp. 3d 44 (D. New Dak. 2018), *rev'd*, 933 F.3d 1088 (13th Cir. 2020), *cert. granted*, 592 U.S. _ (Nov. 6, 2020) (No. 20-1104), R. at 4. They are culturally distinct. *Id.* Both Tribes' traditional lands have been incorporated into the State of New Dakota. *Id.* To this day, they contest the border their reservations share. *Id.*

The Treaty of Wauseon (1802) reserved to Maumee lands west of the Wapakoneta River. *Id.*, R. at 4-5. Treaty of Wauseon, art. III, Oct. 4, 1801, 7 Stat. 1404, R. at 16. From

land within the area otherwise reserved to Maumee, Maumee allowed the United States to claim two six-square-mile parcels along the Wapakoneta River for trading posts. Treaty of Wauseon, art. IV, Oct. 4, 1801, 7 Stat. 1404, R. at 16. The river moved approximately three miles to the west during the 1830s. *Maumee*, 305 F. Supp. 3d 44, R. at 5.

When the Senate was considering the Treaty with the Wendat, Senator Foot observed that "[i]n 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." CONG. GLOBE, 35th Cong., 2nd Sess. 5411-5412 (1859) (statement of Sen. Foot), R. at 30. The Treaty with the Wendat (1859) reserved to Wendat lands east of the Wapakoneta River. Treaty with the Wendat, art. I, March 26, 1859, 35 Stat. 7749, R. at 18.[1]

The land that had been west of the Wapakoneta River as of the Treaty of Wauseon—but was east of the Wapakoneta River as of the Treaty with the Wendat—is known as the Topanga Cession. *Maumee*, 305 F. Supp. 3d 44, R. at 5. Referencing its respective treaty, each Tribe claims that the Topanga Cession is located exclusively within the external boundaries of its reservation. *Id.*, R. at 4. The Topanga Cession is located in Door Prairie County. *Id.*, R. at 5. The Tribes agree that most of the Topanga Cession land was declared surplus under an allotment act. *Id.*, R. at 7. They disagree as to which one. *Id.*

Congress subjected both the Maumee Reservation and the Wendat Reservation to allotment following the General Allotment Act of 1887, Pub. L. No. 49-105, 24 Stat. 388, *Maumee*, 305 F. Supp. 3d 44, R. at 5. The legislative history of the Treaty with the Wendat reveals the long-held expectation of at least some Senators that non-Indian settlement on the

[1] Two sections, one of which was specifically identified as being in Door Prairie County, were set aside for private individuals from the land Wendat ceded to the United States, as opposed to from within the boundaries of the Wendat Reservation. Treaty with the Wendat, art. II, March 26, 1859, 35 Stat. 7749, R. at 18.

Reservation was inevitable and desirable. CONG. GLOBE, 35th Cong., 2nd Sess. 5411-5412 (1859), R. at 29. Senator Lazarus had argued, for example, that "[t]hose lands must by necessity eventually be opened to the cultivation of our people. 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?" *Id.* (statement of Sen. Lazarus), R. at 29. He further acknowledged that "[d]oubtless our people will settle on some of these lands even now. It would be better to secure to us their legal title." *Id.* Senator Chestnut, Jr., did not conceal that he supported the Treaty only as a means of keeping the peace until settlers outnumbered Indians and suggested that "nothing in this treaty, like any that have come before it, will prevent American frontiersmen from making use of the lands around them." *Id.* (statement of Sen. Chestnut, Jr.), R. at 30.

The legislative history of the Wendat Allotment Act reflects a continued focus on the wants of homesteaders who, now anticipating that the land would become available to them in time to plant for the next season, gathered there prematurely. CONG. REC. 1777 (1892), R. at 19. Congressman Harvey asserted that "it is important that [survey] work should be resumed speedily in order to allow these people to go on the lands in the early spring . . . ." CONG. REC. 1777 (1892) (statement of Rep. Harvey), R. at 20. Congressman Mansur was similarly concerned about the homesteaders' planting season, noting that "unless this resolution is passed today and the money given to the Department for the purpose of allotting these Indians, it will put back the settlement for one crop season." *Id.* (statement of Rep. Mansur), R. at 21. He viewed the Wendat as "wholly wild and savage." *Id.*, R. at 22. Congressman Pickler referred to the Wendat as uncivilized "blanket Indians." *Id.* (statement

of Rep. Pickler), R. at 21. Congressman Ullrich lauded breaking up reservations as "good work." *Id.* (statement of Rep. Ullrich), R. at 20.

Section 1 of the Wendat Allotment Act authorized completion of a survey of the western half of the Wendat Reservation, after which individuals would have a year to select their allotments. Wendat Allotment Act of 1892, Pub. L. 52-8222, § 1, R. at 15. At the end of the year, land not selected would be declared surplus and open to settlement. *Id.* Section 2 provided that the United States would pay three dollars and forty cents per acre declared surplus up to a cap of $2,200,000. *Id.* § 2, R. at 15. Wendat ultimately received $2,200,000 for more than 650,000 acres of land. *Maumee*, 305 F. Supp. 3d 44, R. at 5.

Maumee received approximately $2,000,000 for approximately 400,000 acres of land. *Id.* The Bureau of Indian Affairs lost the records of which parcels of land Maumee was paid for. *Id.*, R. at 7. However, section 1 of the Maumee Allotment Act provided that Maumee agreed to select individual allotments from the western three-quarters of its reservation only. Maumee Allotment Act of 1908, Pub. L. 60-8107, § 1, R. at 13. Maumee deemed its interest in the entire eastern quarter of its reservation surplus, ceding it to the United States to be returned to the public domain. *Id.*

During allotment, few Wendat or Maumee members selected allotments within the Topanga Cession. *Id.*, R. at 7. Members who live there now rent or own land in fee. *Id.*

The State of New Dakota has enacted a Transaction Privilege Tax ("TPT") statute. *Id.*, R. at 5. The TPT requires a license to conduct business resulting in more than $5000 from gross proceeds of sales or gross income and subjects the gross proceeds of sales or gross income to a three percent tax. 4 N.D.C. § 212(1)-(2), R. at 5. Ordinarily, TPT proceeds benefit the State's general revenue fund. § 212(3), R. at 5. However, tribes and

tribal businesses operating on their own reservations on land held in trust are exempt from the taxation and licensing requirements. § 212(4), R. at 5. The statute further provides that the State will remit TPT revenue from other entities operating on a reservation to the Tribe. § 212(5), R. at 5. The State will also remit half of the TPT revenue collected from Door Prairie County businesses that are not located in Indian country to Maumee. § 212(6), R. at 5. As lands in the Topanga Cession have been used for non-commercial purposes, the TPT has had no effect there before the instant case. *Maumee Indian Nation v. Wendat Band of Huron Indians*, 305 F. Supp. 3d 44 (D. New Dak. 2018), R. at 7.

Wendat purchased a 1,400-acre parcel within the Topanga Cession in fee from non-Indians on December 7, 2013. *Id.* The land has not been taken into trust. *Id.*, R. at 8. On June 6, 2015, Wendat announced its plans for the parcel. *Id.* The Wendat Commercial Development Corporation ("WCDC"), a tribal corporation, is to build a multipurpose site to advance tribal economic development and address the housing needs of low-income tribal members and the healthcare needs of tribal elders. *Id.*, R. at 7-8. The plans feature a tribal cultural center, a tribal museum, and a shopping complex that makes traditional Wendat cuisine available, all of which Wendat expects to appeal to non-Indian consumers. *Id.*, R. at 8. Wendat expects the complex to sustain 350 jobs and generate proceeds sufficient to enable Wendat to fund the housing and healthcare components. *Id.*

On November 4, 2015, Maumee representatives met with the WCDC and the Wendat Tribal Council to reiterate their claim to the Topanga Cession and their expectation that the WCDC would pay the TPT. *Id.* Referring to the terms of the Treaty with the Wendat of 1859, the Tribal Council responded that the Topanga Cession was Wendat land. *Id.* Even if it had been part of the Maumee Reservation after the Treaty, the Tribal Council argued that

diminishment of the Maumee Reservation by the allotment act in 1908 resulted in the land reverting to Wendat control. *Id.* The Tribal Council argued that the State has no authority to collect the TPT either because of federal preemption or because of infringement on Wendat sovereignty. *Id.*

Statement of the Proceedings

Seeking declaratory relief, Maumee filed suit against Wendat on November 18, 2015. *Id.* Maumee asked the district court to declare that the Topanga Cession was within the Maumee Reservation and that any WCDC development there would need a TPT license and to pay the tax. *Id.* Should the court not have granted that relief, Maumee alternatively asked for a declaration that the Topanga Cession was not Indian country. *Id.* The court held that the Topanga Cession was within the Maumee Reservation and that any WCDC development beyond the statutory gross sales threshold of $5000 would be subject to licensing requirements and taxation pursuant to 4 N.D.C. section 212. *Id.*, R. at 9. The State would remit the tax revenue to Maumee. *Id.*

Wendat timely appealed, and the case was held pending the Supreme Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). *Wendat Band of Huron Indians v. Maumee Indian Nation*, 933 F.3d 1088 (13th Cir. 2020) (2-1 decision), *cert. granted*, 592 U.S. _ (Nov. 6, 2020) (No. 20-1104), R. at 10. The parties were then permitted to file supplemental briefs. *Id.* On September 11, 2020, a divided Thirteenth Circuit reversed, concluding that the Maumee Reservation had been diminished and that the Topanga Cession was in Indian country within the Wendat Reservation. *Id.* The court further held that the State tax was prohibited on the bases of both preemption and infringement. *Id.*, R. at 11. The dissenting judge would have held that the Topanga Cession was not in Indian country at all, but had it

been, that the State should have been prohibited from levying the tax on the basis of preemption only. *Id.* (Lahoz-Gonzales, J., dissenting).

Maumee filed a petition in the Supreme Court for a writ of certiorari, which was granted on November 6, 2020. *Maumee Indian Nation v. Wendat Band of Huron Indians*, *cert. granted*, 592 U.S. _ (Nov. 6, 2020) (No. 20-1104), R. at 1-2.

SUMMARY OF ARGUMENT

This Court should affirm the holding of the Thirteenth Circuit that the Topanga Cession is Indian country within the Wendat Reservation. As of the Treaty with the Wendat, the Topanga Cession was on the Wendat Reservation. Although the Topanga Cession had been within the boundaries of the Maumee Reservation established by the Treaty of Wauseon, the Treaty with the Wendat abrogated the Treaty of Wauseon. The canons of construction require the Court to construe the Treaty with the Wendat as they would have understood it. The Topanga Cession remains part of the Wendat Reservation. The portion of the Wendat Allotment Act applicable to the Topanga Cession did not include the language this Court has found to be the "hallmark" of diminishment or provide that the Wendat Band of Huron Indians agreed to cede, cell, relinquish, and convey land for sum certain.

This Court should affirm the holding of the Thirteenth Circuit that the State of New Dakota is precluded from levying its Transaction Privilege Tax against the Wendat Commercial Development Corporation on the grounds of infringement and preemption. Congress has not explicitly authorized the State of New Dakota to assess its Transaction Privilege Tax against the Wendat Commercial Development Corporation on its own reservation, and doing so would infringe upon the right of Wendat to make its own laws and be governed by them. Nor has the State shown an interest in collecting the revenue that

would outweigh Wendat's interest in directing the revenues it will generate from value it will have created toward essential tribal programs or the federal government's interest in supporting Wendat's initiative. Although the Wendat Commercial Development Corporation designed its complex without direct federal involvement, its comprehensive nature and the dependence of critical tribal programs upon it allow a reasonable conclusion that preemption provides an additional ground for preventing the State from collecting its tax if the Topanga Cession is on the Wendat Reservation.

Even if this Court reverses the Thirteenth Circuit and holds that Topanga Cession is Indian Country on the Maumee Reservation, this Court should hold that federal Indian trader statutes preempt the Transaction Privilege Tax at least with respect to sales to Maumee members. Further, if revenues from sales to non-Indians and nonmember Indians are to be taxed, the federal policy goals of avoiding paternalism and promoting tribal sovereignty articulated by the Court since the Indian Reorganization Act demand Maumee Nation collect the tax directly.

ARGUMENT

I: THE TOPANGA CESSION REMAINS INDIAN COUNTRY WITHIN THE WENDAT RESERVATION.

A. The Topanga Cession is within the Wendat Reservation because the Treaty with the Wendat abrogated the Treaty of Wauseon to the extent that they were inconsistent.

Regardless of the phrasing, treaties are grants from rather than to Indians, and reservations reserve rights they have not granted. *United States v. Winans*, 198 U.S. 371, 381 (1905). Owing to the unique relationship between the federal government and tribes and communication barriers during negotiations, the Court must construe treaties with tribes with particular care as the Indians would have understood them. *Id.* at 380-81. However,

Congress can unilaterally abrogate a treaty, "though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so." *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903).

In this case, Wendat and Maumee traditional lands overlap. In the Treaty of Wauseon, the eastern boundary of the Maumee Reservation was set at the Wapakoneta River. Between the signing of the Treaty of Wauseon and the signing of the Treaty with the Wendat, the river moved westward. The Treaty with the Wendat set the western boundary of the Wendat Reservation at the Wapakoneta River. It made no mention of the Maumee and was silent as to any movement of the river over time. The boundary was not established with reference to another reservation, much less one that encompassed land on the eastern side of the river. By its plain language, and construed as the Wendat would have understood it, the Treaty with the Wendat refers to the river as it was at the time of signing. While the Maumee had reserved to themselves and did not relinquish their claim to what is now called the Topanga Cession, the Treaty with the Wendat abrogated the Treaty of Wauseon by inconsistency. While Congress "presumably" exercises its power to abrogate a treaty only in the interest of an affected tribe, presumptions are just that. The Treaty with the Wendat is unambiguous.

B. The Wendat Reservation was not diminished by the Wendat Allotment Act because it lacked the "hallmarks of diminishment," and while the Maumee Allotment Act used clear cession language in reference to the eastern quarter of the Maumee Reservation, the Topanga Cession was not part of the Maumee Reservation at that time.

In assessing whether diminishment of a reservation has occurred, statutory language is the most probative evidence. *Solem v. Bartlett*, 465 U.S. 463, 470 (1984) (citing *DeCoteau*

v. District County Court, 420 U.S. 425, 444-445 (1925)). In *Nebraska v. Parker*, 136 S. Ct. 1072 (2016), the Supreme Court observed that its precedents had also considered contemporaneous understanding and subsequent demographics as factors. *Id.* at 1079 (citing *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329, 351 (1998)). However, in the landmark case of *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), the Supreme Court rejected the test that gave weight to those factors and held that it would from then on consider them if and only if the text of an allotment act is ambiguous:

> When interpreting Congress's work in this arena, no less than any other, our charge is usually to ascertain and follow the original meaning of the law before us. That is the only "step" proper for a court of law. To be sure, if during the course of our work an ambiguous statutory term or phrase emerges, we 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 (citing *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019)).

Some allotment acts "allow[ed] 'non-Indian settlers to own land on the reservation.'" *Parker*, 136 S. Ct. at 1080 (quoting *Seymour v. Superintendent of Wash. State Penitentiary,* 368 U.S. 351, 356 (1962)). "But in doing so, they d[id] not diminish the reservation's boundaries." *Parker*, 136 S. Ct. at 1080. "Our analysis of surplus land acts requires that Congress clearly evince an 'intent to change boundaries' before diminishment will be found." *Solem*, 465 U.S. at 470 (quoting *Rosebud v. Kneip,* 430 U.S. 584, 615 (1977)). "Throughout the inquiry, we resolve any ambiguities in favor of the Indians, and we will not lightly find diminishment." *Hagen v. Utah*, 510 U.S. 399, 411 (1994) (citing *Solem*, 465 U.S. at 470, 472).

In examining allotment acts, the Supreme Court in *Parker* looked for what it termed "hallmarks of diminishment." *Parker,* 136 S. Ct. at 1079. Language indicating that land was

restored to the public domain strongly suggests diminishment because "[s]tatutes of the period indicate that Congress considered Indian reservations as separate from the public domain." *Hagen*, 510 U.S. at 413. Text that "contains both explicit cession language, evidencing 'the present and total surrender of all tribal interests,' and a provision for a fixed-sum payment, representing 'an unconditional commitment from Congress to compensate the Indian tribe for its opened land'" also weighs heavily in favor of finding diminishment. *Yankton Sioux Tribe*, 522 U.S. at 330.

In this case, the Wendat Allotment Act is unambiguous, and *McGirt* instructs that we need not look beyond it. There is none of *Parker*'s "hallmark language." There is no mention of the public domain, and the so-called surplus lands in the eastern portion of the reservation, which encompasses the Topanga Cession, were merely "open to settlement." Wendat Allotment Act of 1892, Pub. L. 52-8222, § 1, R. at 15. The United States did not offer a certain fixed-sum payment, but rather agreed to pay an amount per acre of surplus land up to a maximum total. Further, based on the text, it was possible for there to have been less land classified as surplus than would trigger the maximum payment. This falls short of clear Congressional intent to alter the boundaries of the Wendat Reservation.

In the absence of ambiguity, the Court need not consider other factors. The actual amount ultimately paid and how this compared with the rate contemplated does not figure into the analysis. Nor does the Court need to look to subsequent demographics or the legislative history that reveals legislators' contemporaneous expectation that settlers would come regardless of legal title, or indeed their hope that settlers would soon outnumber the Indians.

Because the Treaty with the Wendat abrogated the Treaty of Wauseon, as argued above, only the Wendat Allotment Act is relevant to the issues presently before the Court. We would concede that, if the Topanga Cession were on the Maumee Reservation prior to the Maumee Allotment Act, there is clear "hallmark" language in that Act ceding the eastern quarter of the Maumee Reservation to be returned to the public domain, and that would be difficult to undercome under *Yankton Sioux Tribe*. Maumee Allotment Act of 1908, Pub. L. 60-8107, § 1, R. at 13. This is moot because that land was already within the Wendat Reservation, but otherwise the language does support a finding of diminishment.

C. The Topanga Cession meets the definition of Indian country pursuant to 18 U.S.C. § 1151.

The United States Code defines Indian country as follows:

> (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.

18 U.S.C. § 1151.

Even though the WCDC purchased the parcel in the Topanga Cession from non-Indians and it is not currently held in trust, it remains Indian country pursuant to 18 U.S.C. § 1151(a) because it is within the Wendat Reservation. It is immaterial whether the land is held in fee or trust.

II. REGARDLESS OF WHICH RESERVATION THE TOPANGA CESSION REMAINS WITHIN, THE COMBINED INFRINGEMENT AND PREEMPTION ANALYSIS ESTABLISHED BY *BRACKER* PROHIBITS THE STATE OF NEW DAKOTA FROM LEVYING ITS TRANSACTION PRIVILEGE TAX AGAINST THE WENDAT COMMERCIAL DEVELOPMENT CORPORATION ON EITHER OF THE TWO INDEPENDENTLY SUFFICIENT GROUNDS.

Federal policy regarding Indians has shifted in an effort to address the enduring harm past policies have caused Indian communities, and at the end of the allotment era, Congress enacted the Indian Reorganization Act of 1934, Pub. L. 73-383, 48 Stat. 984 (1934), for the purpose of "rehabilitat[ing] the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. REP. NO. 73-1804, at 6 (1934)). Addressing Congress, President Nixon called for new legislation in recognition that federal micromanagement of Indians failed to produce good results for the tribes. Special Message on Indian Affairs, 1 PUB. PAPERS 564-76 (July 8, 1970). Congress has since passed a series of Acts designed to restore to tribes decision-making power over such areas as healthcare and housing. *See, e.g.*, Native American Housing Assistance Self-Determination Act, Pub. L. 104-330, 110 Stat. 4016 (1996), Indian Self-Determination and Education Assistance Act, Pub. L. 93-638, 88 Stat. 2203 (1975).

"[T]here is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980). "[T]he standard principles of statutory construction do not have their usual force in cases involving Indian law. . . . [S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). In *White Mountain Apache Tribe v. Bracker*, the Supreme Court recognized that either infringement or

preemption could be an independently sufficient barrier to State assertion of regulatory authority over the activities of tribal members on their reservations. *Id.* at 142-43.

"When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." *Id.* at 144. In other situations, the Court conducts "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Id.* at 145.

With respect to taxation, the general rule[2] does not apply in this context, and "in recognition of the sovereignty retained by Indian tribes even after formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory." *Blackfeet*, 471 U.S. at 764. Plenary power allows Congress to "authorize the imposition of state taxes on Indian tribes and individual Indians. It has not done so often, and the Court consistently has held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear." *Id.* at 765.

When nonmembers are involved, "a State seeking to impose a tax on a transaction between a Tribe and nonmembers must point to more than its general interest in raising revenues." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 336 (1983). The legal

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[2] The Buck Act provides that "(a) No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area." 4 U.S.C. § 105. However, the Court has interpreted this as inapplicable to Indians. *See Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685, n. 18 at 691, (1965) (citing *Your Food Stores, Inc. v. Village of Espanola*, 361 P.2d 950, 955-56 (N.M. 1961), 58 I.D. 562. Cf. 4 U.S.C. § 109 (1964 ed.)).

incidence of a tax is "[t]he initial and frequently dispositive question in Indian tax cases." *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 458-59 (1995).

A. If the Topanga Cession remains Indian country on the Wendat Reservation, the State Transaction Privilege Tax infringes on Wendat tribal sovereignty.

In an infringement inquiry, "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." *Williams v. Lee*, 358 U.S. 217, 220 (1959). "If this power [to govern themselves] is to be taken away from them, it is for Congress to do it." *Id.* at 223 (citing *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564-66).

In *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980), the Supreme Court considered the relative interests of tribes and states with respect to taxation. Tribes' " interest in raising revenues for essential governmental programs . . . is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services." *Id.* at 156-57. The State's interest is "strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services." *Id.* At issue in *Colville* was whether the state tax burdened commerce that would have taken place had the Tribes not marketed an exemption from the tax for on-reservation purchases by non-members, and the Court found that it did not. *Id.* at 157. State taxation of non-member Indians was not infringement because it did not "contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing Tribe." *Id.* at 161.

In this case, if the Court affirms that the Topanga Cession is on the Wendat Reservation, the proposed WCDC complex will be operated by Wendat on its own reservation. Regardless of the projected demographics of the patrons, the legal incidence of

the tax would fall on Wendat because it is not a sales tax but a tax assessed on the gross proceeds of sales or gross income. As in *Chickasaw Nation*, this factor carries significant weight and may be dispositive. Where nonmembers are not directly involved, *Blackfeet* confirmed that the essential question is whether Congress has explicitly authorized the State to levy the tax against the Tribe. Congress has not explicitly authorized New Dakota to levy its TPT against Wendat.

Even if this Court views this situation as involving nonmembers, a particularized comparison of federal, tribal, and state interests precludes the TPT. There is a strong federal interest in encouraging Wendat to generate revenue to fund its own essential programs. Wendat will leverage its culture to do just that. Unlike in *Colville*, the value of the goods and services in this case would be largely generated by Wendat on the reservation. Indeed, via the museum, cultural center, and café serving traditional foods, Wendat will generate value that no one else could. Wendat culture is the focal point of the complex, which, when free from infringement by the State, will fund low-income housing and elder care and create hundreds of jobs for members.

By contrast, nothing in the plans for the complex involves services provided by the State to the taxpayer, which again is the WCDC, nor has the State shown how it would benefit from taxing the WCDC. The TPT statute as a whole reflects multiple purposes. There is a provision in 4 N.D.C. section 212(3) indicating that some TPT proceeds go toward the State's general interest in raising revenue, precisely what *Mescalero Apache* deemed inadequate, but that section does not control here. Because the complex is on Wendat land but *not held in trust*, it would not be exempt from licensing requirements under 4 N.D.C. section 212(4). Under 4 N.D.C. section 212(5), the WCDC would be required to obtain a

license and pay the tax only for it to then be remitted back to Wendat. The statute ironically touts this arrangement as "the most efficient means of providing these funds to tribes," *id.*, but here the result would be infringement. The applicable section ostensibly aims to help Wendat by remitting revenues from non-tribal entities operating on its reservation, but its results defy common sense when the statute places inordinate weight on whether land is held in trust or in fee rather than on who uses it. Despite the State's benevolent intentions, this would bring added administrative costs with no benefit to either the State or Wendat. Since the Indian Reorganization Act, *Jones* recalls, federal policy has sought to correct course away from counterproductive paternalism, of which this is a particularly acute example.

If the Court holds that the Topanga Cession is on the Maumee Reservation, the relevant inquiry would come from the preemption portion of the *Bracker* analysis rather than the infringement portion. While *Colville* forecloses a finding of infringement upon the right of Wendat to make its own rules and be governed by them because Wendat members are not Maumee constituents, preemption would still preclude the State from collecting the TPT.

B. If the Topanga Cession remains Indian country on the Maumee Reservation, the State Transaction Privilege Tax is preempted by federal law.

Turning to preemption, sovereignty is the "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). Thus, this Court has held that preemption may be found even when not explicitly provided for in a treaty or statute. *Id.* at 174.

In *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), the Tribe built a resort to generate income, create jobs, and fund services for tribal members. *Id.* at 327. The Tribe worked with the federal government to restore, manage, and regulate hunting of game

and fish. *Id.* at 327-28. The tribal and state licensing schemes conflicted, *id*. at 329, and the Supreme Court ruled in the Tribe's favor:

> The assertion of concurrent jurisdiction by New Mexico not only would threaten to disrupt the federal and tribal regulatory scheme, but would also threaten Congress' overriding objective of encouraging tribal self-government and economic development. The Tribe has engaged in a concerted and sustained undertaking to develop and manage the reservation's wildlife and land resources specifically for the benefit of its members. The project generates funds for essential tribal services and provides employment for members who reside on the reservation. This case is thus far removed from those situations, such as on-reservation sales outlets which market to nonmembers goods not manufactured by the tribe or its members, in which the tribal contribution to an enterprise is *de minimis.*

Id. at 341. The Court further held that the State's financial interest was minimal and its revenue loss probably negligible where few people obtain tribal hunting licenses. *Id.* at 343.

In cases specifically addressing taxation, the Supreme Court has found that a tax on the gross proceeds of sales or gross income of a non-Indian business on a reservation was preempted because of the extensive Congressional regulation of Indian traders. *Warren Trading Post Co. v. Arizona State Tax Commission,* 380 U.S. 685, 685-90 (1965). The Court reasoned as follows:

> [S]tate tax on gross income would put financial burdens on appellant or the Indians with whom it deals in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner. And since federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax.

Id. at 691.

The Indian trader statutes vest in the Commissioner of Indian Affairs exclusive "power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the

prices at which such goods shall be sold to the Indians." 25 U.S.C. § 261. "Any person desiring to trade with the Indians on any Indian reservation shall . . . do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians." 25 U.S.C. § 262. The statute specifies penalties for "[a]ny person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license . . . ." 25 U.S.C. § 264.

The Supreme Court has held that when a sale to Indians took place on a reservation, the "transaction [was] plainly subject to federal regulation. It [was] irrelevant that [the seller was] not a licensed Indian trader. . . . It is the existence of the Indian trader statutes, then, and not their administration, that pre-empts the field of transactions with Indians occurring on reservations." *Cent. Mach. Co. v. Arizona State Tax Comm'n*, 448 U.S. 160, 164-65 (1980). The Fourth Circuit has held that while Indians are not subject to the same penalties as non-Indians, they are not exempt from compliance. *United States v. Parton*, 132 F.2d 886, 887 (4th Cir. 1943).

In *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), the Supreme Court found a state severance tax on on-reservation oil and gas production by a non-Indian lessee permissible when the State provided some services, *id.* at 185, and the Tribe did not show a financial burden when the legal incidence of the tax was on the non-Indian lessee. *Id.* at 187. It was "not a case in which the State has had nothing to do with the on-reservation activity, save tax it." *Id.* at 187.

That the legal incidence of a tax falls on non-members does not necessarily preclude a finding of preemption, however, and the Eighth Circuit recently held that a state tax of the

amenities associated with a tribal casino was preempted when it would make the operation as a whole unfeasible. *Flandreau Santee Sioux Tribe v. Noem*, 938 F.3d 928 (8th Cir. 2019), *cert. denied*, 140 S. Ct. 2804 (2020). The Tribe owned a casino on its reservation where the majority of the patrons were non-members. *Id.* at 931. The court found that the legal incidence of the State-imposed use tax on goods and services was on non-Indians. *Id.* at 932. Nonetheless, the court found it sufficient to preempt the tax that "[t]he State's taxation of the Casino amenities would raise their cost to nonmember patrons or reduce tribal revenues from these sales." *Id.* at 936.

In this case, if the Court determines that the Topanga Cession is on the Maumee Reservation, the federal Indian trader statutes preempt the collection of the TPT from the WCDC, at least with respect to sales made to Maumee and its members. As in *Warren Trading Post Co.*, where this Court held that State regulation of Indian traders would interfere with the statutory plan designed to protect Indians from unfair prices and that the State was not entitled to the privilege of taxation without taking on responsibilities toward the Indians, the Indian trader regulations would already apply to the WCDC complex. As *Cent. Mach. Co.* held, the analysis turns on the existence of the statutes, not the status of the seller with respect to licensing under them. And, although the issue has not come directly before the Supreme Court, the Fourth Circuit persuasively reasoned in *Parton* that Indian sellers must comply with the rules and regulations set forth by the Commissioner of Indian Affairs. Because the WCDC would need to comply with the statutory plan Congress authorized the Commission of Indian Affairs to formulate via the Indian trader statutes, the imposition of additional regulation by the State would violate federal law.

Even beyond the sales to Maumee and its members to which the Indian trader statutes would apply, the tax is preempted. It would impose a burden on Wendat that would frustrate its goals of funding its own low-income housing, healthcare for elders, and job creation. While a state's contribution to an enterprise need not be proportional to a tax in order for it to be collected, it cannot exercise the power to tax without taking on any responsibilities toward the Indians. While Maumee may not object to the tax, the State is not contributing any services, which distinguishes this case from *Cotton Petroleum*. Under the provisions of 4 N.D.C. section 212(5), which would apply if the Topanga Cession were on the Maumee Reservation, the State would remit all the proceeds from the tax levied on the WCDC to Maumee. The State's apparent altruism toward Maumee is not an interest that warrants taxing Wendat. Allowing the State to collect and remit the TPT as provided by the statute would transfer revenue generated by Wendat to Maumee with no net positive change in the total funds the Tribes collectively have to work with. It would introduce myriad complications, drive up prices within the range permitted by the regulations on Indian traders, and make the entire complex less sustainable and less accessible to the end consumer.

As a matter of policy, assuming the State Department of Revenue is correct in its assessment "that each Tribe could collect this tax itself," 4 N.D.C. section 212(5), there is no reason to reinvigorate the paternalistic approach that has stunted tribal economic growth in the past. Any State interest in supporting Maumee development initiatives falls short of empowering the State to levy a tax on value generated by Wendat ingenuity and initiative. This is especially true in light of the fact that Wendat purchased this land with the understanding that it was within its own reservation boundaries. If the Court determines it is

not, paying taxes directly to Maumee would set a better precedent for sovereignty than permitting the State to involve itself as a middleman.

If the Court affirms that the Topanga Cession is on the Wendat Reservation, preemption, along with or as an alternative to a finding of infringement, precludes the State from collecting the TPT from the WCDC. Although the Indian trader statutes would not apply and the proposed complex was not designed pursuant to federal acts regulating tribal wildlife management or gaming operations as in *Mescalero Apache* or *Noem*, respectively, *McClanahan* instructs that sovereignty provides the backdrop even when preemption is not made explicit by an act or treaty. Legislation such as the Native American Housing Assistance Self-Determination Act and the Indian Self-Determination and Education Assistance Act reflect Congressional intent to honor tribal self-determination. While the federal government may not be directly involved in the complex, the complex nonetheless entails a comprehensive plan for the benefit of Wendat members that the TPT would disturb. *Noem* suggests that fungible goods also available from off-reservation sellers sold in connection to a tribal operation where the tribe generates value may be considered incidental to the culturally-based attractions and protected from state tax where it would disrupt the bigger plan. Aside from a specific scheme developed by a tribe in cooperation with the federal government, *Mescalero Apache* pointed to the federal government's overriding objective of encouraging tribal self-government and economic development. It would be a huge step backward to make direct federal involvement in the WCDC complex plans a prerequisite to recognizing their legitimacy as advancing tribal economic development and their worthiness of protection from encroachment by the State.

CONCLUSION

For the foregoing reasons, the Respondent respectfully asks the Court to affirm the holding of the Thirteenth Circuit that the Topanga Cession remains in Indian country on the Wendat Reservation and that the State of New Dakota is prohibited from collecting its Transaction Privilege Tax against the Wendat Commercial Development Corporation on the grounds of infringement and preemption.