TEAM T1035

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 THE PETITIONER

Counsel for Petitioner

QUESTIONS PRESENTED

I. Did the Treaty with the Wendat abrogate the Treaty of Wauseon and/or did the Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908) diminish the Maumee Reservation? If so, did the Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892) also diminish the Wendat Reservation or is the Topanga Cession outside of Indian country?

II. Assuming the Topanga Cession is still in Indian country, does either the doctrine of Indian preemption or infringement prevent the State of New Dakota from collecting its Transaction Privilege Tax against a Wendat tribal corporation?

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STATEMENT OF THE CASE

I. Statement of the Proceedings

This appeal before the United States Supreme Court by the Maumee Indian Nation arises from a ruling in which the District Court in *Maumee Indian Nation v. Wendat Band of Huron Indians*, 305 F. Supp. 3d 44 (D. New Dak. 2018) concluded that the Maumee Reservation was not diminished and that the State of New Dakota was permitted to levy its Transaction Privilege Tax directly on a non- member tribal entity. R. at 3. A divided Thirteenth Circuit reversed. *Id.* In *Wendat Band of Huron Indians v. Maumee Indian Nation*, 933 F.3d 1088 (13th Cir. 2020) the Thirteenth Circuit held that while the Maumee Reservation has been diminished, the Wendat Reservation remained intact. *Id.* It further concluded that the State of New Dakota was prohibited from levying its tax on a Wendat tribal entity. *Id.*

The Maumee Nation maintains that the Thirteenth Circuit's opinion on infringement and preemption is contrary to well established Supreme Court precedent. *Id.* The Maumee Indian Tribe requests Declaration that the Topanga Cession is within the Maumee Reservation and that any development by the WCDC of any commercial enterprise with more than $5,000 in gross sales is required to obtain the TPT license and pay the tax to the State of New Dakota to be remitted to the Maumee Indian Tribe. *Id.* at 9.

II. Statement of the Facts

This case is about the Maumee Indian Nation and the Wendat Band of Huron Indians which are both culturally distinct federally recognized tribes with traditional lands in what has now been incorporated as the State of New Dakota. *Id.* at 4. Their traditional land claims overlap, and

their present reservations share a border. *Id.* For more than eighty years the Maumee Indian Tribe and the Wendat Band have disputed the ownership of the Topanga Cession. *Id.* at 7. The Topanga Cession consists almost exclusively of fee lands that have been used for non-commercial purposes and no Transaction Privilege Tax (TPT) is currently collected on these lands. *Id.* TPT is a tax levied on the gross proceeds of sales or gross income of a business and paid to the state for the 'privilege' of doing business in that state. *Id.* at 5. Both parties recognize the existence and general legality of the TPT in New Dakota, although its application to the facts sits at the center of this dispute. *Id.*

Specifically, at issue here is the taxation by the State of New Dakota of a commercial development by the Wendat Band on land claimed by both tribes. *Id.* at 4. The Maumee Nation defends the state tax and argues that the Wendat development is within the Maumee Reservation and so the Maumee Nation should be remitted 3% of the development's gross proceeds. *Id.* If the court disagrees, the Maumee Nation argues in the alternative that the Wendat reservation has also been diminished and so the Wendat development is not in Indian country. *Id.* Such an outcome would entitle the Maumee Nation to 1.5% of the development's gross proceeds under state law. *Id.* In opposition the Wendat Band argues that the State of New Dakota is prohibited from imposing its tax on the Band's commercial development by both the doctrines of infringement and preemption. *Id.* If the court disagrees, the Wendat Band argues that the development is located on the Wendat Reservation where any tax paid by the development would be remitted back to the Band under state law. *Id.*

Each tribe has a treaty with the United States that reserves a set of lands in what is now the State of New Dakota. *Id.* The Maumee Indian Nation dates its rights to the Treaty of Wauseon,

ratified by Congress in 1802. *Id.* at 4-5. This treaty reserves to the Maumee Indian Nation those lands west of the Wapakoneta River. *Id.* at 5. The Wendat Band dates its rights to the Treaty with the Wendat in 1859. *Id.* This treaty reserves to the Band those lands east of the Wapakoneta River. *Id.* Both the Maumee Nation and the Wendat Band were subject to allotment by Congress after passage of the General Allotment Act, P.L. 49–105 (Feb. 8, 1887). *Id.* While the exact accounting is uncertain, the parties generally agree that the Wendat Band was paid $2,200,000 for more than 650,000 acres of land while the Maumee Tribe was paid about $2,000,000 for about 400,000 acres of land. *Id.*

At some point in the 1830s the Wapakoneta River moved approximately three miles to the west. *Id.* This created a sizeable tract of land in Door Prairie County which was west of the Wapakoneta River in 1802 but east of the Wapakoneta River in 1859. *Id.* Both tribes have maintained the exclusive right to these lands since at least 1937 by pointing to the boundary description in their respective treaties. *Id.* Over the last eighty years both tribes have referred to this tract as the "Topanga Cession" although the origins of this phrase have now been lost to history. *Id.* The parties agree that the Topanga Cession consists mostly of land that was declared surplus under one of the two allotment acts, although they disagree about which act. *Id.* at 7. The Maumee Tribe has submitted uncontested evidence that while it received about two million dollars for lands which were sold between 1908 and 1934 under its allotment act, the Bureau of Indian Affairs has lost or spoilt the records which show exactly which parcels the Maumee Tribe was compensated for. *Id.* Both parties agree that virtually no member of either tribe selected an allotment within the Topanga Cession and that the Indians who live there now either live in rented accommodation or purchased their lands in fee from non-Indian homesteaders, the State of New Dakota, and/or the United States. *Id.*

On December 7, 2013 the Wendat Band purchased a 1,400-acre parcel of land in fee from non-Indian owners located within the Topanga Cession. *Id.* at 7. On June 6, 2015 the Band announced its intention to construct upon the parcel a combination residential – commercial development which would include public housing units for low-income tribal members, a nursing care facility for elders, a tribal cultural center, a tribal museum, and a shopping complex owned by the Wendat Commercial Development Corporation (Hereinafter WCDC). *Id.* at 7-8.

On November 4, 2015 representatives from the Maumee Nation approached the WCDC and the Wendat Tribal Council to explain that the Maumee Nation considered the Topanga Cession to be its land. *Id.* at 8. They further argued any dispute regarding land ownership was resolved when the Wendat Reservation was diminished by the 1892 allotment act, and that the Maumee Nation accordingly expected the shopping complex to pay to the State of New Dakota the 3.0% Transaction Privilege Tax. *Id.* The tax would then be remitted back to the Maumee Nation pursuant to §212(5) because the WCDC is a non-member business operating on Maumee lands. *Id.*

The Maumee Nation explained that it desperately needed the funds the TPT would bring in because its largest source of revenue – sustainable timber harvesting – was being threatened by climate change with revenues declining by 12% a year. *Id.* The plan was to use the new funds generated by the TPT to help pay for tribal scholarships and invest in renewable energy and other forms of sustainable economic development to diversify the tribal economy so that it could continue to provide basic services and jobs for Maumee tribal members. *Id.* Finally, the Maumee Nation explained that its average citizen's income is 25% lower than the average income of a Wendat tribal member. *Id.*

The Wendat Tribal Council and the WCDC countered that the Topanga Cession was part of the Wendat Reservation and had been since the Treaty with the Wendat of 1859. *Id.* They further argued that if the Topanga Cession continued to be part of the Maumee Reservation after 1859 that it was diminished by the Allotment Act in 1908 and so reverted back to Wendat control pursuant to the 1859 treaty. *Id.* Finally, the Wendat Band recognizes that the land it has purchased in the Topanga Cession has not been taken into trust and is thus accorded the status of Indian fee land; however it argues that the state of New Dakota has no authority to collect the TPT as long as it is in Indian country because the state's power to collect the tax is either preempted by federal law or infringes upon the Band's own sovereign powers. *Id.*

On November 18, 2015 the Maumee Nation filed their complaint against the Wendat Band asking the federal court for a Declaration that any development by the WCDC in the Topanga Cession would require the procurement of a TPT license and payment of the tax because it is located on the Maumee Reservation. *Id.* The Maumee Nation also asked for a Declaration that the Topanga Cession was not Indian country at all, presumably so one-half of the TPT tax would be remitted to it under §212(6). *Id.*

SUMMARY OF THE ARGUMENT

As in *Parker* and *McGirt*, statutory text decides this case. There is no clear language in the text of the Wendat Treaty that Congress intended for that treaty to abrogate the Wauseon Treaty. Absent any clearly explicit language to abrogate the Wauseon Treaty, it must be inferred that Congress did not intend for abrogation. Congress did not employ the hallmark language required in the 1908 Allotment Act in order to infer diminishment of the Maumee Indian Reservation. Although the phrases "cession" and "public domain" were mentioned, those

phrases were not coupled with an unconditional commitment for a specific sum to be paid to the Maumee Nation for its opened lands. Unlike cases where clear intent of diminishment was found, the 1908 Act contained no such language.

The lack of any promise for unconditional payment of allotments of open land not sold, merely opened the Maumee reservation land to settlement and provided that the uncertain future proceeds of settler purchases should be applied to the Indians' benefit. This type of Surplus Land Act only allowed for non-Indian settlers to own land on the reservation and did not diminish the reservation boundaries in any way.

The "history surrounding the passage of the" relevant statutes, and subsequent history in ensuing years, are no help to the Respondent's argument that the Maumee Reservation was diminished. In fact, Congressional record states that the Maumee Indians were of high intelligence. Therefore, they would have understood if they were ceding such a large portion of their reservation and would likely not have agreed to such terms without just compensation. Additionally, *Parker* reinforced the notion that subsequent demographic history is relevant unless it is supporting the text. Here is the demographic history is similar to *Parker*, where the Maumee were absent from the land for years. However, as stated in Parker, that absence along does not infer diminishment.

Moreover, because the Maumee Indian Reservation was not diminished, the Topanga Cession is considered Indian Country. The Wendat Corporation that is subject to the tax at issue is wholly owned by the Wendat Tribe. Therefore, federal preemption precludes the State of New Dakota from levying its Transaction Privilege Tax on the Wendat Corporation's activities on the Maumee Reservation. The State of New Dakota even admitted that the Tribes could leverage

this tax themselves, and by allowing Tribes to do so would ensure sufficiency and support tribal self-governance. Therefore, this Court should reverse the Thirteenth Circuit.

DISCUSSION

I. THE MAUMEE INDIAN NATION'S RESERVATION UNDER THE 1801 TREATY HAS NOT BEEN DIMINISHED.

In diminishment cases, this Court asks whether Congress has diminished reservations that the United States government promised by treaty to preserve and that Tribes sacrificed their ancestral lands and lives to obtain. The test for diminishment reflects the magnitude of that sacrifice, and is therefore, stringent and based primarily on statutory text. *Parker* and *McGirt* makes that clear.

As established in this Court's precedent, diminishment will not be lightly inferred. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020) (quoting *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)). This Court's approach on this issue is so stringent and rigorous because diminishment cases have three underlying principles that reveal why this Court demands clear and explicit evidence in the text in order to infer diminishment.

First, because only Congress can diminish a reservation's boundaries, statutory text is the only dependable evidence of that intent. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). This has been paramount across the board for all areas involving statutory interpretation. *Id.* Cases involving Indian reservations are no different. *Nebraska v. Parker*, 136 S. Ct. 1072, 1079 (2016).

Second, the standard for sovereign rights is even more stringent, and again this is not specific to reservations. *E.g., Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003) (abrogation of immunity must be "unmistakably clear"). This rule also applies to tribal

governments, who retain their historical sovereign authority. *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014).

Third, the standard is more stringent because of "the canons of construction applicable in Indian law" that are "rooted in the unique trust relationship [with] Indians." *Oneida City v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 247 (1985). This Court has long held that Indian treaty language must be "interpreted liberally in favor of the Indians." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200 (1999). "Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so." *Id.* at 202. The same canons of construction apply to statutes. *City of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251,269 (1992).

A. The 1859 Treaty with The Wendat Did Not Abrogate The 1801 Treaty with The Wauseon.

The 1859 Treaty with The Wendat did not abrogate the 1801 Treaty with The Wauseon. Although Congress may abrogate Indian treaty rights through a later-enacted statute, there must be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other and chose to resolve the conflict by abrogating the treaty." *South Dakota v. Bourland*, 508 U.S. 679, 693 (1993). There is no clear language in the text of the Wendat Treaty that Congress intended for that treaty to abrogate the Wauseon Treaty. Treaty of the Wendat, March 26, 1859, 35 Stat. 7749; Treaty of Wauseon, Oct. 4, 1801, 7 Stat. 1404. If Congress had intended the Wendat Treaty to abrogate the Wauseon Treaty and their right to the Topanga Cession, thereby diminishing the Maumee Reservation boundaries, it would have explicitly stated so. However, no such language exists.

In addition to the text of a treaty, courts "may look…to the history of the treaty, the negotiations, and the practical construction adopted by the parties" to deduce its meaning. *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943). However, we do not have access to any legislative history of the Wendat Treaty or its negotiations that would infer an intent to abrogate the Wauseon Treaty. The only legislative history that we have access to is the Congressional record regarding the Allotment Acts. Nothing in that legislative history implies that Congress intended to abrogate the Wauseon Treaty. As mentioned in the previous section, the same stringent canons of construction are applied to treaties and statutes involving Indian tribes. A straightforward application of these stringent standards establishes that the 1801 Treaty with the Wauseon was not abrogated by the Treaty with the Wendat.

B. The Maumee Allotment Act of 1908 Did Not Diminish the Maumee Reservation.

As *Parker* unanimously explained, "only Congress can divest a reservation of its land and diminish its boundaries, and its intent to do so must be clear." *Parker*, 136 S. Ct. at 1078-79 (quoting Solem, 465 U.S. at 470). "[W]e start with the statutory text," because "statutory language" is the "most probative" evidence of Congressional intent. 136 S. Ct. at 1078-79 (quoting *Solem*, 465 U.S. at 470; *Hagen v. Utah*, 510 U.S. 399, 411 (1994)). Thus, *Parker* examined the text and found "none of the[] hallmarks of diminishment" that the Court's prior cases had identified. *Id.* at 1079. *Parker* found that the petitioners had "failed at the first and most important step," concluding that Congress did not intend to diminish. *Id.* at 1080. *Parker* examined statements from legislators suggesting that the reservation had vanished, and subsequent demographic history that the tribe was absent for almost 120 years. *Id.* at 1080-81. However, the Court noted that its precedents make relevant only "unequivocal evidence," and

the Court was unwilling to let mixed historical evidence overcome a lack of text showing clear intent to diminish. *Id.* at 1079-80.

Here, as in *Parker*, the simple dispositive, and undisputed fact is that the Maumee Allotment Act is ambiguous and does not contain clear language of diminishment. As the canons of construction require, any ambiguities are to be restored in favor of the Indians. *Mille Lacs*, 526 U.S. at 206.

First, the relevant statute does not contain all the textual "hallmarks"- or any other clear text- that reveal Congress's intent to go beyond altering land title to "diminish reservation boundaries." *Parker*, 136 S. Ct. at 1079. This Court has cataloged examples of the hallmark language recognized as an intent to diminish. An "explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggest that Congress meant to divest from the reservation all unallotted opened lands." *Solem*, 465 U.S. at 470 (citing *DeCoteau v. District County Court*, 420 U.S. 425, 444-45 (1975)). "When such language of cession is buttressed by an unconditional commitment from Congress to compensate the Indian tribe for its opened land, there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." *Solem*, 465 U.S. at 470-71.

Unlike *Parker*, the relevant statute here does reference "cession," however that cession is not coupled by an unconditional commitment from Congress to compensate the Maumee for its opened land. Act of May 29, 1908, chp. 818 § 4 ("Allotment Agreement"). The allotment actually states, "nothing in this law provides for the unconditional payment of any sum to the Indians but that the price of said lands actually sold shall be deposited with the United States treasury to the credit of the Indians." This is similar to *Parker*, where "rather than receiving a fixed sum for all of the disputed land, the Tribe's profits were entirely dependent upon how

many nonmembers purchased the appraised land." *Parker*, 136 S. Ct. at 1079. The Court concluded from that text that it was clear that the Act fell into another category of surplus land Act; namely those that "merely opened reservation land to settlement and provided that the uncertain future proceeds of settler purchases should be applied to the Indians' benefit." *Id.* at 1079-80. (citing *DeCoteau*, 420 U.S. at 448). Schemes such as this only allow for non-Indian settlers to own land on the reservation." *Id.* at 1080 (citing *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 356 (1962)). In doing so, they do not diminish the reservation's boundaries. *Id.*

In applying this same analysis to the current case, the East side of the Maumee Reservation was merely opened up for white settlement and only provided for uncertain future proceeds to the Maumee. This scheme only allowed for white settlers to own land on the Maumee reservation, and it did not diminish the reservation's boundaries.

The current case is distinguishable from cases where the Court found reservations to be diminished by Allotment Acts. In *South Dakota v. Yankton Sioux Tribe*, the Tribe agreed to "cede, sell, relinquish, and convey to the United States" all of the unallotted lands on the reservation. 522 U.S. 329, 338 (1998). Additionally, the United States agreed to compensate the Tribe in a single payment of $600,000, which amount to $3.60 per acre. *Id.* A majority of the agreement focused on the payment and distribution of that sum. *Id.* The Court ultimately held that the Act contained the "most certain statutory language, evincing Congress' intent to diminish the Yankton Sioux Reservation by providing for total cession and fixed compensation. *Id.* at 357.

Nowhere else in the 1908 Maumee Allotment Act is there specific reference to the cession of Indian interests in the opened lands or any change in existing reservation boundaries.

In *Solem*, certain provisions of the Act strongly suggested that the unallotted opened lands would remain an integral part of the Cheyenne River Indian Reservation for the immediate future. *Solem*, 465 U.S. at 474. This included language that the Secretary was authorized to set aside portions of the opened lands "for agency, school, or religious purposes." *Id.* at 474. The Court noted that Congress would not have set aside land for such purposes if it did not anticipate that the opened area would remain part of the reservation. *Id.* Similar here, § 7 of the Act provided that two specific sections of the opened land would be reserved for the use of the common schools and paid for by the United States. Act of May 29, 1908, chp. 818 § 7 ("Allotment Agreement"). It is unlikely that Congress would have done so if the opened land was not to remain part of the Maumee reservation. This interpretation is also supported by § 2 of the Act, under which the Secretary was given permission to accept payment from Maumee Indians who already owned allotments in the opened area. Act of May 29, 1908, chp. 818 § 2 ("Allotment Agreement"). Meaning that Maumee Indians already lived in the open area of land and were not being forced to sell their allotments.

Also, in § 2, Congress instructed the Geological Survey to examine the lands within the Maumee reservation, and if any lands were found to bear coal, they were to be reserved from allotment or disposal. *Id.* As the Court found in *Solem*, the apparent reason for this was to reserve those mineral resources for the whole Tribe. *Solem*, 465 U.S. at 474.

The 1908 Allotment Act with the Maumee does reference language of returning land to the "public domain." Act of May 29, 1908, chp. 818 § 1 ("Allotment Agreement"). However, the Court in *Solem* held that reference to open areas as being in "the public domain" are merely isolated phrases and are hardly dispositive of diminishment. *Solem*, 465 U.S. at 475. When balanced against the lack of a fixed sum for the opened area for sale to non-Indian settlers,

"cession" and "public domain" these two phrases cannot carry the burden of establishing an express congressional purpose to diminish the Maumee Reservation. *Id.* (citing *Mattz v. Arnett*, 412 U.S. 481, 497-499 (1973).

C. The Historical Evidence and Demographic History Reinforces the Text.

Evidence from the "history surround the passage of the Act," reinforces the text. *Parker*, 136 S. Ct. at 1080. Of course, such evidence is distinctly secondary, as with legislative history generally. *Id.* Here the history supports the Petitioner. True, during the key period, many Congressmen believed that Indian Territory reservations---like all reservations-- "were a thing of the past" to be extirpated. *Solem*, 465 U.S. at 468. However, if read as a whole, the Congressional record in 1908 confirms that confirms that the steps taken would not diminish the Maumee Reservation. 42 Cong. Rec. 2345 (1908).

Additionally, the Congressional Record from 1908 also describes the Maumee Tribe as a very intelligent class of Indians. *Id.* Surely if the negotiations surrounding the Allotment Act had made it clear that the Maumee would be giving up a third of their reservation, they would not have agreed to such terms. There is also evidence in the Congressional record that the Maumee had made requested several amendments to the Act. However, unlike in Yankton Sioux, there is no evidence that negotiations between the Commissioner of Indian Affairs and the Maumee Indians unambiguously "signaled [the Tribe's] understanding that the cession of the surplus lands dissolved tribal governance" of the Eastern half of the reservation. *Yankton Sioux Tribe*, 522 U.S. at 353. In fact, the Maumee Nation has held the Topanga Cession out as part of its reservation since at least 1937. R 5.

Parker slammed the door on using demographic history" for anything beyond "reinforc[ing]" the text. *Parker* thus found no diminishment even though the Omaha "Tribe was

almost entirely absent ... for more than 120 years" and did "not enforce any ... regulations" or provide "any social services," and even though the federal government "for more than a century and with few exceptions ... treated the disputed land as Nebraska's." 136 S. Ct. at 1081-82.

Here, both parties agree that virtually no member of either tribe selected an allotment within the Topanga Cession and that the Indians who live there now either live in rented accommodation or purchased their lands in fee from non-Indian homesteaders, the State of New Dakota, and/or the United States. R. 7. However, as stated in *Parker*, the fact that no member of the Maumee Nation selected a tract of land in the Topanga Cession and the State of New Dakota has treated the Topanga Cession as part its land, is dispositive absent explicit text that supports diminishment. Therefore, the Topanga Cession is still a part of the Maumee Reservation, and considered Indian Country for that reason.

II. FEDERAL LAW PREEMPTION PREVENTS THE STATE OF NEW DAKOTA FROM COLLECTING TRANSACTION PRIVILEGE TAX IN INDIAN COUNTRY.

The State of New Dakota is preempted from collecting its transaction privilege tax against the Wendat Tribal Corporation for its activity in what is known as the Topanga Cession. The Topanga Cession is a part of the Maumee Reservation, and therefore, is considered Indian Country.[1] "Absent explicit congressional direction to the contrary, we presume against a State's having the jurisdiction to tax within Indian country[.]" *Okla. Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 128 (1993).

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[1] The definition is:

[T]he 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.

18 U.S.C. § 1151.

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. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980). The State of New Dakota's Transaction Privilege Tax currently at issue places a tax on the Wendat Commercial Development Corporation, which is a Section 17 IRA Corporation. This is a Corporation wholly owned by the Wendat Band. Therefore, New Dakota State law regarding the Transaction Privilege Tax is inapplicable to the current case.

When a state tax falls on a non-Indian in Indian country and Congress has not expressly allowed (or prohibited) the tax, the Court uses "*Bracker* balancing" to determine whether the state can overcome the presumption by demonstrating that the taxation advances the state's legitimate interests while not unduly burdening those of the tribe and the federal government. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 150-51 (1980). However, because the Wendat Corporation at issue is solely owned by the Tribe, it is unnecessary to apply the *Bracker* balancing test here.

The Maumee Nation in the Courts below supported the State of New Dakota Tax at issue because it would be remitted the 3% collected by the State. However, even the Department of Revenue for the State of New Dakota recognizes that each Tribe could collect this tax itself, and that the State collects for sufficiency purposes. Therefore, it would make sense for the Maumee Tribe to begin collecting this tax from the Wendat Corporation itself, thereby avoiding any confusion that the State has the power to exercise taxing authority on the Maumee Reservation, when that conduct involves a tribally owned corporation.

Judge Lahoz-Gonzales' concurrence was correct in finding that the State of New Dakota is preempted from requiring the Tribe to obtain a TPT license based on the long history of Indian

preemption cases developed by the U.S. Supreme Court *if the Wendat Band's development in the Topanga Cession is in Indian country*. As stated throughout this brief, the Topanga Cession remains within the boundaries of the Maumee Reservation and is therefore, considered Indian Country. As such, this Court should reverse the Thirteenth Circuit's finding that the Maumee Reservation was diminished and find sufficient evidence to deny the State the right to tax.

CONCLUSION

For the aforementioned reasons, Petitioner respectfully requests this Court reverse the Thirteenth Circuit in its entirety.