No. 20-1104

IN THE

Supreme Court of the United States

MAUMEE INDIAN NATION,

Petitioners,

v.

WENDAT BAND OF HURON INDIANS,

Respondent.

Respondent's Brief on the Merits

TEAM NO. T1038

ATTORNEY FOR RESPONDENT

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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?

STATEMENT OF THE CASE

I. Statement of the Facts

The Maumee Indian Nation and the Wendat Band of Huron Indians are both culturally distinct, federally recognized tribes of between 1,500 and 2,000 members with traditional lands in what has now been incorporated as the State of New Dakota. *Record on Appeal* ("*ROA*" hereinafter) at 4. 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*. A Transaction Privilege Tax (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 6. 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.

The movement of the Wapakoneta River in the 1830s created ambiguity as to the boundaries of the Maumee and Wendat Band Reservations. *ROA* at 5. The Maumee Reservation was established by the Treaty of Wauseon, ratified in 1802, where the "boundary line between the United States and Maumee Nation, shall be the western bank of the river Wapakoneta." Treaty of Wauseon art. 3, Oct. 4, 1801, 7 Stat. 1404. The Treaty with the Wendat in 1859 reserved to the Wendats those lands east of the Wapakoneta River. *ROA* at 5. The movement occurred after the Treaty of Wauseon and before the Treaty with the Wendat in 1859 and created a tract of land in Door Prairie County which was west of the River in 1802 but east of the River in 1859. *Id.* at 4-5. To further complicate the Maumee and Wendat Reservation lines, both Reservations were subject to allotment by Congress through the Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908) (hereinafter "Maumee Allotment Act) and the Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892) (hereinafter "Wendat Allotment Act").

ROA at Appendix 1. For more than eighty years the Maumee Indian Tribe and the Wendat Band have disputed the ownership of the Topanga Cession but had refrained from asking a federal court of the United States to resolve the dispute. *Id.* at 7.

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 (WCDC) (a Section 17 IRA Corporation wholly owned by the Wendat Band with 100% of corporate profits remitted quarterly to the tribal government as dividend distributions). *Id*. If constructed the WCDC's shopping complex would include a café serving traditional Wendat cuisine, a grocery store offering both fresh and traditional foods to help prevent the area from becoming a food desert, a salon/spa, a bookstore, and a pharmacy. *Id*. at 8. The WCDC will use the proceeds to fund the tribal public housing and nursing care facility whose operating costs would otherwise pose a financial hardship to the Wendat Band and could not be constructed. The café, cultural center, and museum are expected to be particularly helpful in raising revenue by attracting non-Indian consumers who may live outside of the reservation. *Id*.

On November 4, 2015 representatives from the Maumee Nation approached the WCDC and the Wendat Tribal Council reminding them that the Maumee Nation considered the Topanga Cession to be its land, that 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*. at 8. 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 Wendat Tribal Council and the WCDC replied that the Topanga Cession was part of the Wendat Reservation and had been since the Treaty with the Wendat of 1859. *Id.* At 8. 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 Bans's own sovereign powers. *Id.*

II. PROCEDURAL HISTORY

On November 18, 2015 the Maumee Nation filed a 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. *ROA* at 8. In the alternative, the Maumee Nation 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*. The district court held 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.

The Court of Appeals for the Thirteenth Circuit reversed the District court's decision and held that the Treaty with the Wendat of 1859 makes it clear the Maumee Nation's claim to the Topanga Cession has been abrogated and therefore the Topanga Cession is located in Indian country on the Wendat Reservation. *Id* at 10. The court also noted that the State of New Dakota is nonetheless prohibited from requiring the Band or the WCDC to procure a TPT license or pay the tax as the imposition of the tax infringes on tribal sovereignty and should be subject to Indian preemption under Supreme Court precedent. *Id* at 11.

SUMMARY OF THE ARGUMENT

When determining the scope of the Maumee and Wendat Reservations according to the Treaty of Wauseon, the Treaty with the Wendat of 1859, and the Allotment Acts, the Topanga Cession is located in Indian country on the Wendat Reservation. This Court should affirm the Court of Appeals' rulings that (1) the Treaty with the Wendat of 1859 abrogated the Maumee Nation's claim to the Topanga Cession; and (2) the Wendat Allotment Act does not diminish the Wendat Reservation. *Wendat Band of Huron Indians v. Maumee Indian Nation,* 933 F.3d 1088 (13th Cir. 2020). Regarding the first ruling, the Treaty of Wauseon is in direct conflict with the Treaty with the Wendat of 1859. Therefore, as the treaty later in date, the 1859 Treaty abrogated the Maumee Nation's claim to the Topanga Cession under the Treaty of Wauseon and placed the Topanga cession within the Wendat reservation. In addition, the Maumee Allotment Act abrogated the Maumee's interest in the eastern quarter of the lands. Regarding the second ruling, there is no language sufficient in the Wendat Allotment Act to diminish the Wendat Reservation and the Topanga Cession remains on the Wendat reservation within Indian Country.

The Indian preemption doctrine, also known as the *Williams* test, refers to two different barriers to state regulation of Indians or Indian land: (1) federal preemption and (2) Indian sovereignty. *Blunk v. Ariz. DOT*, 177 F.3d 879, 881 (9th Cir. 1999) (citing David H. Getches, Charles Wilkinson, & Robert A Williams, Jr., *Cases and Materials on Federal Indian Law* 432-437 (4th ed. 1998)). The State of New Dakota's Transaction Privilege Tax (TPT) is federally preempted because the power to regulate commerce among Indian Tribes rests solely in congress and the field of taxation has been regulated by comprehensive federal judicial decisions. Furthermore, the TPT on the Wendat Commercial Development Corporation

(WCDC) infringes on tribal self-governance because the WCDC is a tribal entity within Indian Country.

ARGUMENT

I. The court in *Wendat Band of Huron Indians v. Maumee Indian Nation* Correctly Concluded that the Topanga Cession is Located in Indian Country on the Wendat Reservation.

The Treaty with the Wendat of 1859 was ratified after the Treaty of Wauseon, abrogated the Maumee Nation's claim to the Topanga Cession, and placed it within the Wendat reservation. The Constitution provides that treaties and statutes are "the supreme law of the land" considered with equal force and weight. U.S. Const. art. VI, § 2. A treaty is a written agreement between sovereigns. Vienna Convention on the Law of Treaties art. 2, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331. In this case, the Treaty of Wauseon and the Treaty with the Wendat of 1859 are both ratified between the United States and Native American Tribes. These treaties determine the scope of the Maumee Nation and the Wendat Band's rights and claims to certain New Dakota land. When there is an inconsistency present between treaties and statutes, "the one last in date will control the other." *Whitney v. Robertson*, 124 U.S. 190, 194 (1888). This analysis can determine whether certain treaty rights and claims are abrogated by later legislative acts. Similarly, Tribal claims to land may be terminated or modified by treaty or agreement with affected tribes, or by unilateral acts of Congress. 1 Cohen's Handbook of Federal Indian Law § 3.04(3) (2019). This analysis involves determining "whether Congress intended an act opening a reservation to terminate reservation boundaries, or otherwise diminish the size of the reservation." *Id.* (citing S*olem v. Bartlett*, 465 U.S. 463 (1984)).

A. There is Sufficient Congressional Intent in the Treaty with the Wendat of 1859 to Abrogate the Maumee Nation's Claim to the Topanga Cession under the Treaty of Wauseon.

Like statutory interpretation, the interpretation of a treaty begins with its text. *Medellin v. Texas*, 552 U.S. 491, 506 (2008) (citing *Air France v. Saks,* 470 U.S. 392, 396–397 (1985)). A key difference is that Indian law canons of constructions are distinct from the standard principles of statutory interpretation. *See generally* 1 Cohen's Handbook of Federal Indian Law § 2.02 (2019). The basic Indian law canon follows the rule of liberal construction, where treaties, agreements, statutes, and executive orders are to be liberally construed in favor of the Indians and any ambiguities resolved in their favor. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200 (1999) (citing *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.,* 443 U.S. 658, 675–676 (1979) and *Winters v. United States,* 207 U.S. 564, 576 (1908)). This entails interpreting treaties as tribes meant and would have understood them at the time, not according to the understandings of contemporary federal agents. 1 Cohen's Handbook of Federal Indian Law § 2.02 (2019) (citing *Washington State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1011 (2019)). When dealing with ratified treaties, courts also consider the negotiation and drafting history of the treaty, *Medellin* 552 U.S. at 506, as well as the practical construction adopted by the party, *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 196. If abrogating a treaty, courts expect congress to do so explicitly and clearly. *Id.* at 196.

Indian law canons of construction are complicated when involving multiple treaties and/or acts of congress. *E.g., Id.* (the Supreme Court applied the Indian law canons to subsequent treaties and a subsequent statute in a single case). The Constitution places treaties and statutes on equal footing as the supreme law of the land. U.S. Const. art. VI, § 2. "When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but, if the two are inconsistent, the

one last in date will control the other: provided, always, the stipulation of the treaty on the subject is self-executing." *Whitney*, 124 U.S. at 194; *e.g.*, *Medellin* 526 U.S. at 1189 (holding a later in time federal statute supersedes inconsistent treaty provisions). This Court has characterized the duty of the courts is to "construe and give effect to the latest expression of the sovereign will." *Whitney*, 124 U.S. at 195. Because treaties and statutes are given the same effect, each is an interchangeable instrument given the same force and weight. U.S. Const. art. VI, § 2. Although *Whitney* and *Medellin* deal with each treaty and statute, the same analysis should be applied to scenarios involving multiple treaties or multiple statues.

The first issue involves interpreting two ratified treaties between two different tribes, namely the Treaty of Wauseon with respect to the Maumee Nation and The Treaty with the Wendat of 1859 with respect to the Wendat Band. The Chippewa case provides some instruction on dealing with subsequent treaties, but that case discusses subsequent treaties the United States entered into with the same tribe. In this case, at issue are subsequent treaties respecting different tribes with similar claims. The Indian law canons of construction directs courts to construe each treaty in favor of the contracting Indians. However, both Tribes invoke each treaty to justify the same claim to the Topanga Cession and an outcome granting both claims is impossible. Therefore, this Court should follow the rule that the treaty last in date should control the other. The Treaty with the Wendat of 1859 acts as the latest expression of the sovereign will and should control the conflicting claims found in the Treaty of Wauseon. Therefore, the Wendat's claim to the Topanga Cession should be favored over the Maumee's claim to the Topanga Cession.

The Indian law canons of construction provide guidance on interpreting individual treaties, but provide little guidance on interpreting treaties in light of each other. *See generally* 1 Cohen's

Handbook of Federal Indian Law § 2.02 (2019). Although the general rule under Indian law canons of construction is that courts expect congress to do so explicitly and clearly, this analysis of a treaty and subsequent statute where as this issue deals with the implications of a subsequent treaty on a former treaty and the application of the later in time rule and other principles of statutory interpretation. This court has established certain rules when dealing with inconsistent statutes, including when repeals by implication are proper. *See Posadas v. Nat'l City Bank of New York*, 296 U.S. 497, 503 (1936). Although this issue deals with two competing ratified treaties, it is settled that treaties and statutes are to be treated the same with equal force and consideration, *see* U.S. Const. art. VI, § 2, and thus these standards may apply by analogy to scenarios involving treaties. Normally, repeals by implication are not favored and "[w]here there are two acts upon the same subject, effect should be given to both if possible." *Id. Posadas* describes two categories of repeals by implication:

> (1) when there is an irreconcilable conflict between provisions of the acts, the later act repeals the earlier act by implication to the extent of the conflict; and
>
> (2) when a later act covers the whole subject of the earlier act and is clearly intended as a substitute, the later act repeals the earlier act by implication.

Id. These categories should be utilized in the context of competing treaties to determine whether a treaty later in time sufficiently abrogates the rights established by previous treaties.

Like the Court of Appeals, this Court should treat the Treaty with the Wendat of 1859 to have abrogated Maumee Nation's claim to the Topanga Cession. Although the circumstances of Treaties do not fall into the second repeal by implication, it falls into the first repeal by implication category, where there is an irreconcilable conflict between claims granted by both treaties. In the Treaty of Wauseon, the "boundary line between the United States and Maumee Nation shall be the western bank of the river Wapakoneta." Treaty of Wauseon art 3,

Oct. 4, 1801, 7 Stat. 1404. In the Treaty with the Wendat, the Wendat retains "their title and interest to the lands . . . East of the Wapakoneta River." Treaty with the Wendat art. 2, March 26, 1859, 35 Stat. 7749. Since the position of the Wapakoneta River changed after the Treaty of Wauseon was ratified and before the Treaty with the Wendat of 1859 was ratified, this presents an irreconcilable conflict where both Treaty Articles describe the Topanga Cession to be in possession of both tribes. Therefore, as the later act, the Wendat Band's claim to the Topanga Cession under the Treaty with the Wendat of 1859 should control over the Maumee's claim to the Topanga Cession per the later in time rule and the rules of repeal by implication.

A limitation to the two categories of repeals by implication is that there must be clear congressional intent to repeal. *See Posadas,* 296 U.S. at 503. Otherwise the later act functions as a continuation and not a substitute of the earlier act. *Id*. To determine congressional intent to abrogate with respect to treaties requires falling back on the Indian law canons of construction. To determine whether treaty abrogated rights previously guaranteed, "we look beyond the written words to the larger context that frames the Treaty, including "the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Mille Lacs Band of Chippewa Indians,* 526 U.S. at 196 (quoting *Choctaw Nation v. United States,* 318 U.S. 423, 432 (1943)).

The legislative history behind the Treaty with the Wendat of 1859 supports an intent to abrogate the Maumee Nation's claim to Topanga Cession. When enacting the Treaty, Senator Solomon Foot of Vermont expressly considered the implications of the Treaty of Wauseon and the claims of the Maumee Nation. Cong. Globe, 35th Cong., 2nd Sess. 5411-5412 (1859). They acknowledge the Maumee Nation was the first nation to yield their claims "to the bulk of [their] territory" in New Dakota. *Id*. In addition, they point to the Treaty of Wauseon and explain that

since the ratification of the treaty, "the Maumee have been reduced in number and no longer inhabit parts of their territory." *Id*. The history of the Treaty with the Wendat of 1859 shows that Congress contemplated the Maumee's claims under the Treaty of Wauseon when ratifying the treaty later in time. This contemplation is sufficient to support a congressional intent to abrogate any conflicting claim in the Treaty of Wauseon. Furthermore, the Wendat did not intend to contract to retain land that would not be in their possession and remain in possession of another tribe, in this case the Maumee Nation.

The Treaty with the Wendat of 1859 abrogated the Maumee Nation's claim to the Topanga Cession in the Treaty of Wauseon. The Treaty with the Wendat is the treaty later in time and therefore controls. Moreover, the Treaty with the Wendat falls within the first repeal by implication category and reflects sufficient congressional intent to abrogate conflicting claims existing within the Treaty of Wauseon. The Maumee Nation does not have any claim to the Topanga Cession.

B. The Maumee Allotment Act Diminished the Maumee Reservation While the Wendat Allotment Act Maintained the Topanga Cession in Indian Country on the Wendat Reservation.

At issue in this case is the status of the Topanga Cession, whether it is located in Indian Country, and if so, whether that Indian Country is located on the Maumee or the Wendat reservation. The statutory definition of Indian Country is comprised of three parts:

> (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. Termination of a reservation land's Indian country status may occur through treaty, agreement, or by a unilateral act of congress. 1 Cohen's Handbook of Federal Indian Law § 3.04(3) (2019). Most disputes around the termination of Indian Country status arise from sources of law that purports to open Indian reservations to non-Indian settlements through the purchase of reservation land designated as "surplus", and the disposition of those surplus lands. *Id*. Termination that results in the taking of property interests always requires compensation. *Id*. (citing *United States v. Sioux Nation*, 448 U.S. 371 (1980)). In this case, the Maumee Allotment Act and the Wendat Allotment Act are the sources of law that determines the Indian Country status of the Topanga Cession.

Although canons of liberal construction were first applied in the context of treaty interpretation, courts have expanded these canons to reach other sources of law such as agreements, statutes, executive orders, and federal regulations. 1 Cohen's Handbook of Federal Indian Law § 2.02(1) (2019) (*Winters v. United States*, 207 U.S. 564 (1908)). Therefore, these canons are utilized when interpreting the Allotment acts and its effect on the status of Indian Country. However, there are some limitations when applying these canons to the Allotment acts in question. First, these canons will not apply if the statute is "clear on its face." 1 Cohen's Handbook of Federal Indian Law § 2.02(1) (2019). Second, determining the issue of reservation diminishment requires clear congressional intent to do so, which overcomes the presumption in favor of the continued existence of a reservation. *Id.* (citing *Solem*, 465 U.S. at 472). Assessment of whether the statute exhibits Congressional intent to diminish "start[s] with the the statutory text . . . . [and] also 'examine[s] all the circumstances surrounding the opening of the reservation.'" *Nebraska v. Parker*, 136 S. Ct. 1072, 1079 (2016) *(citing Hagen v. Utah*, 510 U.C. 399, 412 (1994)). Moreover, this Court has developed a three-part inquiry to aid with

determining whether Congress "intended an act opening a reservation to terminate reservation boundaries, or otherwise diminish the size of the reservation. *See* 1 Cohen's Handbook of Federal Indian Law § 3.04(3) (2019); *see also Solem*, 465 U.S. at 472 (1984). This inquiry involves analysis of (1) statutory language, (2) statutory history, and (3) review of post enactment history and demographics. *Id*.

1. The Maumee Allotment Act expressly abrogated the Maumee's interest in the eastern quarter of the Maumee Reservation.

The statutory language of the Maumee Allotment Act explicitly cedes all of the Maumee Nation's interest in the eastern quarter of the reservation, thereby establishing sufficient congressional intent to diminish the Maumee Reservation. The first step of the *Solem* test to determine congressional intent to diminish starts with the statutory language. When determining congressional intent to abrogate treaty rights this Court has applied two different standards. The stricter standard is "Congress must make its intent to abrogate express through the use of 'explicit statutory language.'" *Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. at 690; *see also Mille Lacs Band of Chippewa Indians*, 526 U.S. at 200. Statutory language is the most probative evidence and "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to diverse form the reservation all unallotted opened lands." 1 Cohen's Handbook of Federal Indian Law § 3.04(3) (2019). Moreover, when explicit statutory 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 the tribe's reservation to be diminished." *Solem*, 465 U.S. at 472-71. However, explicit cession language and unconditional compensation are not prerequisites for finding congressional intent to diminish. *Id*. The lesser standard is met if Congress's intent is "clear

and plain." 1 Cohen's Handbook of Federal Indian Law § 3.04(3) (2019) (citing *United States v. Dion*, 476 U.S. 734, 740 (1986) (holding that, although preferable, explicit statements by Congress is not a per se rule)). This involves analyzing the circumstances surrounding the opening of the reservation, *Nebraska*, 136 S. Ct. At 1079.

The Maumee Allotment Act of 1908 abrogates the Maumee's claim to Topanga Cession because it indicates the Maumee's agreement to "cede their interest in the surplus lands to the US, where it may be returned [to] the public domain by way of this act." Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908). This unambiguous language amounts to a total surrender of tribal interests in the eastern quarter of the Maumee reservation. This explicit language of cession is sufficient, and provisions of unconditional compensation is not a necessary condition to finding congressional intent to diminish. Regardless if the Maumee Allotment is ambiguous, the Treaty with the Wendat sufficiently abrogates the Maumee's treaty claims to Topanga Cession. The eastern quarter of the Maumee reservation included the Topanga Cessation at the time the Treaty of Wauseon was ratified. After the Maumee Nation's claim to the Topanga Cessation was abrogated by the Treaty with the Wendats, the Maumee Allotment Act of 1908 further diminished the eastern quarter. Therefore, the reservation cannot and does not include land in or near the Topanga Cession.

The second part of the *Solem* test looks to the circumstances of the congressional act if the statutory language is ambiguous. This requires looking at legislative reports and negotiations of the Congress that passed the statute to determine whether intent to diminish the reservation is present. 1 Cohen's Handbook of Federal Indian Law § 3.04(3) (2019). Because the cession language of the Maumee Allotment Act is unambiguous, this Court does not need

to look further to circumstantial evidence to find congressional intent to diminish. Congressional intent to diminish is present in the statutory language.

The third and final part of the *Solem* test reviews the post-enactment history as additional circumstantial evidence. This looks to acts by Congress, the Bureau of Indian Affairs, and local authorities with regard to the unallotted open lands within the years following the opening of the reservation. 1 Cohen's Handbook of Federal Indian Law § 3.04(3) (2019). This Court has focused on demographics within this circumstantial evidence. "Where 'non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred.'" 1 Cohen's Handbook of Federal Indian Law § 3.04(3) (2019) (citing *Solem*, 465 U.S. at 471). However, this Court has limited the availability of demographic evidence and refused to rely on it when the statutory language does not support a finding of diminishment. *Nebraska*, 136 S. Ct. at 1072. Because the cession language of the Maumee Allotment Act is unambiguous, this Court does not need to look further to circumstantial evidence to find congressional intent to diminish. Congressional intent to diminish is present in the statutory language.

2. The Wendat Allotment Act did not diminish the Wendat Reservation and Topanga Cessation remains located on the Wendat Reservation.

This Court should affirm the Court of Appeals ruling that Topanga Cession is located in Indian country on the Wendat Reservation because there is no sufficient language in the Wendat Allotment Act that diminishes the Wendat Reservation. First, the statutory text of the Wendat Allotment Act does not include any explicit congressional intent to diminish the Wendat Reservation. The Wendat Allotment Act makes no reference to the cession of the Wendat's interests in the surplus land. This is contrasted by the explicit language referencing

cession in the Maumee Allotment Act. Additionally, there is no provision expressing unconditional compensation. By contrast, the proceeds from the disposal of lands are to be placed in the Treaty of the United States as credit for the Wendat Band of Indians as a permanent fund. Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892)

Secondly, there is no sufficient intent to diminish expressed in the legislative history of the Wendat Allotment Act. In *Solem*, the Court held that Congress only intended to open the reservation to non-Indian settlement and not diminish the size of the reservation because there was no sufficient evidence of intent to diminish. 1 Cohen's Handbook of Federal Indian Law § 3.04(3) (2019). Similarly, the legislative history of the Wendat Allotment act provides evidence that supports intent only to open the reservation to non-Indian Settlement, not to diminish. 23 Cong. Rec. 1777-80 (1892). For example, Mr. Mansur explains that "the opening of these [reservation] lands has been looked forward to in that region with the greatest interest for long years, and unless this resolution is passed today . . . it will put back the settlement for one crop season." 23 Cong. Rec. 1778-79 (1892) (statement of Rep. Mansur). Mr. Mansur further characterizes the work of the bill is "so that the people there can have a chance to enter upon these lands in time to make a crop for this year." 23 Cong. Rec. 1780 (1892) (statement of Rep. Mansur). The intent of the bill is focused on opening the reservation in a timely manner to make the upcoming agriculture season. The only reference to reduction of reservations and cession of lands is made by Mr. Ullrich. 23 Cong. Rec. 1778-79 (1892) (statement of Rep. Ullrich). However, these remarks are made with respect to previous legislation opening the Territory of Oklahoma. These remarks were not made with respect to the Wendat Reservation.

Lastly, demographic evidence is not to be considered because there is no congressional intent to diminish explicit in the statutory text. This Court should refuse to consider

demographic statistics provided in the census like it did in *Nebraska.* After considering the three steps of the *Solem* test, this Court should affirm the Court of Appeals that holds there is no sufficient language in the Wendat Allotment Act that diminishes the Wendat Reservation and the Topanga Cession remains in Indian Country on the Wendat Reservation.

II. The State of New Dakota is Prevented from Collecting its Transaction Privilege Tax (TPT) against the Wendat Commercial Development Corporation (WCDC) Because it is Federally Preempted and it Infringes on Tribal Self-Governance

Federal preemption where the federal government's exclusive authority over relations with Indian tribes may preempt state authority either by "an explicit congressional statement [or because] the balance of federal, state, and tribal interests' tips in favor of preemption." *Blunk,*177 F.3d at 882 (citing *Gila River Indian Community v. Waddell,* 91 F.3d 1232, 1236 (9th Cir. 1996)). A state may not impose a tax that is preempted by federal or tribal interests. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). "'[A]bsent cession of jurisdiction or other federal statutes permitting it,' ... a State is without power to tax reservation lands and reservation Indians." *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995) (quoting *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation,* 502 U.S. 251, 258 (1992)). The traditional notions of Indian sovereignty may prevent state authority from infringing on the right of Indian tribal members to make their own laws and be ruled by them. *Id*. (citing *Gila River Indian Community,* 91 F.3d at 1236). A state may not levy a tax that infringes upon the right of reservation Indians. *Williams v. Lee*, 358 U.S. 217 (1959)

Although the Wendat Band admits that the WCDC has purchased fee land that has not yet been taken into trust and therefore it is not entitled to the automatic exemption from the Transaction Privilege Tax under §212(4) the Topanga Cession is within Indian territory and

the State of New Dakota is prohibited from levying its tax on a Wendat tribal entity because it is federally preempted by comprehensive federal judicial decisions. The power to regulate commerce among Indian Tribes rest solely in congress. Furthermore, the state tax on WCDC impermissibly infringes on Tribal self-governance because the WCDC is a tribal entity.

A. The State TPT is federally preempted because the power to regulate commerce among Indian Tribes rests solely in congress and the field of taxation has been regulated by comprehensive federal judicial decisions.

In *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-145 (1980), a state attempted to collect a motor carrier license tax based on gross receipts and a per gallon tax on fuel used by a non-Indian trucking company operating on the White Mountain Apache Reservation and the court held that a state may not impose a tax that is preempted by federal or tribal interests. The court also noted that the analysis does not require an express federal law that preempts the state law, but rather makes "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. The categorical prohibition against state taxation of Indians applies in "Indian country," broadly defined, including "formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States. *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993). The Court has also prohibited state taxation of Indians on fee lands within reservation boundaries, as well as taxation of Indians and tribes on trust lands outside reservations or in dependent Indian communities. 1 Cohen's Handbook of Federal Indian Law §8.03 (2019). Tribes and tribal members within Indian country have been found to be immune from a variety of state taxes, including hunting and fishing licenses, excise taxes on motor fuels, net income taxes, motor vehicle excise taxes and registration fees,

cigarette excise taxes, personal property taxes, vendor's license fees, and real property taxes on restricted land. *Id.*

The State of New Dakota's TPT on tribal entities is implicitly preempted by comprehensive judicial decisions on federal regulation of taxation, both because the field of taxation and commerce has been occupied by the federal government and it is regulated by comprehensive federal judicial decisions. The commerce clause states that "the Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. Regarding taxation, this Court considered in *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 479 (1976) a state taxing scheme where the state of Montana sought to impose a cigarette tax on sales by smoke shops operated by tribal members located on leased trust lands within the reservation and sought to require the smoke shop operators to collect the tax. The Court upheld the tax, insofar as sales to non-Indians were concerned, because it's legal incidence fell on the non-Indian purchaser. In *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 160-163 (1980), the Court held that the Tribes had the power to impose their cigarette taxes on nontribal purchases, since the power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status.

A state tax on non-Indians doing business with tribes may also be preempted if it creates a substantial burden on the tribe. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 186 (1989). In *Crow Tribe of Indians v. Montana*, 819 F.2d 895, 902–903 (9th Cir. 1987), the 9th circuit held that a severance tax on coal and a gross proceeds tax on coal mining activity imposed by the state were preempted by federal policies intended to protect tribal benefits from

state taxes aimed at appropriating the value of Indian natural resources and infringed on the tribe's self-government rights. In *McClanahan v. Arizona State Tax Commissio*n, 411 U.S. 164, 176-177 (1973), the Court invalidated a state income tax levied on the earnings of an Indian employed on her reservation. The Court held that while the tax did not conflict with any specific tribal law and therefore may not have infringed directly on tribal government, the activity nevertheless was preempted under the principles of *Worcester* as "totally within the sphere which the relevant treaty and statutes leave for the Federal Government and for the Indians themselves. *Id.* at 179-180. In *Warren Trading Post Co. v. Arizona State Tax Commission, 380 U.S. 685,689-690 (1965),* the Court prohibited state gross receipts taxes on a federally licensed Indian trader because Indian trade is governed exclusively by federal law. Furthermore, "ambiguities in federal law are, as a rule, resolved in favor of tribal independence."*Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 176 (1989)

Here, because the TPT tax involves business revenues in commerce, it is federally preempted by the commerce clause which states that only congress may regulate commerce among Indian Nations, not States. Unlike the taxation of cigarettes on sales by smoke shops on non-Indian purchases in *Salish*, the TPT is directly on tribal members because the corporation is wholly owned by the Wendat Band with 100% of corporate profits remitted quarterly to the tribal government as dividend distributions even if it is on fee land. Here, similar to holding in *Colville*, there is no federal statute showing any congressional departure from the view that the Wendat Band has the power to tax themselves, and tribal powers are not implicitly divested by virtue of the tribes' dependent status. Similar to the *Crow Tribe of Indians*, although no natural resources are at risk, the TPT will be appropriating the value of the success of the Wendat's Band businesses. Similar to *McClanahan,* the gross income will

be derived wholly from reservation sources as all businesses are owned by the Wendat Band members. Like *Warren v. Arizona,* the treaty between the United States and Wendat Band set land apart for Band's exclusive use and self-governance, subject to federal supervision but free from state control. In short, there is a comprehensive Supreme Court precedent that protects Indians in matters of taxation in Indian Country. The State of New Dakota may not impose additional financial burdens on the band or the WCDC by levying state taxes against them.

B. The State Tax on the WCDC infringes on tribal self-governance because the WCDC is a tribal entity within Indian Country.

The TPT has specifically interfered with the governmental freedom of the Wendat Band because the State of New Dakota has no substantial interest in taxing the Band's commercial entity. Even when there is a specific statute or regulations preempting a state law, challenges to state jurisdiction on Indian reservations are measured against the fundamental principle that state law can reach into the Indian reservation only to the extent that it can do so without infringing "on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee,* 358 U.S. 218, 220 (1959). In *Williams* a non-Indian merchant sought to sue an Indian couple to collect a debt incurred at a reservation store and the Court held that the state court lacked jurisdiction based on a finding 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 217, 220, 223. The Court noted that self-government meant Indian governance of all people within the reservation, explaining that it was "immaterial that [the] respondent [was] not an Indian" because the issue is "the authority of Indian governments over their reservations." *Id*.

The Supreme Court has noted that application of state law to Indians on the reservation is presumptively invalid absent specific congressional approval. *McClanahan,* 411 U.S. at 164.

The *Williams* test was designed to resolve the conflict of when both the tribe and the state could fairly claim an interest in asserting their respective jurisdictions, by providing that the state could protect its interest up to the point where tribal self-government would be affected. *Id.* at 179. Power to tax transactions occurring on trust lands and significantly involving an Indian tribe or its members is a fundamental attribute of sovereignty which Indian tribes retain unless divested of it by federal law or necessary implication of their dependent status. *Colville*, 447 U.S. at 160-163. In *Ramah Navajo School Board, Inc. v. Bureau of Revenue, 458 U.S. 832, 834 (1982)*, the Supreme Court found that the state could not tax the gross receipts that a non-Indian construction company received from a tribal school board for construction of a school on a reservation. The court held that not only was there federal preemption but also regarding tribal interests, the tribal school board absorbed the economic impact of the tax, which could affect its ability to provide education for Indian children, since the state provided no educational services to the Indian school children or the non-Indian taxpayer. *Id.* at 843–844.

Like the Court in *Lee*, allowing the suit to proceed would undermine the authority of the tribal courts and therefore infringe on the Band's ability to govern affairs on the reservation. In executing and ratifying the treaty with the Wendat Band, the United States and the Wendat Band understood that the Wendat Reservation should be under exclusive tribal control. Similar to the infringement of governance in *Williams*, the State of New Dakota infringes the right of reservation Indians to make their own laws and be ruled by them, because the result of imposing taxes will be to deprive the Tribes of revenues which they currently are receiving. First, these taxes interfere with tribal judgments about how the WCDC uses its revenue, for what purposes, and on what conditions. This tax imposes new burdens on the Wendat band members since Indian fee land is still considered to be in Indian Country. In this case, these

taxes would take necessary income away from the funds necessary to build low-income housing developments and residential housing for elders. This tax infringes on tribal control of its gross proceeds of sales by preventing the Wendat Band from collecting the tax itself. Forcing the Wendat Band to pay the tax even if it is remitted back in order to centralize the collection and enforcement by the State of New Dakota will drastically interfere with the Band's judgments about business enterprises and its choices of how to invest tribal funds, and the management of tribal economic affairs. Those rights are reserved for the Band itself.

Furthermore, the State of New Dakota has no substantial interest in taxing the Band's commercial entity. Similar to *Ramah*, the state of New Dakota is not providing any services to the WCDC as it is entirely owned by Wendat tribal members and they are the ones who will absorb the economic impact of the tax. As a result of the forced imposition of this tax, the Wendat band will be unable to establish a strong tax base structured around the commercial taxes and property taxes that are typically found at the local state government level. If allowed to implement their own taxations rules, they will be able to more efficiently continue using their sales and excise taxes to support tribal government functions such as building their housing complexes. The State of New Dakota imposed this tax for the purpose of maintaining a robust and viable commercial market within the state including funding for the Department of Commerce and funding for civil court which likely provides few services on Indian reservations. Overall, compounding the band’s inability to establish a strong tax base, this policy will negatively impact economic growth in Indian Country and the effect will be felt by entire regional economies.

CONCLUSION

The Topanga Cession is located on Indian Country within the Wendat Reservation and therefore the State of New Dakota is prohibited from requiring the Band or the WCDC to procure a TPT license or pay the tax. Although the Topanga Cession was originally located on the Maumee Reservation at the time the Treaty of Wauseon was ratified, the Maumee Nation's claim to the Topanga Cession was abrogated by the Treaty with the Wendat. Therefore, the Wendat's claim to the Topanga Cession controls. Additionally, the Maumee Allotment Act contains sufficient congressional intent to diminish the eastern quarter of the Maumee Reservation while the Wendat Allotment does not diminish the Wendat Reservation. When read together, the Allotment acts maintain the Topanga Cession in Indian Country on the Wendat Reservation. The State of New Dakota's TPT is federally preempted because the power to regulate commerce among Indian Tribes rests solely in congress and the field of taxation has been regulated by comprehensive federal judicial decisions. Additionally, the TPT on the Wendat Commercial Development Corporation (WCDC) infringes on tribal self-governance because the WCDC is a tribal entity within Indian Country. The Court of Appeals should be affirmed.