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## Winner, Best Appellate Brief in the 2021 Native American Law Student Association Moot Court Competition

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## WINNER, BEST APPELLATE BRIEF IN THE 2021 NATIVE AMERICAN LAW STUDENT ASSOCIATION MOOT COURT COMPETITION\*

*Eric Rolston\*\* & Polina Noskova\*\*\**

### *Questions Presented*

I. Whether the Treaty with the Wendat abrogated the Treaty of Wauseon and/or the Maumee Allotment Act of 1908 diminished the Maumee Reservation. If so, whether the Wendat Allotment Act (1892) also diminished the Wendat Reservation or if the Topanga Cession is outside of Indian Country.

II. Assuming the Topanga Cession is still in Indian Country, whether 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*

This case is about determining whether Congress made the requisite statement to diminish the Maumee or Wendat reservations, and whether it is proper for a state to levy a tax on a tribal corporation in Indian Country when the tax interferes with tribal and federal interests.

The Wendat Band (hereinafter the “Band” or “Wendat Band”) is an Indian tribe located in the State of New Dakota. The Band dates its rights to

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\* This brief has been edited from its original form for ease of reading. The record for this brief comes from the 2021 National Native American Law Students Association Moot Court Competition problem, which can be found at <https://perma.cc/V8VV-TWC3>.

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the 1859 Treaty with the Wendat, reserving land east of the Wapakoneta River to the tribe. *See* Treaty with the Wendat, March 26, 1859, 35 Stat. 7749, R. at 5. The Band intends to construct a combination residential-commercial development (hereinafter the “Development”) on a parcel of land in the western portion of its Reservation. *Id.* at 7. The Development would include public housing units for low-income tribal members, a nursing care facility for elders, a tribal cultural center, and a tribal museum. *Id.* The housing and nursing facilities could not be constructed without revenue provided by a shopping complex that would include a grocery store offering fresh and traditional foods, as well as a bookstore and pharmacy. *Id.* at 7–8. The Development would support at least 350 jobs and any profits would be remitted quarterly to the tribal government as dividend distributions. *Id.*

The Maumee Indian Tribe (hereinafter the “Maumee”) Reservation shares a border with the Wendat Reservation. The 1802 Treaty of Wauseon established the Maumee Reservation, reserving land west of the Wapakoneta River to the petitioner. *Id.* at 4; *see also* Treaty of Wauseon, Oct. 4, 1801, 7 Stat. 1404, *Id.* at 4. The river, referenced in both treaties, moved some three miles west in the 1830s, with the area between the current and prior river locations referred to as the Topanga Cession. *Id.* at 5. Thus, by the time Congress established the Wendat Reservation in 1859, the river already moved, and a plain reading of the treaty would indicate Congress intended the Wendat Band to inhabit the Topanga Cession. *Id.* However, since at least 1937, *both* tribes have maintained they have the exclusive right to the lands. *Id.*

Other congressional acts have since affected these tribal boundaries. Both the Wendat Band and the Maumee were subject to congressional allotment acts, which authorized the allotment of lands to tribal members and opened up their reservations to non-Indian settlers. *Id.*; *see also* Felix Cohen, Cohen’s Handbook of Federal Indian Law § 1.03 (Nell Jessup Newton ed., 2017).

The Wendat Allotment Act of 1892 preserved the boundaries of the Wendat Reservation, while allowing non-Indian settlers to buy plots of land and settle on or near the Topanga Cession. *See* Wendat Allotment Act, Pub. L. No. 52-8222, ch. 42 (1892); *infra* at 19–23. The Maumee Allotment Act of 1908 diminished petitioner’s Reservation and ceded any claims they may have had remaining over the Topanga Cession back to Wendat Band control, per their earlier treaty. *Id.* at 14; Maumee Allotment Act of 1908, Pub. L. No. 60-8107, ch. 818. Both tribes agree that no member of either tribe selected an allotment within the Topanga Cession. R. at 5.

While the tribes have disputed the ownership of the Topanga Cession for over 80 years, there was no need for a definitive answer until recently. R. at 7.

New Dakota's Transaction Privilege Tax ("TPT") played an important part in escalating the dispute between the tribes. R. at 8. The applicable statute requires businesses operating within the state to apply for a license, 4 N.D.C. § 212(1), and remit 3% of proceeds to the state's general fund, *Id.* at § 212(3). Tribal businesses operating within a tribe's own reservation on land held in trust by the United States are exempt from the statute. *Id.* at § 212(4). However, the statute requires Indian businesses operating on another tribe's reservations to remit funds to the state. *Id.* at § 212(5). The state then remits these proceeds to the tribe on whose reservation the business operates. *Id.* Thus, the statute allows for the state to collect taxes on businesses even when the income is entirely earned within Indian Country from a business entirely owned by Indians. If applied to the Development, the TPT would impose additional costs of approximately \$2.4 million per year (assuming estimated gross sales per year of \$80 million at a 3% tax rate), diminishing proceeds that would otherwise go towards the Development, including the housing and nursing facilities, or members of the Wendat Band. *Id.* at 8.

After the Wendat Band announced the Development, the petitioner approached the Band regarding the tax, attempting to divert proceeds from the Development to its own tribe. *Id.* This would happen if the Development was located on a Maumee Reservation. *Id.* at 6–8. The Wendat Band replied that the TPT does not apply to the Development because it is located on the Wendat Reservation, and under the doctrines of Indian preemption and infringement. *Id.* at 8.

## *II. Statement of the Proceedings*

The petitioner filed a complaint in the United States District Court for the District of New Dakota asking for a Declaration that any development in the Topanga Cession be subject to the TPT because it is located on the Maumee Reservation. *Id.* at 8. The Declaration would result in the tax being imposed on the Wendat Band Development and tax proceeds being remitted to the petitioner. *Id.* Alternatively, the petitioner asked for a Declaration that the Topanga Cession is not Indian Country at all, which would result in the tax on the Development being split between the state and the petitioner. *Id.* The Wendat Band argued that the Development is in Indian Country and that New Dakota has no authority to collect the tax because it is either preempted by federal law or infringes on the Wendat Band's sovereignty.

*Id.* at 4. In the alternative, the Wendat Band argued that the Development is located on its own Reservation, in which case any tax paid would be remitted back to the tribe. *Id.* The District Court found for the petitioner. *Id.* at 9.

The Wendat Band appealed to the Court of Appeals for the Thirteenth Circuit which waited to make its ruling until after this Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), and then reversed the District Court. *Id.* at 10–11. The Court of Appeals held that the Treaty with the Wendat of 1859 clearly abrogated the petitioner's claim to the Topanga Cession and the Wendat Allotment Act did not include sufficient cession language to diminish the Wendat Reservation. *Id.* at 10. Thus, the land belongs to the Wendat Band. *Id.* In addition, the Court of Appeals held that "the tax infringes on tribal sovereignty, (*Williams v. Lee*, 358 U.S. 217 (1959)) and should be subject to Indian preemption under Supreme Court precedent (*White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980))." *Id.* at 11. The Court of Appeals noted that either doctrine would be sufficient to bar the application of the tax, but both are present in this case. *Id.*

The Supreme Court of the United States granted certiorari to decide two issues: (1) whether the Topanga Cession is located in the Maumee Reservation, the Wendat Band Reservation, or outside of Indian Country, and (2) whether the doctrines of infringement or preemption bar New Dakota from levying its tax in Indian Country. *Id.* at 3.

#### *Summary of Argument*

The State of New Dakota has no authority to levy its tax on the Development. The Development is located on the Wendat Reservation and both the doctrines of Indian preemption and infringement bar the application of the tax in Indian Country.

The Maumee Reservation does not include lands located within the Topanga Cession. Congress diminished the Maumee Reservation by the Treaty with the Wendat of 1859, and if not this treaty, then by the Maumee Allotment Act of 1908. Following the diminishment of the Maumee Reservation, the Topanga Cession was located completely within the Wendat Reservation which remains the case today.

Congress alone has the power to abrogate Indian treaties or diminish reservations. *McGirt*, 140 S. Ct. at 2462. The first step in analyzing whether an Indian reservation was diminished is to examine congressional intent of the treaty or statute at issue under the test outlined in *McGirt*. *Id.*

Congressional intent should be determined using the language of the act, and then, only if the language is ambiguous, using extratextual evidence to clarify the text. *Id.*

Congress abrogated the Treaty of Wauseon by leveraging its constitutional power to pass laws in conflict with previous treaties made with Indians. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903). Congress clearly delineated their intention that the Wendat Band inhabit lands east of the Wapakoneta River. Treaty of Wauseon, Oct. 4, 1801, 7 Stat. 1404. If the Court finds the text of the treaty ambiguous, legislative history confirms this conclusion by noting that the Maumee had previously yielded their claims to parts of this territory. *See* Cong. Globe, 35th Cong., 2nd Sess. 5411–12 (1859).

Congress confirmed this abrogation when passing the Maumee Allotment Act of 1908, which ceded the eastern quarter of the Maumee Reservation to the United States. Maumee Allotment Act of 1908, Pub. L. No. 60-8107, ch. 818. The Maumee Allotment Act uses cession language similar to other allotment acts which have been held to diminish tribal boundaries. *See DeCoteau v. Dist. Cnty. Ct. for Tenth Judicial Dist.*, 420 U.S. 425, 449 (1975); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 614–15 (1977). Similar to the above, if the language of the Act is found to be ambiguous, the extratextual evidence also indicates that the land was diminished. *See* 42 Cong. Rec. 2345 (1908); also R. at 7.

On the other hand, the Wendat Reservation survived allotment because the language of the act shows that Congress did not intend to diminish the Reservation. Wendat Allotment Act, Pub. L. No. 52-8222, ch. 42 (1892). There is no mention of cession in the act, and the outline of payments to the tribe after land sales are not unconditional. *Id.* In addition, if the Court finds this text ambiguous, the subsequent demographics of the Topanga Cession provide extra contextual evidence that that the section of land was merely opened up to non-Indian settlers. R. at 7.

Because the Maumee claim to the Topanga Cession was abrogated, first by the Treaty with the Wendat and then by the Maumee Allotment Act, the Topanga Cession remains part of the Wendat Reservation.

Regardless of how the Court decides whether the Topanga Cession is located within the Maumee or Wendat Reservation, the Court should find New Dakota's Transaction Privilege Tax invalid as applied in Indian Country. This Court has long recognized that state law is generally not applicable within Indian Country. *See Worcester v. Georgia*, 31 U.S. 515, 561–62 (1832). Two barriers limit the applicability of the state tax to the

Development: the doctrines of Indian preemption and infringement. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142–43 (1980).

In considering Indian preemption of the TPT, there are two routes the Court can take and either approach is sufficient to find the tax preempted. First, the Court should follow the approach laid out in *Chickasaw Nation*, where the Court held that when the legal incidence of a tax in Indian Country falls on a tribe or tribal members, states are categorically barred from applying the tax without congressional authorization. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995). This categorical bar applies because Congress has not authorized this tax, and the tax ultimately falls on the Wendat Band. Second, if not following the *Chickasaw Nation* categorical approach, the Court should find the tax is preempted by federal law using the interest balancing-test articulated in *Bracker*. 448 U.S. at 142–43. Under this test, the Court should weigh the tribal, federal and state interests and find New Dakota's TPT preempted by federal law because the tax interferes with purposes underlying federal laws and programs. *Id.* Specifically, the TPT interferes with the Development's ability to provide affordable housing and healthcare facilities in Indian Country, R. at 7–8, which are supported by comprehensive government programs, *infra* at 29–30.

The TPT also infringes on tribal sovereignty as applied to the Development. The Court has consistently recognized the right of "Indians to make their own laws and be ruled by them" *Williams*, 358 U.S. at 220. Accordingly, unless Congress "expressly authorized state tax jurisdiction in Indian country," that authority is presumed not to exist. *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 126, (1993). The state's application of the tax would touch exclusively Indian entities by taxing a Wendat Band corporation operating on Indian lands. R. at 7–8. In addition, this tax would be on the entirety of the Development's sales, rather than specific products. 4 N.D.C § 212(1). The Court has never ruled that such a broad tax on tribal businesses in Indian Country is valid. A decision in favor of the petitioner would permit a state to dramatically expand its jurisdiction in Indian Country in violation of tribal sovereignty. The Court should avoid such a momentous decision infringing on tribal sovereignty and bar New Dakota's application of the TPT in Indian Country.

*Argument**I. The Topanga Cession Falls Within the Wendat Reservation Because the Maumee Reservation Was Diminished and the Maumee's Claim to the Topanga Cession Abrogated*

Congress diminished the Maumee Reservation in two ways, both resulting in the Topanga Cession falling within the Wendat Reservation. First, Congress abrogated the Treaty of Wauseon with the Treaty with the Wendat. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903). Second, Congress dually confirmed this abrogation when it passed the Maumee Allotment Act of 1908. Explicit language in the Act referring to cession indicates a clear congressional intent to diminish the Maumee's lands in the Topanga Cession, as required under *McGirt*. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020). Legislative history supports the contention that this was Congress's intent. 42 Cong. Rec. 2345 (1908).

The Maumee Allotment Act differs from the Wendat Allotment Act which had no such explicit language indicating congressional intent. Therefore, the Topanga Cession remains on the Wendat Reservation.

*A. The Treaty with the Wendat Abrogated the Treaty Of Wauseon, Diminishing the Maumee Reservation and Placing the Topanga Cession in Wendat Territory*

The 1859 Treaty with the Wendat reserved land in what is now the Topanga Cession to the Wendat Band, abrogating the Maumee Nation's claim to the territory. In other instances of conflicting Indian treaties, Congress has either partitioned the land through mediation or by classifying the land as shared tribal land. See *Sekaquaptewa v. MacDonald*, 575 F.2d 239, 239–52 (9th Cir. 1978) (for an example of the partitioning of overlapping Indian reservations after an initial classification of shared land). However, because Congress took neither approach addressing the conflicting property claims between the Maumee and Wendat Band, the analysis should focus on congressional intent in the relevant treaties under *McGirt v. Oklahoma*. *McGirt*, 140 S. Ct. at 2463.

*1. Congress Has the Power to Abrogate a Treaty by the Passage of a Law in Conflict with Said Treaty*

Congress may abrogate a treaty made with an Indian Nation by passing a law in conflict with the treaty. *Lone Wolf*, 187 U.S. at 566. The Constitution grants Congress plenary and exclusive powers to legislate in Indian affairs. *United States v. Lara*, 541 U.S. 193, 200 (2004). The Indian Commerce

Clause, U.S. Const. Art. I, § 8, cl. 3, and the Treaty Clause, Art. II § 2, cl. 2, are the sources of that power. *Id.* This includes the exclusive authority to establish treaties with Indian nations, which “must be understood as grants of rights from Indian people who reserve all rights not granted.” Felix Cohen, *Cohen’s Handbook of Federal Indian Law* § 6.03 (Nell Jessup Newton ed., 2017).

“Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.” *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). Relatedly, Congress has the exclusive power to diminish Indian reservations. *McGirt*, 140 S. Ct. at 2462. However, while Congress may abrogate Indian treaties, “courts may not find that abrogation occurred absent clear evidence of congressional intent.” Cohen § 1.03.

The most common methods of abrogation are through allotment, surplus, general land sales, or other legislation which may diminish an Indian reservation by restoring lands to the public domain. *Ute Indian Tribe v. State*, 521 F. Supp. 1072, 1138 (D. Utah 1981). However, Congress may also diminish an Indian reservation by passing laws in conflict with previous treaties made with Indians. *See, e.g. Ute Indian Tribe*, 521 F. Supp. at 1136 (where the Court held the Ute Indian Tribe’s Reservation was diminished by legislation withdrawing timber lands and establishing national forests). Essentially, as long as there is clear congressional intent, Congress has the power to abrogate treaties in myriad ways.

*2. A Plain Reading of the Treaty with the Wendat Shows Congress Unambiguously Intended to Abrogate the Maumee’s Claim to the Topanga Cession*

A plain reading of the Treaty with the Wendat shows congressional intent to displace the previous Treaty of Wauseon. This conclusion is bolstered by legislative history from the enactment.

In *McGirt*, this Court outlined a simple analysis to determine whether a reservation is diminished. *McGirt*, 140 S. Ct. at 2462. Under *McGirt*, the only place to look to determine whether a tribe continues to hold a reservation is to the Acts of Congress. *Id.* If Congress “wishes to break the promise of a reservation, it must say so.” *Id.*

However, it is important to note when interpreting Indian treaties that interpretive analyses are not to be considered as “exercises in ordinary conveyancing.” *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630 (1970). Treaties were imposed on Indian Nations and as a consequence, the treaties

must be interpreted as the Indian Nations would have understood them. *Id.* at 631. Therefore, “any doubtful expressions in them should be resolved in the Indians’ favor.” *Id.*

In the Treaty with the Wendat, the Wendat Band agreed to “cede to the United States their title and interest to lands in the New Dakota Territory, *excepting those lands east of the Wapakoneta River.*” Treaty with the Wendat, March 26, 1859, 35 Stat. 7749 (emphasis added). This shows that both Congress and the Band saw those lands as theirs to hold or cede and intended for the Wendat Band to retain these lands that now make up the Topanga Cession.

It is unnecessary to review extra-contextual evidence given the text of the treaty is clear, *see McGirt* 140 S. Ct. at 2462, but this conclusion is underscored in the legislative history of the enactment of the Treaty, *see Cong. Globe*, 35th Cong., 2nd Sess. 5411–12 (1859). In speeches made during the debates regarding the ratification of the Treaty, senators noted that the Territory of New Dakota was “emptying of its Indian population,” with the Wendat Band being some of the last to yield their claims to the bulk of the Territory. *Id.* (“Beginning with the Maumee, the Indians of New Dakota have slowly yielded their claims to the bulk of the Territory”, and “few Indians now live along the Zion tributary and even fewer are to be found near the river Wapakoneta”).

These discussions indicate that Congress did not think that the Maumee were inhabiting the area now called the Topanga Cession at the time the Treaty with the Wendat was made. Even if they were mistaken and Maumee were living in the area, congressional intent controls and indicates that the senators fully intended the Maumee Reservation to be abrogated and for the land to be reserved for the Wendat Band.

*a) The Role of the River Does Not Change the Plain Reading of the Treaties at Hand*

The fact of the river’s movement over time, R. at 5, may appear to complicate the analysis of the question, but it does not change the plain reading of the treaties.

The treatment of rivers which fall within reservations in resolving property disputes among tribes and between tribes and states is also centered on congressional intent. *Choctaw Nation*, 397 U.S. at 652. In *Choctaw*, the Court held that Congress intended to and did convey title to the bed of the Arkansas River in the grants it made to petitioner tribes. *Id.* at 654. It did this by noting that the documents were consistent with and confirmed the natural reading of the title. *Id.* There was no express

exclusion of the riverbed as there was no other land within the grants. *Id.* at 634. Lower courts have applied a similar analysis in deciding disputes over rivers as tribal water resources. *United States v. Aam*, 887 F.2d 190, 190–98 (9th Cir. 1989).

Additionally, both parties agree water law does not weigh on the dispute at hand. R. at 5. Moreover, the Wapakoneta River's role does not make a difference for two reasons: First, because the river moved before Congress made the Treaty with the Wendat, and second, the Wapakoneta River serves as a reservation boundary, not falling directly within either reservation.

Accordingly, both the language in the Treaty and the legislative history surrounding the Treaty's enactment show that Congress intended to abrogate the Maumee's claim to the Topanga Cession.

*B. Even if the Treaty with the Wendat's Intent Regarding Abrogation Is Ambiguous, the Maumee Allotment Act of 1908 Diminished the Maumee Reservation, Placing the Topanga Cession Within Wendat Territory by Default*

If the Court finds the Treaty with the Wendat did not diminish the Maumee Reservation, the Maumee Allotment Act of 1908 would have had the same effect. Maumee Allotment Act of 1908, Pub. L. No. 60-8107, ch. 818. The Maumee Allotment Act diminished the entire eastern quarter of the Maumee Reservation, and no subsequent statute diminished the Wendat Reservation. R. at 8. Therefore, the surplus lands, including the Topanga Cession, revert to Wendat Band control.

Congress passed the Maumee Allotment Act after enacting the General Allotment Act in 1887, which authorized the allotment of reservation lands. *Id.* at 13–14. As demonstrated by the Maumee Allotment Act, actual allotment was accomplished through specific legislation that implemented or sometimes replaced the general Act. *See* 25 U.S.C. § 424; *see also* Felix Cohen, Cohen's Handbook of Federal Indian Law § 1.04 (Nell Jessup Newton ed., 2017) (discussing General Allotment Act of 1887).

The effect of any given surplus land act depends on the language of the act and the circumstances underlying its passage. *Solem*, 465 U.S. at 469. Some allotment acts diminish a reservation, while others allow non-Indians to buy land within a reservation's boundaries. *Id.* at 468. In order to diminish a reservation, Congress must clearly evince "an intent to change boundaries." *Id.* at 470.

*McGirt* has set the standard for analyzing whether there was diminishment under an allotment act, notably by focusing on the analysis of

congressional intent in the language of the act itself and not consulting extratextual sources unless the meaning of an act is unclear. *McGirt*, 140 S. Ct. at 2469. However, although extratextual evidence cannot override clear congressional intent under *McGirt*, it can help shed light on the intended meaning of the text in question at the time of enactment. *Id.* *McGirt* considers the factors outlined in *Solem* as a way to clear up ambiguity in statutory language. *Id.* at 2468.

*Solem* presents a three-prong analysis for determining whether a surplus land act diminished a reservation. *Solem*, 465 U.S. at 470. The first step of the *Solem* test is to consider the language of the act, and whether it explicitly references cession. *Id.* If the reference to cession is coupled by an unconditional commitment to compensate the tribe for opened land, there is an “almost insurmountable” presumption that Congress meant for the tribe’s reservation to be diminished. *Id.* Second, congressional intent may be inferred from events surrounding the passage of a surplus land act, particularly the manner in which the transaction was negotiated and the reports presented to Congress. *Id.* at 471. Lastly, events after the passage of the surplus land act may be used as evidence towards intent. *Id.* This can include Congress’s treatment of the affected area, how the Bureau of Indian Affairs dealt with unallotted open lands, and whether a flood of non-Indian settlers can demonstrate “de facto” diminishment. *Id.*

A handful of federal cases provide examples of how the Court reviews whether an allotment act diminished a reservation. In *Rosebud Sioux Tribe v. Kneip*, the Court held that language and legislative history of three congressional acts showed a definite intent to diminish the boundaries of the Rosebud Reservation in South Dakota. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 597 (1977) (the Indians “belonging on the Rosebud Reservation, South Dakota, for the consideration hereinafter named, do hereby *cede, surrender, grant and convey* to the United States” claim to the part of the Rosebud Reservation now remaining unallotted) (emphasis added). The use of the word “cession” clarifies the intended meaning between the “diminution of the Reservation boundaries on the one hand, and merely opening up designated lands for settlement by non-Indians, on the other.” *Id.* at 597.

Similarly, in *DeCoteau v. District County Court for Tenth Judicial Dist.*, the Court held that the Lake Traverse Indian Reservation in South Dakota was terminated by an 1891 Act on the “face of the Act,” “surrounding circumstances” and “legislative history.” *DeCoteau v. Dist. Cnty. Ct. for Tenth Judicial Dist.*, 420 U.S. 425, 445 (1975). Specifically, the Act says that the Sisseton and Wahpeton bands of Dakota or Sioux Indians “hereby

*cede, sell, relinquish, and convey to the United States*” their claims and interest to all the unallotted lands within the Reservation. *Id.* at 436 (emphasis added); *see also South Dakota v. Yankton Sioux*, 522 U.S. 329 (1998); *Hagen v. Utah*, 510 U.S. 399 (1994); *Wyoming v. EPA*, 875 F.3d 505 (10th Cir. 2017) (all holding that Congress diminished reservations citing a similar language analysis).

The Maumee Allotment Act stipulates that “Unclaimed lands in the western three-quarters of the reservations shall continue to be reserved to the Maumee,” while 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 the public domain by way of this act” [sic], Maumee Allotment Act of 1908, Pub. L. No. 60-8107, ch. 818 (emphasis added). These lands would include those in the Topanga Cession. This is a direct mirroring of the cession language used in *Rosebud Sioux* and *DeCoteau*. *Rosebud Sioux Tribe* 430 U.S. at 597; *DeCoteau*, 420 U.S. at 445. On its face, the Act passes the *McGirt* analysis. There is nothing ambiguous about the cession language therein.

Petitioner may argue that because the Maumee Allotment Act does not include an unconditional commitment to compensate the tribe for the opened land, then it does not evidence intent to diminish, despite the cession language. Maumee Allotment Act of 1908, Pub. L. No. 60-8107, ch. 818. However, this argument would be misguided. While the Act does not specify an unconditional monetary amount to be paid to the Maumee, it does provide that the price of lands actually sold shall be deposited with the U.S. treasury to the credit of the Indians. *Id.*, section 4. While this may seem as though the Act is open-ended, Section 1 of the Act notes that the Secretary of the Interior is authorized by the Act to survey the entire Maumee Reservation. *Id.*, section 1. This indicates that at the time of the enactment, the surveying had not yet been completed, so it would be reasonable to deduce that a price had simply not been agreed upon, and the land sale deal had not yet been closed. Thus, the lack of an unconditional commitment to compensate the tribe for opened land is not evidence that congress did not intend to diminish the Maumee Reservation.

The Maumee Allotment Act, viewed through the analysis outlined by *Solem* and *McGirt*, was certainly intended to diminish the Maumee Reservation. The language of the Act supports the conclusion that Congress intended to diminish the Maumee Reservation. Maumee Allotment Act of 1908, Pub. L. No. 60-8107, ch. 818. The legislative history also supports this contention. Given that the Treaty with the Wendat established Wendat Band authority over that land, by default the Topanga Cession would revert

back to Wendat Band control after 1908, a point that will be examined in Part II, *infra*.

*1. If the Court Deems the Payment Structure in Section 4 of the Maumee Allotment Act Ambiguous, the Extratextual Evidence Indicates the Maumee Reservation Was Diminished*

Even if the Court finds the payment arrangement in Section 4 ambiguous, the extratextual evidence can be used to clarify that Congress diminished the Maumee Reservation. *Supra* 14.

The legislative history from the enactment of the Maumee Allotment Act supports the conclusion above. *See* 42 Cong. Rec. 2345 (1908). In discussing the Act, the congressmen discussed the price per acre and point out that the surveys have not yet been completed. *Id.* While they expressed trepidation that until there is payment the land belongs to the Maumee, one congressman indicated that in no event shall any land be disposed of at less than \$5 an acre, even pending survey. *Id.* These words can have no other meaning than to express an intent to diminish the Reservation, as soon as the surveying was completed.

Additionally, events after the enactment of the Act provide further evidence that diminishment took place. The Bureau of Indian Affairs has lost or spoiled the records which show exactly which parcels of the Topanga Cession the Maumee Tribe was compensated for after the Allotment Act. R. at 7. However, a demographic analysis of U.S. Census records taken since 1880 in Door Prairie County shows that from 1910 to 1920, the percentage of American Indian inhabitants of the Topanga Cession dropped from 80.4% to 20.3% during that timeframe, supporting the conclusion that the intended effects of the act took place. R. at 7. As a whole, the legislative history and subsequent demographic analysis clearly indicate congress executed allotment after the enactment of the Act. The lack of unconditional payment was not a roadblock to the Act's ultimate goal of diminishing the Reservation.

*2. The Reservation of Lands for Schools in the Maumee Allotment Act Is Definitive Textual Evidence of Congressional Intent to Diminish the Maumee Reservation*

Due to the unique treatment of schools in federal legislation during this time, the notation in the Maumee Allotment Act that certain tracts of opened land will be reserved for schools is definitive evidence of diminishment of the Maumee Reservation.

In *Rosebud Sioux*, the Court found evidence of intent in the act's references to reserving land for common schools. *Rosebud Sioux*, 430 U.S. at 601. Under the law admitting North and South Dakota as states into the Union, townships would only be eligible for federal grants to establish schools in areas where reservations were extinguished. *Id.*

Similarly, the Maumee Allotment Act reserves section sixteen and thirty-six of the land in each township for the use of common schools, paid for by the United States at \$5.50 per acre. Maumee Allotment Act of 1908, Pub. L. No. 60-8107, ch. 818. It would be reasonable to conclude that federal guidelines would require New Dakota be subject to similar laws as in *Rosebud Sioux*. *Id.* at 599. Parallel to the Court's holding in *Rosebud Sioux*, the school stipulation in the Act clearly indicate that Congress intended the Reservation to be dissolved in those townships.

## *II. The Topanga Cessions Remains Within the Wendat Reservation Because This Territory Was Not Ceded in the Wendat Allotment Act*

The Wendat Allotment Act of 1892 did not diminish the Wendat Reservation. Instead, in contrast to the Maumee Allotment Act, the Wendat Allotment Act merely opened the way for non-Indian settlers to own land on the Wendat Reservation. Wendat Allotment Act, Pub. L. No. 52-8222, ch. 42 (1892).

The key distinction between the Wendat Allotment Act and the Maumee Allotment Act is that the Wendat Act did not automatically cede lands to be surveyed for potential sales. *Id.* The Wendat Act also allowed tribe members to choose their allotments from the western portion of the Reservation. *See id.* section 1. Therefore, based on similar analysis used in Section I, supra 13–16, the Wendat Band retained control over the Topanga Cession despite the Allotment Act of 1892.

Regardless of whether non-Indian settlers inhabited the Topanga Cession or if it was treated as a continuous, allotted segment of the Wendat Reservation, the Topanga Cession still falls within Indian Country on the Wendat Reservation. *See McGirt*, 140 S. Ct. at 2464.

### *A. The Language of the Wendat Allotment Act Shows That Congress Did Not Intend to Diminish the Wendat Reservation*

The Wendat Allotment Act lacks any language referencing cession, showing that Congress did not intend to diminish the Wendat Reservation.

The analysis for diminishment here mirrors that set out by *Solem* and *McGirt*, above. *See McGirt*, 140 S. Ct. at 2469; *Solem*, 465 U.S. at 470. An allotment act does not automatically diminish a reservation; there must be

language and strong evidence to show that it does before the land is considered diminished. *McGirt*, 140 S. Ct. at 2464. When there is no equivalent law terminating what remained, a reservation can be said to survive allotment. *See McGirt*, 140 S. Ct. at 2464–65 (“Congress may have passed allotment laws to create the conditions for disestablishment. But to equate allotment with disestablishment would confuse the first step of a march with arrival at its destination.”).

For instance, in *Nebraska v. Parker*, the Court held that Congress did not intend to diminish a reservation via an allotment act using the *Solem* factors to guide this analysis. *Nebraska v. Parker*, 136 S. Ct. 1072, 1078 (2016). The Court found that the 1882 Act in *Parker* empowered the government to survey and appraise lands which could be purchased in tracts by non-members of the tribe. *Id.* The Act did not mention cession or restoring parts of a reservation to the public domain – it simply stated that the disputed lands would be “open for settlement under such rules and regulations as the [Secretary of the Interior] may prescribe.” *Id.* at 1077. Thus, while the Act allowed non-Indian settlers to own land on the Reservation, it did not diminish the Reservation’s boundaries. Wendat Allotment Act, Pub. L. No. 52-8222, ch. 42 (1892).

Similarly, in *United States v. Jackson*, the court found that the language of the 1905 Act in question only extended an existing right-of-way law and did not diminish the Reservation. *United States v. Jackson*, 853 F.3d 436 at 446 (8th Cir. 2017). The language surrounding payment in the Act, despite seeming to be unconditional, was explained by evidence showing that this method of compensation indicated Congress intended to compensate tribal members for an expansion of the railroad’s right-of-way. *See also United States v. Webb*, 219 F.3d 1127 (9th Cir. 2000); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 359 (1962); *Murphy v. Royal*, 875 F.3d 896, 938 (10th Cir. 2017).

This case is parallel to *Parker*. The Wendat Allotment Act authorizes the Indian Agent at Fort Crosby to “formally continue surveying the western half of the lands reserved by the Wendat Band in the 1859 Treaty,” after which each adult Indian would have one year to select an allotment for themselves or a child. Wendat Allotment Act, Pub. L. No. 52-8222, ch. 42 (1892). The Act notes that “All lands not selected within one year of the survey’s completion shall be declared surplus lands and open to settlement,” while the eastern half of the Wendat Reservation “shall continue to be held in trust by the United States for the use and benefit of the Band.” *Id.* As in *Parker*, 136 at 1077, the act empowered the government to survey the land in the western part of the Wendat

Reservation, with the intention that some of that land would be sold, but made no mention of restoring parts of the Reservation to the public domain, *id.*

In addition, the Wendat Allotment Act does not include any language of cession, unlike the Maumee Allotment Act (“Indians have agreed to consider the entire eastern quarter surplus and to cede their interest in surplus lands”), and more closely follows the language of the acts in *Murphy v. Royal* and *United States v. Jackson*. See Wendat Allotment Act, Pub. L. No. 52-8222, ch. 42 (1892); *Murphy* 875 F.3d at 938; *Jackson*, 853 F.3d at 446. This distinction is key, as the lack of cession language, or references to restoring parts of the Reservation to public domain puts the Wendat Act squarely within the category of allotment acts which simply open Indian reservations to non-Indian settlers. See *Parker*, 136 at 1077.

In conclusion, the Wendat Allotment Act does not include cession language sufficient to diminish the Wendat Reservation. Wendat Allotment Act, Pub. L. No. 52-8222, ch. 42 (1892). Despite there being no express language confirming “reservation” status, there is no intent in the Act to show that the ownership status of the land will change in any way, and there is no equivalent law terminating what remained. *McGirt*, 140 S. Ct. at 2464.

*1. The Language Regarding Payments in the Wendat Allotment Act Is Not Unconditional, and Is Therefore Confirmatory of the Congressional Intent to Preserve the Wendat Reservation*

The petitioner may argue that the payment arrangement in Section 2 of the Wendat Allotment Act signals Congress intended the act to diminish the Wendat Reservation, but this ignores the alternative reasons for including the payment arrangements.

Under *Solem*, an unconditional promise of payment could indicate that Congress did intend to diminish the Reservation. *Solem*, 465 U.S. at 470. However, this case is distinct from *Solem* because the payments in the Wendat Allotment Act are not unconditional. Wendat Allotment Act, Pub. L. No. 52-8222, ch. 42 (1892).

Section 2 of the Wendat Allotment Act says that the United States will pay the Wendat \$3.40 for every acre declared surplus, and capping that payment to no more than \$2.2 million. *Id.* Thus, the act conditioned this payment on surplus lands being found, which would imply that this would happen after the surveying and allotment to the tribe members. *Id.* at sec. 1. This conditional payment distinguishes this case from the scenario outlined in *Solem* and does not show an intent to diminish the Wendat Reservation.

*2. The Subsequent Demographics of the Topanga Cession Provide Further Evidence That the Wendat Allotment Act Simply Opened Parts of the Wendat Reservation to Non-Indian Settlers*

The drop in the Indian population in the Topanga Cession, which may be cited by petitioner as evidence that the Wendat Reservation was diminished, is irrelevant when considering diminishment. R. at 7. Even if the Court deemed the Wendat Allotment Act language ambiguous and in need of clarification, the decrease in the Wendat Band population in the Topanga Cession after the Wendat Allotment Act is consistent with the conclusion that the area was opened to non-member settlers, but remained part of the Wendat Reservation. *Id.*

In *City of Sherrill v. Oneida Indian Nation*, the Oneida tribe had previously relinquished governmental interest in the property, and the Court held that the tribe was unable to regain sovereignty through open-market purchase of the property. *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 214 (2005). Key to the Court's holding was determining that the character of the area and its inhabitants was distinctly non-Indian so granting tribal sovereignty would not be equitable. *Id.* This evidence was coupled with a long history of state sovereign control over the property. *Id.*

Here, unlike *Oneida*, there is no evidence that the Wendat Band ever relinquished control of the Topanga Cession and are trying to regain sovereignty through buying property. R. at 7–8. The Wendat Band has continuously considered the Topanga Cession to be part of its Reservation. *See McGirt*, 140 S. Ct. at 2468.

Any extratextual evidence, whether demographic or otherwise, is irrelevant because it cannot be found to override the language of the Act. *McGirt*, 140 S. Ct. at 2468. Extratextual considerations do not supply a “blank check” in overruling congressional intent. *Id.* at 2469. However, even if in consulting the extratextual evidence, the Court should find that, unlike the Maumee Allotment Act, the Wendat Act did not diminish the Reservation.

*B. The Fact That the Development in the Topanga Cession Was Purchased from Non-Indian Owners Has No Impact on the Conclusion That It Is in Indian Country on the Wendat Reservation*

The land purchased in the Topanga Cession for the development at question is still considered Indian Country despite being purchased from non-Indian owners. Congress defines Indian Country to include all land within the limits of any Indian reservation, including private land

ownership within reservation boundaries, regardless of member status of the owner. *See* 18 U.S.C. § 1151 (defining “Indian country”); *Solem*, 465 U.S. at 468 (“Only in 1948 did Congress uncouple reservation status from Indian ownership, and statutorily define Indian country to include lands held in fee by non-Indians within the reservation boundaries”).

Therefore, although both tribes agree that no member of either tribe selected an allotment within the Topanga Cession, this has no weight on the fact that the Development is within Indian Country. Allotment and preservation of reservation status are not mutually exclusive, and the Topanga Cession, including land purchased from non-Indian owners, should be considered as a part of the Wendat Reservation.

### *III. The Doctrines of Indian Preemption and Infringement Bar New Dakota’s Transaction Privilege Tax from Applying to the Wendat Band Development*

Since 1832, the Court has consistently held that state law is generally not applicable within Indian Country. *See Worcester v. Georgia*, 31 U.S. 515, 561–62 (1832); *see also Rice v. Olson*, 324 U.S. 786, 789 (1945) (stating that the “policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation’s history”). Specifically, two barriers limit the applicability of state laws in Indian Country: the doctrines of Indian preemption and infringement. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142–43 (1980).

Either doctrine sufficiently bars New Dakota’s Transaction Privilege Tax from applying to the Development.

#### *A. The Doctrine of Indian Preemption Prevents the State of New Dakota from Applying Its Transaction Privilege Tax to Tribes and Tribal Corporations in Indian Country Under Chickasaw Nation or Bracker*

New Dakota’s TPT is barred from applying to the Development because it is preempted by federal law.

Given the unique history of tribal governments, the analysis of federal preemption of state laws in Indian Country is distinct from preemption analysis in other areas of law. *See e.g. Bracker*, 448 U.S. at 143 (“The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of preemption that have emerged in other areas of the law.”). When considering taxation in Indian Country, the presumption is that state law does not apply unless there is sufficient evidence of congressional intent to

the contrary. Felix Cohen, *Cohen's Handbook of Federal Indian Law* § 6.03 (Nell Jessup Newton ed., 2017).

Critical in framing this unique analysis is determining who bears the challenged tax and where the taxation occurs. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 101 (2005). When the legal incidence of a tax in Indian Country falls on a tribe or tribal members, states are categorically barred from applying the tax without congressional authorization. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995). When the legal incidence of the tax falls on a non-Indian within Indian Country, the Court has applied an interest-balancing test considering the particular tribal, federal and state interests at stake (hereinafter the “*Bracker* test”). *Bracker*, 448 U.S. at 145; *see also Wagnon*, 546 U.S. at 110–11 (collecting cases that apply the *Bracker* test). Under this balancing test, federal law preempts the state tax if the tax interferes with purposes underlying federal laws and programs for Indians. *Bracker*, 448 U.S. at 151; *see also Cent. Mach. Co. v. Ariz. State Tax Comm'n*, 448 U.S. 160, 165–66 (1980); *Warren Trading Post Co. v. Ariz. State Tax Comm'n*, 380 U.S. 685, 690–91 (1965).

Because New Dakota's TPT falls on the Tribe within Indian Country, the tax is preempted under *Chickasaw Nation*. 515 U.S. at 459. However, even if the Court finds the tax is not categorically barred, the tax is preempted under the *Bracker* test. 448 U.S. at 151.

*1. Chickasaw Nation's Categorical Approach to Preemption Prevents New Dakota from Applying the TPT to the Development as an Indian Business Operating in Indian Country*

*Chickasaw Nation* bars New Dakota from applying its Transaction Privilege Tax to the Development. 515 U.S. at 459.

In *Chickasaw Nation*, the Court barred the application of a state motor fuels tax to a tribe's retail store located in Indian Country. *Id.* The Court held that if the “legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization.” *Id.* Who bears the legal incidence of the tax can be found by looking at the language of the tax statute. *See Chickasaw Nation*, 515 U.S. at 458; *see also Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 482 (1976). The I.R.S. has held that a tribal corporation has “the same tax status as the Indian tribe,” Rev. Rul. 81-295, 1981-2 C.B. 15, so the same analysis that would apply to the Wendat Band applies to the Development.

New Dakota requires businesses to obtain a license to do business in the state, 4 N.D.C § 212(1), and “every licensee is obligated to the state 3% of *their gross proceeds* or gross income to the state,” *Id.* at § 212(2) (emphasis added). The statute’s requirement that a business remit “their” proceeds clearly indicates the tax falls on the tribal corporation.

The petitioner may contend that the legal incidence falls on consumers rather than the tribal corporation, but this argument is not supported by the text of the statute nor the facts of *Chickasaw Nation*. *Id.* In *Chickasaw Nation*, the legal incidence of the tax fell on the Indian retailer despite the distributor actually remitting the tax. *Id.* However, the Court noted that “crucially, the statute describes this remittal by the distributor as “*on behalf of a licensed retailer.*” *Id.* (quoting Okla. Stat. tit. 68, § 505(C)). Nothing in New Dakota’s statute requires the funds to be passed onto consumers or notes that the funds are remitted on behalf of consumers. 4 N.D.C § 212. Rather, the tribal business must remit “*their gross proceeds*” to the state. 4 N.D.C § 212(2) (emphasis added). Thus, the statute clearly indicates the legal incidence of the tax would fall on the Wendat tribal corporation. *Id.*

Because the legal incidence would fall on a business entirely owned by a tribe, and the Development is located within Indian Country, R. at 3, the tax is categorically barred under the doctrine of Indian preemption articulated in *Chickasaw Nation*. 515 U.S. at 461.

*a) Under Chickasaw Nation, the Tax Is Barred from Applying to the Development in Indian Country Even if the Development Is Located Outside of the Wendat Band Reservation*

The tax would still be barred under the doctrine of Indian preemption articulated in *Chickasaw Nation* even if the Court finds the Development is located in Indian Country, but outside of the Wendat Reservation. 515 U.S. at 450.

In considering federal preemption of taxes in Indian Country, the Court has consistently differentiated between Indian and non-Indian groups, rather than members of a reservation and nonmembers. *See e.g., id.* (noting that a state tax is barred when falling on “*a tribe or on tribal members* for sales made inside Indian country”) (emphasis added); *Bracker*, 448 U.S. at 144 (“When on-reservation conduct involving *only Indians* is at issue, state law is generally inapplicable...”) (emphasis added); *Wagnon*, 546 U.S. at 110–13. In each case, the Court finds the relevant distinction in its preemption analysis to be between Indians and non-Indians rather than tribal members and non-members. *Chickasaw Nation*, 515 U.S. at 450; *Bracker*, 448 U.S. at 143; *Wagnon*, 546 U.S. at 110–13.

New Dakota's statute exempts tribes from collecting taxes for a tribe's operations within their own reservations on land held in trust by the United States, 4 N.D.C. § 212(4), but fails to draw the necessary distinction between Indians and non-Indians operating in Indian Country, *Chickasaw Nation*, 515 U.S. at 450. The statute would therefore require a tribe operating on tribal lands to remit funds to the state despite the activities solely Indian persons or entities. Such a tax is an unlawful exercise of New Dakota's power over tribal affairs, over which the Constitution grants the federal government "exclusive authority." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985).

Thus, the state should be barred from applying the TPT to the Development by the doctrine of Indian preemption this Court articulated in *Chickasaw Nation*. 515 U.S. at 450.

*2. If Chickasaw Nation Did Not Apply, the Transaction Privilege Tax Would Still Be Barred Under the Bracker Test Because the Tax Would Negatively Impact Federal and Tribal Interests*

If the Court finds that *Chickasaw Nation* does not apply, the TPT would still be barred under *Bracker* because the tax's negative effects on federal and tribal interests outweigh the state's general interests in raising revenue and supporting commercial development.

An assertion of state authority in Indian Country must be viewed against any interference with the successful accomplishment of the purposes of federal programs. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335–36 (1983). Because federal preemption "is not limited to cases in which Congress has expressly preempted the state tax," *Flandreau Santee Sioux Tribe v. Noem*, 938 F.3d 928, 932 (8th Cir. 2019), determining the purposes behind federal programs is necessary in this analysis, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989).

In *Bracker*, this Court found that a state tax was barred under the doctrine of Indian preemption because even though the tax fell on a non-Indian logging company, the cost ultimately fell on the tribe and the tax undermined Congress's intent to ensure the benefits from the timber operations would encourage self-government. *Bracker*, 448 U.S. at 149–51 (finding that "the taxes would threaten the overriding federal objective of guaranteeing Indians that they will "receive...the benefit of whatever profit [the forest] is capable of yielding..." (quoting 25 CFR § 141.3(a)(3)). In *Ramah*, this Court found that federal law preempted a state tax on gross receipts a non-Indian construction company received from a tribal school board given the extensive federal oversight and interests in promoting tribal

school financing. *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 841–43 (1982) (finding that the burden from the taxes “impedes the clearly expressed federal interest in promoting the quality and quantity of educational opportunities for Indians by depleting the funds available for the construction of Indian schools”) (internal quotations omitted).

In both *Bracker* and *Ramah*, the Court focused on the purposes behind federal programs, the comprehensiveness of the programs, and how the state tax would interfere with the programs’ purposes. *Ramah*, 458 U.S. at 841; *Bracker*, 448 U.S. at 149.

New Dakota’s TPT would similarly interfere with the purposes of federal programs supporting Indian housing and healthcare by diverting proceeds necessary to support these programs to purposes determined by the state. R. at 7–8. The tax’s interference with federal priorities is directly analogous to the taxes barred in *Bracker* and *Ramah*. *Bracker*, 448 U.S. at 149; *Ramah*, 458 U.S. at 841.

The Development would support 350 jobs, provide nursing services, a bookstore, a pharmacy, a grocery store, and affordable housing. R. at 7–8. As with many large development projects, the provision of these services is interconnected. For instance, the Record notes that the affordable housing units and nursing facilities could not be constructed without revenue from the sales that the state hopes to tax. *Id.*

Focusing on the Development’s housing and healthcare services demonstrates how the tax interferes with federal schemes relating to Native Americans.

The federal government has established comprehensive schemes supporting affordable housing in tribal communities. U.S. Gen. Accounting Office, GAO/RCED-99-16, *Native American Housing: Information on HUD’s Funding of Indian Housing Programs*, 20–31 (1998). The purpose of these programs is clear from the text of the Native American Housing Assistance and Self-Determination Act (1996), which notes the “special role of the United States in helping tribes and their members to improve their housing conditions and socioeconomic status.” 25 U.S.C. § 4101(5). Federal housing programs for Indians are also meant to increase the “availability of private financing in Indian country” and support partnerships among federal and tribal governments to promote housing. Felix Cohen, *Cohen’s Handbook of Federal Indian Law* § 22.05 (Nell Jessup Newton ed., 2017); *see also* 25 U.S.C. 4101(1)(C).

Federal programs promoting Indian healthcare are similarly comprehensive. The Indian Health Care Improvement Act (“IHCA”) notes

that a “major national goal of the United States is to provide the resources, processes, and structure that will enable Indian tribes and tribal members to obtain the quantity and quality of health care services and opportunities that will eradicate the health disparities between Indians and the general population of the United States.” 25 U.S.C. § 1601. The Act broadened Indian healthcare to include hospice, assisted living and long-term care. Elayne J. Heisler, Cong. Research Serv., R41630, *The Indian Health Care Improvement Act Reauthorization and Extension as Enacted by the ACA: Detailed Summary and Timeline* (2011).

These federal laws evince clear purposes and priorities in promoting housing and access to healthcare in Indian communities that would be disrupted by the TPT. The development would provide services to support Native American healthcare, most clearly through the nursing care facilities, but also through the pharmacy and grocery store, which would help prevent the area from becoming a food desert. R. at 7–8. The use of proceeds from the Development and federal programs are steps to close the significant disparities in Native American access to adequate housing and healthcare. R. at 8; Nancy Pindus, et al., U.S. Dep’t of Hous., *Housing Needs of American Indians and Alaska Natives in Tribal Areas: A Report From the Assessment of American Indian, Alaska Native, and Native Hawaiian Housing Needs* 63–65 (2017); U.S. Comm’n on Civil Rights, *Broken Promises: Continuing Federal Funding Shortfall for Native Americans* 61, 66 (2018). The TPT would dilute the private, tribal funding that would otherwise be available to support Indian housing and nursing care. R. at 8.

Because the state’s application of the TPT would negatively interfere with federal and tribal interests in providing affordable housing and healthcare services in Indian Country, only exceedingly strong state interests would justify the tax under the *Bracker* test.

*a) The State’s Interests in Applying the TPT in Indian Country Are Minimal Relative to the Tax’s Negative Impact on Federal and Tribal Interests*

The state’s interest in raising revenue for its general revenue fund, R. at 6, does not justify the imposition of the tax on the Development.

In considering federal preemption of taxes applied in Indian Country under the *Bracker* test, there is a distinction between taxes whose purpose is to raise revenue and taxes that serve some other regulatory interest. See *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 155 (1980). In *Bracker*, the Court noted that where the state is

“unable to justify the taxes except in terms of a generalized interest in raising revenue, we believe that the proposed exercise of state authority is impermissible.” 448 U.S. at 151.

The interests served by New Dakota’s TPT are too general to permit the tax’s interference with federal and tribal interests. The proceeds from the tax “are paid into the state’s general revenue fund for the purpose of maintaining a viable and robust commercial market within the state.” 4 N.D.C. § 212 (3). Such a generalized purpose would fail to ensure a substitute source of funding for the federal and tribal interests negatively impacted by the tax.

In addition, unlike the taxation scheme in the Court’s cigarette taxation cases, *see Washington*, 447 U.S. at 141–42; *Moe*, 425 U.S. at 481–82, there is no indication that applying this tax would serve a similar purpose of preventing non-Indians from evading the state’s tax. In *Washington*, this Court did not bar the tax in those cases in part because the exemption was advertised to non-Indians who would normally do their business elsewhere, interfering with the state scheme to tax cigarettes in its jurisdiction. *Washington*, 447 U.S. at 155. The tax here serves no such regulatory purpose. The state would impose the tax directly on a tribal development that includes a grocery store which would help prevent the area from becoming a food desert, a bookstore and a pharmacy. R. at 8. The tax would not prevent non-Indians from evading a tax because the tax applies to the business itself rather than to customers. Instead, the tax would reduce proceeds for Indian projects relating to housing and healthcare and reduce profits to Indian owners of the project.

Accordingly, the state’s interests are not sufficiently strong to justify the imposition of the TPT in tribal country and the tax is therefore preempted by federal law under the *Bracker* test. 448 U.S. at 151.

*b) The Tax Still Interferes with Federal and Tribal Interests Even if the State Remits the Proceeds to Tribal Governments*

The petitioner may argue that because the state would remit the proceeds from the TPT to tribes when the tax is imposed on reservations, 4 N.D.C. § 212(5), the tax does not interfere with federal or tribal interests.

This argument fails because the tax would still infringe on the federal government’s interest in encouraging tribal sovereignty by promoting tribal self-government and self-sufficiency. *See New Mexico*, 462 U.S. at 334–35 (noting that “both the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal

embodied in numerous federal statutes.”); *Bracker*, 448 U.S. at 143 (noting “a firm federal policy of promoting tribal self-sufficiency.”).

If the state were to collect taxes within the Maumee Tribe’s jurisdiction in Indian Country and remit these taxes back to the tribe, the state effectively takes over the Maumee’s taxation function. This discourages self-government by disincentivizing the Maumee Tribe from establishing its own revenue collection scheme. In addition, it interferes with the economic self-sufficiency of both the Wendat Band and Maumee Tribe. The Wendat Band would earn less income, increasing the likelihood of reliance on other funds, and the Maumee Tribe receiving the proceeds may become reliant on state proceeds, displacing funds earned from the tribe’s own activities. Consequently, the goal of promoting economic self-sufficiency of both tribes are discouraged by the state’s tax.

Thus, the statute requiring remission of proceeds a tribe when earned on a tribe’s reservation does not prevent the tax from being preempted under the *Bracker* test.

*B. The Transaction Privilege Tax Is Barred by the Doctrine of Tribal Sovereignty Because the State Does Not Have Jurisdiction to Impose the Tax in Indian Country on an Indian Corporation*

The doctrine of infringement bars New Dakota from levying its TPT because the tax infringes on the right of tribes to make their own laws in Indian Country. The doctrine of infringement is related to Indian preemption because the federal interest in promoting sovereignty informs the preemption analysis. *Ramah Navajo Sch. Bd., Inc.* 458 U.S. at 838. However, the doctrine is distinct and focuses on the right of “Indians to make their own laws and be ruled by them” rather than federal priorities. *Williams v. Lee*, 358 U.S. 217, 220 (1959).

Since *Worcester v. Georgia*, the Court has recognized the sovereignty of tribal governments, with “distinct political communities, having territorial boundaries, within which their authority is exclusive.” 31 U.S. at 557. The Indian sovereignty doctrine does not definitively bar state taxes or regulations, but it does provide “a backdrop against which the applicable treaties and federal statutes must be read.” *McClanahan v. State Tax Comm’n of Ariz.*, 411 U.S. 164, 172, (1973).

Accordingly, unless Congress “expressly authorized state tax jurisdiction in Indian country,” that authority is presumed not to exist. *Okla. Tax Comm’n v. Sac & Fox Nation*, 508 U.S. 114, 126, (1993); see also *Blackfeet Tribe of Indians*, 471 U.S. at 764. The Court has recognized that this presumption applies to a broad conception of “Indian country.” *Id.* at 115.

Despite the sovereignty doctrine seemingly disallowing state jurisdiction in Indian Country absent express congressional authority, *Fox Nation*, 508 U.S. at 126, the Court has authorized state taxation on non-Indian companies relating to taxes on specific products or activities. *Washington*, 447 U.S. at 141–42 (reviewing tax on cigarettes); *Cotton Petroleum Corp.* 490 U.S. at 177 (reviewing tax on oil and gas); *Ariz. Dep't of Revenue v. Blaze Const. Co.*, 526 U.S. 32, 37 (1999) (reviewing tax on federal construction contracts).

However, the TPT would apply to an entire Indian development providing groceries, books and pharmaceuticals to finance state priorities. R. at 8. This Court has never permitted such a broad application of state taxes that would affect the sale of a range of essential products such as those at issue. Allowing such a broad tax on the Development's activities would allow the state to impose higher costs across a range of products, including groceries, books and pharmaceuticals to finance state priorities. R. at 8.

The state cites efficiency as a reason to require businesses operating within a reservation to remit funds to the state. 4 N.D.C. § 212(5). However, efficiency cannot outweigh the protection of tribal sovereignty, given the “policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.” *Rice*, 324 U.S. at 789.

The consideration of whether the tax violates tribal sovereignty and federal authority over Indian affairs is even clearer when considering that the state's application of the tax would touch exclusively Indian entities. A decision in favor of the petitioner would permit a state to dramatically expand its jurisdiction to cover almost any business activity occurring within Indian Country even when Indian entities are the sole parties in a transaction. The Court should avoid such a momentous violation of tribal sovereignty.

### *Conclusion*

For the foregoing reasons, the Court should affirm the decision of the United States Court of Appeals for the Thirteenth Circuit. The Court should hold that (1) the disputed territory in the Topanga Cession belongs to the Wendat Band, and (2) New Dakota is barred from applying the TPT to the Development under the doctrines of Indian preemption and infringement.