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

Team No. T1040

Attorneys for Respondent

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QUESTIONS PRESENTED

I. Whether the Wendat Treaty abrogated the Treaty of Wauseon when the two treaties are inconsistent and the Treaty with the Wendat was enacted later-in-time.

II. Whether the Maumee Allotment Act diminished the Maumee Reservation when the text of the act, history of the act, and subsequent demographics of the Topanga Cession show that Congress clearly intended to diminish the Maumee Reservation.

III. Whether the Wendat Allotment Act diminished the Wendat Reservation when the text of the Act, history of the Act, and subsequent demographics do not reveal clear Congressional intent to diminish the Wendat Reservation.

IV. Whether the State of New Dakota's Transaction Privilege Tax may be levied against a wholly owned Wendat Band corporation on the Wendat Reservation notwithstanding the strong federal and tribal interests in the Band's free use of the land and insufficient state justifications for the tax.

V. Whether the State of New Dakota's Transaction Privilege Tax would infringe upon the Wendat Band's sovereignty when the tax affects the Band's ability to develop its proposed commercial enterprises.

STATEMENT OF THE CASE

STATEMENT OF PROCEEDINGS

Maumee Nation filed a complaint against the Wendat Band in the District of New Dakota that alleged that development by the Wendat Commercial Development Corporation (WCDC) in the Topanga Cession would require a Transaction Privilege Tax (TPT) license and tax payment because the Topanga Cession is located on the Maumee Reservation and in the alternative, asked for a declaration that the Topanga Cession is not Indian country and thus, one-half of the TPT would be remitted to Maumee Nation. (R. at 8.)

The Wendat Band countered that based on the Treaty with the Wendat of 1859 ("Wendat Treaty"), the Topanga Cession was within the Wendat Reservation and even if the Cession continued to be within the Maumee Reservation after the Treaty, the Maumee Reservation was diminished by the Maumee Allotment Act of 1908, which would revert the Cession back to the Wendat Reservation. *Id.* Furthermore, the Band recognized that the land it purchased in the Cession is Indian fee land but pointed out that since the land is in Indian country, New Dakota's ability to tax is preempted by federal law and inconsistent with the Band's sovereign powers. *Id.*

Usefully, both parties have stipulated to the facts of the case including facts surrounding the treaties, statutes, Topanga Cession, and facts of the case. (R. at 5-9.)

The District Court for New Dakota found that there was no clear evidence that Congress intended to abrogate the Treaty of Wauseon with the Wendat Treaty. (R. at 9.) Furthermore, the District Court concluded that the Maumee Reservation was undiminished because there was no Congressional intent to diminish and that the Wendat Reservation was diminished because of the payment of a "sum certain." *Id.*

Next, based on *Williams v. Lee* and *Mountain Apache Tribe v. Bracker*, the District Court found that New Dakota could levy the TPT upon the Topanga Cession. The court held that neither the doctrine of preemption nor the doctrine of infringement prevented the State from levying its tax against any commercial development constructed by the WCDC. *Id.* Accordingly, the court determined that any WCDC commercial enterprise with more than $5,000 in gross sales could be subject to a State tax that would be remitted to the Maumee Nation. *Id.*

The Wendat Band appealed the case to the Court of Appeals for the Thirteenth Circuit, where the court ruled in favor of the Wendat Band. There, the court held that the Wendat Treaty abrogated the Treaty of Wauseon. (R. at 10.) On top of that, the Court concluded that the Maumee Reservation had been diminished and that the Wendat Reservation had not been diminished. *Id.* Based on these findings, the court concluded that the Topanga Cession is Indian country and within the Wendat Reservation. *Id*.

Next, although the trust land automatic exemption did not apply, the court found that the TPT would both infringe on tribal sovereignty and be subject to preemption. (R. at 11.) Accordingly, the Court of Appeals reversed the District Court. *Id.* Finally, Judge Lahoz-Gonzalez dissented and argued that there was no clear evidence of Congress's intent to abrogate, both reservations were diminished, and the Cession was not Indian country. *Id.*

STATEMENT OF THE FACTS

The Maumee Nation and the Wendat Band each have a treaty with the United States that reserves a set of lands in what is now the State of New Dakota. The Maumee Reservation, with the Wapakoneta River as its eastern border, was established by the Treaty of Wauseon in 1801. (R. at 4.) Significantly, the Wapakoneta River changed course and

shifted about three miles to the west in the 1830s. (R. at 5.) Next, in 1859, the Wendat Treaty established the Wendat Reservation and the Wapakoneta River as its western boundary. *Id.* The River's shift created a tract of land that became known as the "Topanga Cession." *Id.* Both the Maumee Nation and the Wendat Band have maintained the exclusive right to these lands since at least 1937. *Id.*

Next, both the Maumee Nation and the Wendat Band were subject to allotment by Congress after the passage of the General Allotment Act, P.L. 49-105 (Feb. 8, 1887). (R. at 5.) The Maumee Allotment Act (1908) reserved the western three-quarters of the reservation for the Maumee and declared the eastern quarter surplus. (R. at 13.) Under the terms of the treaty, the Maumee ceded their interest in the eastern quarter and returned the land to the public domain. *Id.* Wendat Allotment Act (1892) merely declared the western half of the Wendat Reservation surplus and opened the land for settlement. (R. at 15.)

The parties agree that the Cession consists mostly of land that was declared surplus under one of the two allotment acts, although they do not agree about which act controls. (R. at 7.) The Maumee Indian Nation and the Wendat Band have disputed ownership of the Topanga Cession for more than 80 years. *Id.*

The parties agree that the Wendat Band was paid $2,000,000 for more than 650,000 acres of land while the Maumee Nation was paid about $2,000,000 for about 400,000 acres of land. (R. at 5.) Although both tribes were paid, neither treaty specified a total dollar amount. (R. at 13, 15.)

The demographics of the reservations and the Topanga Cession shifted after enactment. The percentage of American Indians on the Maumee Reservation dropped significantly after 1910. (R. at 7.) After 1910, the percentage of Indians in the Topanga

Cession dropped by nearly 60 percent. *Id.* Finally, the percentage of American Indians in western half of the Wendat Reservation dropped significantly after 1890. *Id.*

At issue in this litigation is the State of New Dakota's TPT. *Id.* The Tax is levied on the gross proceeds of sales or gross income of a business and paid to the state. *Id.* Though the parties recognize the existence and general legality of the Tax, they dispute its application to the tribes. *Id.* The TPT applies to persons who receive gross proceeds of sales or gross income of more than $5,000 on transactions commenced in the State. (R. at 5.) The TPT requires every licensee to remit to the State three percent of their gross proceeds or gross income on transactions commenced in the State. *Id.* Section 212(4) allows for an automatic exemption from taxation for Indian tribes or tribal businesses operating within their own reservation on land held in trust by the United States. (R. at 6.) Finally, the TPT contains a provision that remits to each tribe the proceeds of the Tax collected from entities operating on their reservations that do not fall within the exemption in § 212(4). *Id.* The Topanga Cession was previously not subject to the TPT because it was used for non-commercial purposes and consists almost entirely of fee lands. *Id.*

In late 2013, the Wendat Band purchased a 1,4000-acre parcel of land in fee from non-Indian owners located within the Topanga Cession. *Id.* Eighteen months later, The Band announced that it intended to construct a commercial development on the parcel that would include public housing units for tribal members, a nursing care facility, a tribal cultural center, a museum, and a shopping complex. *Id.* The shopping complex was to be owned by the WCDC, which is a Section 7 IRA Corporation wholly owned by the Wendat Band and with 100% of profits remitted to the tribal government as dividend distributions. (R. at 6-7.)

The WCDC's proposed shopping complex would include a café serving traditional Wendat cuisine, a grocery store, a salon/spa, a bookstore, and a pharmacy. (R. at 8.) The WCDC projected that the complex would eventually support at least 350 jobs and earn more than 80 million dollars in annual sales. *Id.* The proceeds would be used to fund the tribal public housing and a nursing care facility. *Id.* The café, cultural center, and museum are expected to be particularly helpful in raising revenue by attracting non-Indian consumers from outside of the reservation. *Id.*

Shortly after the Wendat Tribe announced this plan, representatives from the Maumee Nation approached the WCDC and the Wendat Tribal Council and claimed that the Topanga Cession was Maumee Nation land. *Id.* The Maumee Nation argued that the Wendat Reservation was diminished by the 1892 Allotment Act and that it expected the shopping complex to pay the State of New Dakota the three percent tax. *Id.* The Wendat Tribal Council and the WCDC replied that the Topanga Cession was part of the Wendat Reservation and has been since the Treaty of the Wendat of 1859. *Id.* The Wendat Band recognizes that the land it purchased in fee on the Topanga Cession was not taken into trust and was not accorded the status of Indian fee land. *Id.* The Maumee Nation filed a complaint against the Wendat Band on November 18, 2015, requesting a Declaration from the federal district court that any development by the WCDC in the Topanga Cession would require a TPT license and payment of the tax.

SUMMARY OF ARGUMENT

The Circuit Court's decision that the Wendat Treaty abrogated the Treaty of Wauseon should be affirmed. The "last-in-time" rule should apply in this situation instead of the "clear evidence" canon because Indian interests are on either side of the conflict. Since the two

treaties are inconsistent and the Wendat Treaty was ratified later, the Wendat Treaty abrogated the Treaty of Wauseon.

Next, under the *Solem* three-part analysis, the Maumee Reservation was diminished by the Maumee Allotment Act. The text, history, and post-enactment demographics show clear Congressional intent to diminish the Maumee Reservation. The same test leads to the opposite conclusion with the Wendat Allotment Act and Wendat Reservation because the text, history, and post-enactment demographics fail to show clear Congressional intent to diminish the Wendat Reservation.

The Circuit Court correctly found that the State of New Dakota is prohibited from requiring the Wendat Band or the WCDC to procure a TPT license or pay the tax. The doctrines of preemption and infringement prevent a State from interfering with the rights of a sovereign Indian tribe to govern itself where federal law has provided no responsibilities for the State to fulfill. A state may not tax an Indian-owned commercial enterprise on a reservation without the explicit consent of Congress. In this case, Congress's intent is evident in the Wendat Treaty that the State of New Dakota was not granted authority to tax the Wendat Band on its reservation. The court below properly found that the tax would infringe on tribal sovereignty based on the seminal case of *Williams v. Lee*. Further, the tax is properly subject to Indian preemption under this Supreme Court's precedent. The State is precluded by both doctrines from collecting its tax against the WCDC's development.

ARGUMENT

I. The Topanga Cession is on the Wendat Reservation because the Treaty with the Wendat of 1859 Abrogated the Treaty of Wauseon.

This Court should find that the Topanga Cession is within the Wendat Reservation because the Wendat Treaty abrogated the Treaty of Wauseon. The *Dion* "clear evidence" canon does not apply to this situation because the "Indian canons" are inapplicable in situations where the rights of Indians are on either side of a conflict. Instead, the "last-in-time" rule applies in this situation and because the Wendat Treaty was enacted in 1859 after the Treaty of Wauseon which was enacted in 1801, the Wendat Treaty controls. Finally, even if the *Dion* clear evidence rule did apply, Congress's actions met the standard.

A. The "Clear Evidence" Canon Does Not Apply in This Case.

Congress can abrogate Indian treaties. For over one hundred years, this Supreme Court has found that Congress can abrogate treaties. *Fong Yue Ting v. United States*, 149 U.S. 698, 720 (1893). In *Lone Wolf*, the Supreme Court confirmed that Congress's power to abrogate treaties extends to Indian treaties. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566-57 (1903). However, courts are hesitant to abrogate Indian treaties and thus use the strict "clear evidence" canon.

When analyzing conflicts between treaty rights and statutes, courts employ the "clear evidence" canon. For an Indian treaty to be abrogated, a court must find, "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *United States v. Dion*, 476 U.S. 734, 738-40 (1986). The purpose behind the "clear evidence canon" is to ensure that Indian treaty rights are not "easily cast aside." *Id.*at 739. Courts have repeatedly applied this rule when considering conflicts between statutes and Indian treaties.[1]

1 Indian treaties are the legal equivalent of federal statutes. *Solis v. Matheson*, 563 F.3d 425, 434 (9th Cir. 2009).

E.g., United States v. Gotchnik, 222 F.3d 506, 508-09 (8th Cir. 2000); *United States v. Peterson*, 121 F. Supp. 2d 1309, 1318-20 (D. Mont. 2000).

However, the purpose behind the Indian canons lose force when Indian treaty interests are on either side of the conflict. Over the years, courts have consistently applied Indian canons when interpreting contradictory treaties and statutes. *E.g., Northern Cheyenne Tribe v. Northern Cheyenne*, 505 F. 2d 268, 272 (9th Cir. 1974) (noting that language should interpreted as Indians understood it, statutes passed for the benefit of Indians should be interpreted liberally, and all doubts are to be resolved in their favor).[2] However, these Indian canons only apply when "there is a choice between interpretations that would favor Indians on one hand and state or private actors on the other." *See Rancheria v. Jewell*, 776 F.3d 706, 713 (9th Cir. 2015); *Northern Cheyenne Tribe v. Hollowbreast,* 425 U.S. 649, 655 (1976) (noting that while the liberal construction cannon is valid, it would not apply in a case between a tribe and tribal members). The canons exist because of the trust relationship between the United States and Indian tribes. *Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 340 (9th Cir. 1996). Thus, where the government has a trust relationship with both parties in the lawsuit, it cannot use the Indian canons to favor one tribe over another. *See id.*

This is a case where there are Indian treaty interests on either side of the conflict. Both Maumee Nation and the Wendat Band claim that their respective treaties include the Topanga Cession. The Maumee are interested in claiming the Topanga Cession because of the potential tax revenue from the proposed shopping center on the land. The Wendat are

2 Although the "clear evidence" canon considers abrogation, which is a slightly different topic than these canons, the "clear evidence" canon is part of the clear statement rule which is a "corollary" to the canons listed in *Northern Cheyenne*. *See* Matthew L.M. Fletcher, Principles of Federal Indian Law 154-55 (2017).

interested in claiming the Topanga Cession because they would like to use all of the proceeds from the shopping center located on the Cession to fund vital tribal activities.

Since there are Indian interests on both sides, the "clear evidence" canon would lead to unjust results. Application of the canon would favor the Maumee Nation's interests over the Wendat Band's interests simply because the Treaty of Wauseon was ratified earlier than the Wendat Treaty. Thus, the canon should not apply in this situation. Since the application of the canon would favor the Maumee Nation's interests over the Wendat Band's interests, the "clear evidence" canon would do what courts have said Indian canons cannot, prefer the interests of one tribe to another. Thus, this court should decline to apply the "clear evidence" canon and instead apply the "last-in-time" rule.

B. The "Last-in-Time" Rule is an Appropriate and Equitable Approach to Resolving Conflicts Between Indian Treaties.

The "last-in-time" rule is a practical and equitable approach to resolving conflicts between Indian treaties.[3] Courts use the "last-in-time" rule to analyze conflicting federal statutes and treaties. The over-100-year-old rule simply states that in *the event of a conflict*, a later enacted statute or treaty applies over an earlier enacted statute or treaty. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888). Courts are reluctant to find conflicts. *Owner-Operator*

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3 Courts have previously applied the "last-in-time" rule to find that Indian treaties were abrogated by federal statutes. *Cherokee Tobacco*, 78 U.S. 616, 621 (1870). However, the "last-in-time" rule is problematic when applied to these types of situations. *See* Mike Townsend, *Congressional Abrogation of Indian Treaties: Reevaluation and Reform*, 98 Yale L.J. 793, 805-06 (1989) (critiquing the application of the "last-in-time" rule to resolve conflicts between Indian treaties and federal statutes). Respondents do not advocate for the general application of the "last-in-time" rule but rather only to conflicts between Indian treaties.

Independent Drivers Ass'n v. United States DOT, 724 F.3d 230, 233-34 (D.C. Cir. 2013) (citing *South Dakota v. Bourland*, 508 U.S. 679, 687, 113 S. Ct. 2309, 124 L. Ed. 2d 606 (1993)). Accordingly, courts "will always endeavor to construe [the enactments] 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…" *Whitney*, 124 U.S. at 194.

Application of the "last-in-time" rule to conflicts between treaties is consistent with the purpose behind the "clear evidence" canon. The goal of the canon is to protect Indian treaty rights by ensuring they are not "easily cast aside." *See Dion*, 476 U.S. at 739. Under the "last-in-time" rule, courts attempt to avoid the conflict in the first place. This first step ensures that each enactment is fairly considered. By comparison, under the "clear evidence" canon, the party advocating for the later enactment must prove that Congress considered the conflict and chose to abrogate. This is a very high standard and disadvantages the later-enacted treaty and the tribe relying on it. The "last-in-time" rule avoids this problem and ensures that neither treaty is disadvantaged.

C. The Treaty of Wauseon is Abrogated by the Wendat Treaty Under the "Last-in-Time" Rule.

The "last-in-time" rule for determining conflicts between enactments is a two-step test. First, the court must determine whether it is possible to give effect to both provisions without violating the terms of either enactment. *Whitney*, 124 U.S. 194.[4] Second, if it is not

4 There is some debate about the appropriate analytical method at step one. *See Breard v. Greene*, 523 U.S. 371, 376 (1998) ("when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.") (internal citations omitted); *but see Owner-Operator Indep. Drivers Ass'n v. DOT,* 724 F.3d 230, 234-35 (D.C. Cir. 2013) (indicating that a clear statement of intent to abrogate is required before moving to step two).

possible for the court to reconcile the enactments, the court will apply the later-in-time enactment. *Id*.

Here, the conflict is between two treaties, the Wendat Treaty and the Treaty of Wauseon. The Wendat Treaty (1859) states that the Wendat Band agreed to give up their lands excepting, "those lands East of the Wapakoneta River…" Treaty with the Wendat, March 26, 1859, 35 Stat. 7749 [hereinafter *Treaty with the Wendat*]. The Treaty of Wauseon (1801) states that the eastern boundary of the Maumee Reservation "shall be the western bank of the river Wapakoneta." Treaty of Wauseon, Oct. 4, 1801, 7 Stat. 1404 [hereinafter *Treaty of Wauseon*]. The conflict between them is a result of the Wapakoneta's course shifting several miles westward in the 1830's. As a result of the shift, based on the terms of the treaties, the two reservations overlap by several miles. Since the terms of the treaties conflict, the next question is whether they can be reconciled.

The texts of the two treaties are irreconcilable. A court must not "distort" the language of an enactment to make it consistent with another enactment. *See Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 879 (D.C. Cir. 2006). Both treaties are clear, the Wendat Reservation's western border is the Wapakoneta River and the Maumee Reservation's eastern border is the Wapakoneta River. *Wendat Treaty*, *supra*.

The only way to reconcile the two treaties would be to add words which would distort and violate the treaties' terms. For example, the Wendat Treaty could be interpreted as if it stated, "those lands East of the Wapakoneta River [as it ran at the time of the Treaty of Wauseon in 1801]." Such an interpretation would distort the meaning of the treaty because the Wendat Treaty would no longer mean what it says. Unaltered, the Wendat Treaty states the western border of the Wendat Reservation is the Wapakoneta River. In the altered

version, the border is no longer the Wapakoneta River but instead a couple of miles east of the river. Thus, this alteration would distort the language of the treaty and violate its terms.

Since the two treaties are irreconcilable, this Court should apply the terms of the later-enacted treaty, the Wendat Treaty. In this case, the Wendat Treaty was enacted in 1859 and the Treaty of Wauseon was enacted in 1801. The Wendat Treaty is the later-enacted of the two treaties. Since the Wendat Treaty is later-enacted, it controls this situation. The Wendat Treaty establishes the Wapakoneta River as the western boundary of the Wendat Reservation. Therefore, the Treaty of Wauseon is abrogated and the Topanga Cession is within the Wendat Reservation.

D. Even if this Court Determines that the *Dion* "Clear Evidence" Canon Applies, Congress Expressed the Requisite Intent to Abrogate the Treaty of Wauseon.

Even if this Court determines that the *Dion* "clear evidence canon" applies, Congress expressed the requisite intent to abrogate the Treaty of Wauseon. Congress's intent must be "clear and plain" before it can abrogate. *Dion*, 476 U.S. at 739. To find "clear and plain intent," there must be evidence that Congress "actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Id.* at 740.[5] Evidence of this intent may be established through the plain text of the enactment and via legislative history. *Id.*

5 This test does not make sense in this situation. Here, Indian treaty rights are on either side and there is no pitting of Indian treaty rights against some other action that Congress intended to take. This test has been largely applied in situations in which a statute—often a conservation statute—conflicts with Indian treaty rights. *E.g., United States v. Gotchnik*, 222 F.3d 506 (8th Cir. 2000) (Boundary Waters Act and treaty rights to fish and hunt in conflict); *United States v. Peterson*, 121 F. Supp. 2d. 1309 (D. Mont. 2000) (legislation creating Glacier National Park and treaty rights to hunt in conflict).

For example, in *United States v. Peterson*, a court found that the legislation creating Glacier National Park abrogated the Blackfeet Tribe's treaty-based hunting rights on the land. The court acknowledged the legislation lacked explicit reference to the Blackfeet Tribe's treaty rights but noted that the legislation's language and context revealed that Congress intended to abrogate the treaty. *Peterson*, 121 F. Supp. 2d at 1320. Congress wrote that "all hunting" was prohibited on Glacier National Park lands and the legislative history indicated that Congress believed the Blackfeet Tribe would benefit from increased game on national park lands that would overflow into the Blackfeet Reservation. *Id.* at 1319-20.

In this case, the language of the Wendat Treaty as well as the circumstances of the treaty indicate an intent to abrogate the Treaty of Wauseon. The Wendat Band agreed to cede all lands except for "those lands East of the Wapakoneta River…" *Wendat Treaty, supra*. Just like the legislation in *Peterson*, the language of the Wendat Treaty does not contain any exceptions. It unequivocally establishes the Wapakoneta River as the western border of the Wendat Band's reservation.

Next, the legislative history reveals that Congress had considered the potential conflict and opted to abrogate. First, Senator Powell noted that he thought that the land near the Wapakoneta River needed to be opened up to settlers sooner rather than later and wondered why those lands had not been negotiated for while the government was negotiating with the Wendat. Cong. Globe, 35th Cong., (Speech Senator Solomon Foot). This comment would make little sense if the Wendat Reservation did not border the Wapakoneta River.

Second, Congress apparently believed that exposing the Wendat Tribe to the Maumee Nation and settlers at Fort Crosby, which to that point had been within the Maumee Reservation, would be beneficial. After noting that the Maumee were peaceful and engaged

in trade with the residents of Fort Crosby, Senator Foot wrote, "I hope that the Wendat may benefit by example and learn from the many new residents of their neighboring lands." *Id*. Senator Foot and Senator Chesnut noted that a goal of the treaties was to secure peace between settlers and Indians. *Id.* Apparently, Congress believed that they could achieve peace with the Wendat Band by placing them in close proximity with the Maumee Nation and Fort Crosby inhabitants and in the process, they abrogated the Treaty of Wauseon.

The text and legislative history indicate that Congress considered the potential conflict between the two treaties and chose to abrogate. Just like the statute in question in *Peterson*, the Wendat Treaty is unequivocal—the western border of the Wendat Reservation *is* the Wapakoneta River. Moreover, the Congressional record reveals that Congress believed the land east of the Wapakoneta River was the Wendat Reservation and that abrogating the Treaty of Wauseon would have substantial benefit.

Therefore, this Court should find under either the "last-in-time" rule or the "clear evidence" canon that the Wendat Treaty abrogated the Treaty of Wauseon.

II. The Maumee Allotment Act Diminished the Maumee Reservation.

This Court should find that the Maumee Reservation is diminished because the text, history, and post-enactment demographics show clear Congressional intent to diminish the Maumee Reservation.

As background, in the late 1800's and early 1900's Congress passed a series of "surplus land acts." These acts which forced Indians onto individual "allotted lands" were intended to hasten Indian assimilation and to open up land for white settlers. *Solem v. Bartlett*, 465 U.S. 463, 466-67 (1984). At the time of passage, Congress expected reservations to quickly disappear which resulted in acts that lacked clarity about whether the

lands opened by the surplus land acts remained part of Indian reservations. *Nebraska v. Parker*, 136 S. Ct. 1072, 1079 (2016).

Due to this confusion, courts developed a three-part framework to determine when a surplus land act diminished an Indian reservation. Only Congress is capable of "divesting" a tribe of its land and when Congress does divest a tribe of its land, it must do so clearly. *Solem*, 465 U.S. at 470; *see also McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020). Courts consider three sources of evidence when looking for clear Congressional intent to diminish: (1) the text of the allotment statute, (2) historical evidence, and (3) the post-enactment demographics of the opened lands. *Parker*, 136 S. Ct. at 1079-83; *Solem*, 465 U.S. at 470-72.

A. The Text of the Maumee Allotment Act Shows Clear Congressional Intent to Diminish the Maumee Reservation.

The text of the statute is the most valuable tool for determining whether there was diminishment. *Parker*, 136 S. Ct. at 1079 (internal citation omitted). Some textual indications of Congress's intent to diminish include an "explicit reference to cession," language showing "total surrender of tribal interests," and provisions restoring parts of the reservation to the public domain. *Id*.; *Hagen v. Utah*, 510 U.S. 399, 414 (1994) ("[holding] the restoration of unallotted reservation lands to the public domain evidences a congressional intent with respect to those lands inconsistent with the continuation of reservation status.")

In this case, the text of the Maumee Allotment Act shows clear Congressional intent to diminish the Maumee Reservation. Section One of the Maumee Allotment Act discusses returning land to the public domain. The Act states, "The Indians have agreed to consider the entire eastern quarter surplus and to cede their interest in the surplus lands to the United States 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) (emphasis added) [hereinafter *Maumee Allotment Act*].

The Maumee Allotment Act's reference to returning land to the "public domain" is sufficient to show Congress's clear intent to diminish. "We hold that the restoration of unallotted reservation lands to the public domain evidences a congressional intent with respect to those lands inconsistent with the continuation of reservation status." *Hagen*, 510 U.S. at 414.[6] Based on *Hagen*, the Act's language ceding their interest in the land and returning it to the public domain is sufficient to show Congressional intent to diminish the Maumee Reservation.

Moreover, the Maumee Allotment Act contains explicit language regarding cession which is a hallmark of Congressional intent to diminish. "[The Maumee Nation] agreed to cede their interest in the surplus [eastern quarter] lands" which would have included the Topanga Cession.[7] *Maumee Allotment Act*, *supra*. This language is clear, Congress ceased Maumee interests in the eastern quarter of the Maumee Reservation and diminished the reservation.

Congress intended to diminish the Maumee Reservation even though there was not a "sum certain" in the Act. Payment provisions are just one factor and are not dispositive in determining whether Congress intended to diminish a reservation. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 598, n.20 (1977) (internal citation omitted) (holding statutes diminished

6 There is a single Tenth Circuit case which held that language regarding returning lands to the public domain was insufficient to disestablish and diminish an Indian reservation. *Ute Indian Tribe v. Utah*, 773 F.2d 1087, 1092 (10th Cir. 1985). This case was later distinguished and repudiated by the Tenth Circuit. *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1400 (10th Cir. 1990) (pointing out that in *Ute Indian Tribe*, the phrase "public domain" was not the operative provision of the statute.). Section 1 of the Maumee Allotment Act is the operative provision of the act, it orders allotment of the Maumee Reservation and explains the procedure for unclaimed lands.

7 Based on the assumption that the Treaty of Wauseon was not abrogated by the Wendat Treaty.

reservation even without "sum certain" language.). "What matters most is not the mechanism of payment, but rather the 'language of immediate cession.'" *Wyoming v. EPA*, 873 F.3d 505, 517 (10th Cir. 2017) (citing *Kneip*, 430 U.S. at 597). While the payment of a "definite sum" can weigh in favor of diminishment, "the lack of such a provision does not lead to the contrary conclusion." *Hagen*, 510 U.S. at 411-12.

Here, the Maumee Allotment Act clearly does not contain "sum certain" language. In fact, the Act explicitly states that it does not provide for "unconditional payment." *Maumee Allotment Act*, *supra*. However, the lack of "sum certain" language is overcome by the explicit cession language of the act and the text stating that the land should be "returned to the public domain." Thus, whatever contrary weight is provided by the lack of "sum certain" language—a non-dispositive factor in textual diminishment analysis—it is overcome by the clear text of the Act.[8]

B. Since the Text of the Maumee Allotment Act is Clear, There is No Need to Consider Any Evidence Beyond the Text of the Act.

Normally, the next step in the analysis would be to consider the history of the Act but since the text is clear in this case, that analysis is unnecessary. Extra-textual sources of evidence, like the historical circumstances of an act and subsequent demographics, are only relevant when the text of a statute is ambiguous. *See McGirt*, 140 S. Ct. 2452, 2469. Historical evidence should be used to clear up ambiguity, not to create ambiguity. *Id.* (internal citation omitted). Here, the text is clear, Congress clearly intended to diminish the

8 In *Kneip*, the court found that although the act lacked a "sum certain," the Tribe was "eventually paid" for its land. *Kneip*, 430 U.S. at 598. Here too, the Maumee were eventually paid for their land (though it is unclear specifically what land the Maumee were compensated for).

Maumee Reservation. Thus, this Court should follow the *McGirt* court's approach and decline to analyze the historical context of the Maumee Allotment Act which in this case, could only create ambiguity, not resolve it.

C. The History of the Maumee Allotment Act Supports Diminishment.

Even if examination of the history surrounding the Maumee Allotment Act is required, it buttresses the conclusion that the Maumee Reservation was diminished. The presence of "Indian consent" is useful for finding diminishment. *DeCoteau v. Dist. County Court for Tenth Judicial Dist*., 420 U.S. 425, 448 (1975) ("It is not a unilateral action by Congress but the ratification of a previously negotiated agreement, to which a tribal majority consented."); *see also Kneip*, 430 U.S. at 598, n.20 (noting that "Indian consent" helped the court in *DeCouteau* find that the reservation had been terminated). According to the Congressional record, after the bill was discussed thoroughly with the Maumee Nation by an Indian Service agent, 95 percent of the Maumee ratified the agreement. 42 Cong. Rec. 2345 (1908). This evidence shows that the Maumee Nation overwhelmingly consented to the previously negotiated agreement which indicates that the reservation was diminished.

The only indication against diminishment in the record, a single and unanswered question from a Tennessee Representative, is insufficient to overcome clear textual indications of diminishment. Representative Gaines of Tennessee stated, "I understand that all lands unsold will continue to belong to the Indians is that right? Until there is payment the land belongs to the Maumee?" *Id.* Representative Pray—who failed to answer the question—answered, "I hope that the gentleman will understand that $5.05 is fixed for sections 16 and 36, the school lands granted to the State of New Dakota…" *Id*. This exchange merely

documents the confusion of a single Representative which serves only to create ambiguity, not resolve it and is of next to no probative value.

D. Post-Enactment Demographics Support Diminishment.

The final factor, the post-enactment demographic history of the opened lands, is the least important factor in the analysis. Subsequent demographic history serves as, "one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers." *Solem*, 465 U.S. at 472. Changed demographics is the "least compelling" evidence in the diminishment analysis because surplus land acts always result in a flood of settlers but not all surplus land acts diminish. *Parker*, 136 S. Ct. at 1081-82. When a reservation has lost its "Indian character" by virtue of a flood of settlers to the reservation, courts may find that diminishment has occurred. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 356 (1998).

Here, to the extent that it is useful, the post-enactment demographics of the Topanga Cession support diminishment. The Maumee Allotment Act was passed in 1908 and over the next twelve years, the percentage of American Indians on the Topanga Cession dropped by over 70 percent. (R. at 7.) Over the same span, the percentage of Indians on the Maumee Reservation dropped by under 30 percent. *Id.* Thus, in comparison to the Maumee Reservation as a whole, the Topanga Cession experienced a significant influx of settlers after Congress passed the Maumee Allotment Act which indicates diminishment.

Since the text, history, and demographics all point towards diminishment, this Court should find that Congress clearly intended to and did diminish the Maumee Reservation with the Maumee Allotment Act.

III. The Wendat Allotment Act Did Not Diminish the Wendat Reservation.

The text, history, and demographics of the Wendat Allotment Act do not show clear Congressional intent to diminish the Wendat Reservation.

A. The Text of the Maumee Allotment Act Does Not Show Clear Congressional Intent to Diminish the Maumee Reservation.

The text of the Wendat Allotment Act shows that Congress intended to allow for the transfer of individual plots, not that Congress intended to diminish the reservation. An act that opens reservation land to settlement and provides that uncertain proceeds will be used to benefit Indians does not diminish a reservation. *See Parker*, 136 S. Ct. at 1079-80 (internal citations omitted). "Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others." *McGirt*, 140 S. Ct. at 2464. In the relevant part, the Act states, "All Lands not selected within one year of the survey's completion shall be declared surplus lands and open to settlement." Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892) [hereinafter *Wendat Allotment Act*]. The Act also provides for payment based on the number of acres declared surplus and states that money accrued from this process should benefit the Wendat. *Id*. In this case, the Act's text provides a process for declaring land surplus, allowing it to be settled, and providing for an uncertain amount of payment based on the acreage declared surplus. Based on the text, Congress simply intended to allow the transfer of individual plots, not to diminish the Wendat Reservation.

Next, the Wendat Allotment Act lacks hallmarks of Congressional intent to diminish. Congress must "clearly express its intent" to diminish. *McGirt*, 140 S. Ct. at 2463. Textual

indications of diminishment include references to: cession, surrender of tribal interests, unconditional commitment to compensate, and return of the land to the public domain. *Parker*, 136 S. Ct. at 1079. The text of the Wendat Allotment Act contains none of these indications. *Wendat Allotment Act*, *supra*. Congress failed to include any textual indicators of diminishment and thereby failed to clearly express its intent. Since Congress failed to express its intent, this Court should find that the Wendat Reservation was not diminished.

Furthermore, the Wendat Allotment Act is similar to an Act that the Supreme Court found did not diminish a reservation. In *Nebraska v Parker*, the court found that an act which called for the survey, appraisal, and division of Indian lands did not result in diminishment. *Parker*, 136 S. Ct. at 1079. The text of the statute also stated that lands would be opened for settlement and that payment to the Tribe would be based on the lands actually opened. *See id.* The Wendat Allotment Act also calls for survey, appraisal, and division of the Wendat Reservation and also conditions payment upon land being declared surplus. *Wendat Allotment Act, supra*. Since the Supreme Court found the act in *Parker* to not diminish an Indian reservation, this Court should also find that the similarly worded Wendat Allotment Act did not diminish the Wendat Reservation.

Moreover, the Wendat Allotment Act does not contain a "sum certain." The Act states, "[t]he United States hereby agrees to pay… in the name of the Wendat Band, the sum of three dollars and forty cents for every acre declared surplus…" *Wendat Allotment Act, supra*. Next, the Act set a cap for the amount paid in the name of the Wendat Band at $2,200,000. *Id*. The setting of a payment cap does not make the amount certain. One acre could have been declared surplus and the Wendat Band would have gotten $3.40. Or, approximately 650,000 acres could have been declared surplus and the Wendat Band would

have $2,200,000. Under the Act's payment scheme there are **over 600,000** different dollar amounts the Wendat Band could have received and therefore, there is no sum certain.

B. Since the Text of the Maumee Allotment Act is Clear, There is No Need to Consider Any Evidence Beyond the Text of the Act.

It is not necessary to consider the history of the Wendat Allotment Act because the text of the Act is unambiguous. After being established, a reservation remains a reservation unless Congress explicitly says otherwise. *McGirt*, 140 S. Ct. 2469 (internal citation omitted). Here, the text of the Act is unambiguous, Congress has not explicitly shown its intent to diminish, and therefore, the history surrounding the Act should not be used to create ambiguity.

C. The History of the Act Does Not Provide Enough Evidence to Clear Congressional Intent to Diminish.

The history of the act is insufficient to find that the Congress clearly intended to diminish the Wendat Reservation. Cherry-picked statements are not particularly probative of Congress's intent to diminish, especially when there are contradictory statements. *See Parker*, 136 S. Ct. at 1080-81. In this case, the historical record only provides statements from individual legislators. For example, Representative Ullrich discussed reducing reservations and Representative Harvey mentioned opening some of the Wendat Reservation to the public domain. 23 Cong. Rec. 1777 (1892). These statements are contrasted by Representative Mansur's reference to the Wendat Reservation as being 4,000,000 acres—its total pre-allotment acreage—which suggests that the reservation was undiminished. *Id*. Due

to the scarce and conflicting remarks, the legislative history does not support finding clear Congressional intent to diminish.

D. Post-Enactment Demographics Indicate That the Wendat Allotment Act Did Not Diminish the Wendat Reservation.

Demographic data does not reveal a significant influx of settlers following the Wendat Allotment Act which indicates that the Act did not diminish the Wendat Reservation. The Wendat Allotment Act was passed in 1892. Nearly a decade after the passage of the Act, the percentage of Indians on the Topanga Cession had only decreased by five percent. (R. at 7). Therefore, although there was a decrease in the percentage of American Indians on the Cession, it was hardly the flood required to find diminishment.

Since the Maumee Reservation was diminished by the Maumee Allotment Act and the Wendat Reservation was not diminished by the Wendat Allotment Act, the Topanga Cession is located in Indian country and within the Wendat Reservation.

IV. Preemption Doctrine Prevents the State of New Dakota from Levying its Transaction Privilege Tax Against the WCDC.

The Court should find that the State's TPT is preempted by federal law because well-established Supreme Court precedent prevents the State from taxing a Wendat Band corporation. Accordingly, the Circuit Court did not err in determining that the State was prohibited from levying its tax against a tribal-owned corporation.

A. The Doctrines of Preemption and Infringement Are Similar and May Independently Invalidate State Law.

Both the doctrine of preemption and the doctrine of infringement may serve as independent bases for holding a state law inapplicable to activity undertaken on a tribal reservation by tribal members. The "policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 (1945). The policy of preempting state jurisdiction was first articulated by Chief Justice John Marshall when he held that Indian nations were "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries . . ." *Worcester v. Georgia*, 31 U.S. 515, 557 (1832). Further, the Chief Justice articulated that the United States Constitution grants Congress the exclusive authority to regulate Indian affairs. *Id.* at 561. Inherent in the policy of preventing states from interfering with tribal authority is the concept of Indian reservations as separate, although dependent, nations, in which state law has no role to play within their boundaries. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973).

Although the doctrines of preemption and infringement are distinct, they are related in several important ways. While determining whether federal legislation has preempted state taxation of lessees of Indian land is primarily an exercise in examining congressional intent, the history of tribal sovereignty serves as a necessary backdrop to that process. *Id.* at 172. The Court's decision in *Williams v. Lee*, 358 U.S. 217 (1959), indicates that state action on a reservation is afforded a presumption of validity unless it infringes on the right of reservations to make their own laws and be governed by them. In subsequent cases, notions of Indian tribal sovereignty have been adjusted to account for the state's legitimate interests in regulating the affairs of non-Indians. *See, e.g., New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946); *Draper v. United States*, 164 U.S. 240 (1896). The entire emphasis in treaties

and congressional enactments dealing with Indian affairs has always been focused on the treatment of Indians themselves and their property. *Martin*, 326 U.S. at 501.

B. The State of New Dakota's Tax is Categorically Barred as Applied to the WCDC on the Wendat Reservation.

The Supreme Court has made clear that state law is permitted to intrude into Indian country only if two conditions are met: (1) there is no interference with tribal self-government; and (2) non-Indians are involved. *McClanahan*, 411 U.S. at 171-72. In *McClanahan*, the Court held that the State of Arizona could not tax the income of an Indian earned on the reservation. *Id* at 179. The Court articulated a new approach to the doctrine of tribal sovereignty, where a court's preemption analysis is based on "the applicable treaties and statutes which define the limits of state power." *Id*. at 172. Courts are not to look to "platonic notions of Indian sovereignty" in determining whether the doctrine applies. *Id*. When a court engages in preemption analysis, it must be remembered that the Indian tribes were once independent nations and that their claim to sovereignty predates that of the United States Government. *Id.*

Although this Supreme Court generally has considered tribal self-determination to be a weighty federal interest in applying preemption analysis, it has declined to entertain a presumption that all on-reservation activities affecting the tribes are beyond the reach of state power. *See Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue*, 458 U.S. 832, 845-46 (1982). The state's interest in exercising its regulatory authority over the activity in question must be analyzed and given appropriate weight. *Id.* at 838. Preemption analysis is therefore highly fact-specific and depends on the interplay of the applicable statutes, treaties, regulations and

interests involved, and is less predictable than a more formalistic approach for determining Indian sovereignty. *McClanahan*, 411 U.S. at 172.

The unique historical origins of tribal sovereignty make it generally unhelpful to apply standards of preemption that have developed in other areas of law. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). In the area of tribal law, courts apply unique standards to determine whether federal law preempts the state's authority. *See Confederated Tribes of Siletz Indians v. Oregon*, 143 F.3d 481, 486 (9th Cir. 1998). When a state tax is not categorically barred or explicitly preempted by federal law, a court typically conducts a *Bracker* balancing analysis, weighing the federal, tribal, and state interests at stake to determine whether implicit preemption of a state tax is proper. *Bracker*, 448 U.S. at 142-45. First, it is critical to determine the entity being taxed. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995). This determination is commenced by examining who bears the "legal incidence of a tax." *Id.* at 458.

The "legal incidence of a tax" falls on the person or entity who has the obligation to pay the tax. *Canteen Serv. v. State*, 83 Wn.2d 761, 762, 522 P.2d 847 (1974). If the legal incidence of the tax rests on a tribe or its members inside Indian country, such tax is unenforceable absent congressional authorization. *Chickasaw Nation*, 515 U.S. at 459. However, if the legal incidence of the tax falls on non-Indians, no categorical bar precludes the tax from being enforced. *Id.* When a state attempts to levy a tax directly on an Indian tribe or a tribal member in Indian country, rather than on non-Indians, a court applies a categorical approach rather than a balancing inquiry. *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 258 (1992). The Court has invalidated a number of state taxes whose legal incidence rested on a tribe or on tribal members inside

Indian country. *See, e.g., Bryan v. Itasca County*, 426 U.S. 373 (1976) (tax on Indian-owned personal property situated in Indian country); *McClanahan*, 411 U.S. at 165-66 (tax on income earned on reservation by tribal members).

The State's proposed tax should be preempted because it would be levied against a tribal-owned entity and tribal members within Indian country. The Court should apply the categorical approach to federal preemption to the WCDC's development as laid out in *Chickasaw Nation*. Although non-members and non-Indians may purchase products from the shopping complex, the tax would ultimately be levied against a Wendat Band corporation. The fact that the shopping complex would principally benefit reservation Indians belonging to the Wendat Band further suggests that the State's tax must be preempted. The Wendat Band's commercial development is part of the Wendat Reservation, which is confirmed by the Wendat Treaty's grant of the lands east of the Wapakoneta River to the Band.

C. The State of New Dakota Lacks Clear Authorization from Congress to Tax the WCDC.

The tradition of tribal sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been preempted by the operation of federal law. *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976). Nonetheless, this Supreme Court has recognized that, even on reservations, state laws may apply unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law. *See, e.g., Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962); *Draper*, 164 U.S. at 245. However, in the special area of state taxation, absent a federal statutory provision permitting it, there has been no satisfactory authority for taxing Indian reservation land or Indian income from activities carried on within

the boundaries of the reservation. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973). *McClanahan* made clear that any such taxation on reservation land is not permitted absent Congress's consent. *See id.*

However, the Supreme Court has somewhat narrowed the scope of Indian preemption with respect to state taxation in Indian country. In *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), the Court held that the State of Washington could impose cigarette and sales taxes on sales made to Indians who were not members of the tribe in question. The Court set forth several important factors to determine whether a state's tax in Indian country merits preemption, including the severity of the burden on an Indian retailer to aid in enforcing and collecting the tax. *Id.* at 151-52. The Court held that the imposition of the Washington tax would not contravene the principle of tribal self-government because nonmembers were not constituents of the governing tribe. *Id.* The Court reaffirmed its *Confederated Tribes* holding eleven years later in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 512-13 (1991).

Unlike in *Confederated Tribes*, the tribe's ability to govern itself is at issue in this case because the tax would be levied against a Wendat corporation. Even if the State's actions do not interfere with tribal sovereignty to the extent in *McClanahan*, this is a proper case for preemption for several reasons. Here, preemption doctrine should be applied based on the unique relationship between the federal government – as trustee for the Indian tribes – and the various States. *See Worcester*, 31 U.S. at 561. The United States has preserved title and interest to land in the New Dakota Territory belonging to the Wendat Band.[9] Moreover, the eastern half of the lands reserved by the Wendat Band in the 1859 Treaty are held in trust by

9 Treaty with the Wendat, March 26, 1859, 35 Stat. 7749.

the United States for the use and benefit of the Band. *Wendat Allotment Act*, *supra*. The cession to the United States of the Wendat Band's title and interest to lands in the New Dakota Territory strongly suggests that New Dakota's tax should be preempted.

Respondent concedes that the WCDC purchased fee land from non-Indians that has not yet been taken into trust and is thus not entitled to an automatic exemption from the TPT under 4 N.D.C. § 212(4). (R. at 8.) Nevertheless, this Court's precedent supports the conclusion that the New Dakota TPT license and tax requirements are subject to federal preemption despite the land's trust status. Accordingly, the State is prohibited from requiring the WCDC to procure a TPT license or pay the tax because the WCDC is a tribal corporation exempt from taxation.

V. The Doctrine of Infringement Prevents the State of New Dakota from Levying its Tax against the WCDC.

Next, the doctrine of infringement prevents the State from requiring the WCDC to procure a TPT license or pay the tax. No federal statutory provision, treaty, or other congressional indication permits the State to tax a Wendat tribal corporation. State law is generally inapplicable when on-reservation conduct involves only Indians. *See, e.g., Moe*, 425 U.S. at 480-81. More difficult questions may arise when a State asserts authority over the conduct of non-Indians engaging in activity on the reservation. *See Bracker*, 448 U.S. at 144. In such cases, the Supreme Court has examined the language of the federal treaties and statutes with respect to both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. *Id.* at 144-45. Rather than relying on mechanical or absolute conceptions of state or tribal sovereignty, the inquiry is particularized and focuses on the nature of the state, federal, and tribal interests

at stake to determine whether the exercise of state authority would violate federal law. *Compare Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965), *and Williams*, 358 U.S. at 223, *with Moe*, 425 U.S. at 478-79, *and Thomas v. Gay*, 169 U.S. 264 (1898).

A. New Dakota's TPT Would Infringe Upon the Wendat Band's Sovereignty.

A state may not levy a tax that infringes upon the rights of reservation Indians. *McClanahan*, 411 U.S. at 168. Supreme Court precedent has consistently guarded the authority of Indian governments over their reservations. *See id.*; *Williams*, 358 U.S. at 223. Congress has also acted consistently upon the assumption that States have no power to regulate the affairs of Indians on a reservation. *Id.* at 222. Notably, the exclusion of the states from taxation of Indian property does not depend on the federal trust status of the property; in the absence of congressional authorization, states lack the power to tax even non-trust property when it is owned by a tribal member and is located on the tribe's reservation. *See Bryan*, 426 U.S. at 375. The Court in *Bryan* noted in particular the absence of congressional intent to confer upon states the authority to tax Indians or Indian property on reservations. *Id.* at 381. The Court also found significant that neither the Committee Reports nor the floor reports in either House mentioned such authority to tax. *Id.*

In contrast to a more protective view of tribal sovereignty in *Williams*, the Court followed a narrower approach to the doctrine of infringement in *Egan*. In that case, the Court suggested that state law and state court jurisdiction could be extended to Indians as well as non-Indians in Indian country, so long as there did not seem to be a direct interference with the tribal government itself. *Egan*, 369 U.S. at 73-74. Another statement of this principle was made in a decision reaffirming the authority of a State to punish crimes committed by non-

Indians against other non-Indians on reservations: "In the absence of a limiting treaty obligation or Congressional enactment each state had a right to exercise jurisdiction over Indian reservations within its boundaries." *Id.* (quoting *Martin*, 326 U.S. at 499). Accordingly, the Court has made clear that state law may be applied even to Indians on reservations unless the law's application would infringe on the ability of tribes to govern themselves or impair a right granted or reserved by federal law. *Egan*, 369 U.S. at 75.

Unlike a straightforward case of state taxation of on-reservation conduct involving only Indians, this case contains somewhat more complex factual circumstances. Nevertheless, the Supreme Court's more permissive approach does not allow the State of New Dakota to collect its tax against a Wendat tribal corporation. Under well-established case law, and under the trust doctrine, states may tax Indians only when Congress has clearly manifested its consent. *See, e.g., Warren Trading Post*, 380 U.S. at 691. Any ambiguity in such a provision must be construed in favor of the Indian tribe. *Id*.

In *Warren Trading Post*, the Court invalidated a state tax which left the state with no duties or responsibilities respecting reservation Indians on the Navajo Reservation. *Id*. Because the state tax at issue in the case would have subjected the Indian tribe to financial burdens, the Court reasoned that the statutory plan Congress set up to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner could have been disturbed and disarranged. *Id.* Consequently, the Court ruled that Congress could not have intended to leave the state with the privilege of levying the tax. *Id.* Because Congress left the Navajo Reservation to maintain largely autonomous supervision over the reservation and its affairs without state control, the state was left with few responsibilities. *Id.* at 690.

In this case, Congress has not evinced any intent to permit the State of New Dakota to tax a Wendat tribal corporation. Similar to the Navajo Reservation's relationship with the state in *Warren Trading Post*, this case presents circumstances in which New Dakota has been left with few responsibilities with respect to the Wendat Band. The Wendat Treaty and the legislative history of the Treaty both demonstrate that Congress did not intend the State to have the authority to exact a commercial tax on Indian nations within the State. Several Senators recognized that the treaty's ability to serve the interests of the Wendat Band was paramount, and that the State would only be established with a successful treaty. Cong. Globe, 35th Cong., 2nd Sess. 5411-5412 (1859). Moreover, the legislative history does not indicate that the Senate intended the State of New Dakota to have any responsibility to tax the various Indian nations. *Id.* Accordingly, it is reasonable to conclude that the intent of the Wendat Treaty was to establish a relationship between the Wendat Band and the State in which the two governments would be largely independent of one another.

B. The State of New Dakota's Tax Would Be Levied Against the Wendat Band Itself.

The unique characteristics of the WCDC's development do not preclude the application of preemption and infringement doctrine to the State of New Dakota's tax. Although the shopping complex is expected to attract non-Indian consumers living outside of the reservation, its primary purpose is to fund public housing and a nursing care facility for the Wendat Band. (R. at 8.) The shopping complex is owned by the WCDC, which is wholly owned by the Wendat Band with 100 percent of corporate profits remitted quarterly to the tribal government. *Id.* at 7-8. Therefore, Petitioner's argument that the WCDC is a non-member business must fail. The WCDC's prospectus' suggestion that the enterprise will

eventually support at least 350 jobs and earn more than $80 million in gross sales annually provides further evidence of an appreciable benefit for the Wendat Band. *Id.* Consequently, the State is prohibited from interfering with the Wendat Band's self-determination through its imposition of the tax on the development.

In this case, the mere proposition that particular businesses in the shopping complex would attract non-Indian consumers does not alter the infringement analysis with respect to the Wendat Band's corporation. Non-member consumers and tribal member consumers are not distinguished in the application of the tax, which would apply as long as the WCDC receives gross proceeds of sales or gross income of more than $5,000 on transactions commenced in New Dakota. 4 N.D.C. § 212(1). Like the tribal member who was improperly taxed by the state in *Bryan*, the WCDC itself would ultimately be subject to the State's tax regardless of who purchases its products.

The State of New Dakota may not assert jurisdiction to tax the Wendat tribal corporation located on the Wendat development. Petitioners would have no right to a percentage of the TPT as the development is not located on their Reservation. Accordingly, even if the doctrines of infringement and preemption were held not to apply, any tax paid by the WCDC on the Wendat Reservation must be remitted back to the Wendat Band under 4 N.D.C. § 212(5). The Wendat Treaty further demonstrates that the Wendat development is not within the Maumee Reservation. Accordingly, this Court should uphold the decision of the Circuit Court finding that the State was prohibited from requiring the WCDC to procure a TPT license or pay the tax.

CONCLUSION

For the foregoing reasons, the Court should affirm the Circuit Court's decision. The Circuit Court correctly held that the 1859 Wendat Treaty abrogated the Maumee Nation's claim to the Topanga Cession. Moreover, the Maumee Reservation was diminished by the Maumee Allotment Act and the Wendat Reservation was not diminished by the Wendat Allotment Act. Therefore, the Circuit Court was correct that the Topanga Cession is located in Indian country and within the Wendat Reservation.

The Court should also affirm the Circuit Court's holding that the State of New Dakota was prohibited from requiring the Wendat Band to procure a TPT license or pay the tax. Respondent has demonstrated that both preemption and infringement apply in this case. Accordingly, Respondent Wendat Band respectfully requests that the Court affirm the decision of the Circuit.