No. 21-769

IN THE

Supreme Court of the United States

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS,

Petitioner,

v.

GRETCHEN WHITMER, GOVERNOR OF THE STATE OF MICHIGAN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF OF GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, LITTLE RIVER BAND OF OTTAWA INDIANS, SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, BAY MILLS INDIAN COMMUNITY, AND THE MIDWEST ALLIANCE OF SOVEREIGN TRIBES AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the 1855 Treaty of Detroit established a federal reservation for the Little Traverse Bay Bands of Odawa Indians.

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INTEREST OF AMICI CURIAE

The amici tribes, along with petitioner the Little Traverse Bay Bands of Odawa Indians, are federally recognized successors to tribes that were counterparties to the United States in the Treaty of Washington in 1836 and the Treaty of Detroit in 1855. Amici support petitioner's request that the Court review and reverse the Sixth Circuit's decision holding that the 1855 treaty never created a reservation. Amici have vital legal and sovereign interests in having their treaties interpreted accurately and in accordance with applicable law.

The Midwest Alliance of Sovereign Tribes represents the thirty-five sovereign tribal nations of Minnesota, Wisconsin, Iowa, and Michigan. MAST's mission is to advance, protect, preserve, and enhance the mutual interests, treaty rights, sovereignty, and cultural way of life of the sovereign nations of the Midwest throughout the twenty-first century.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

"Treaty analysis," of course, "begins with the text." *Herrera v. Wyoming*, 139 S. Ct. 1686, 1701 (2019). And for treaties as for statutes, the meaning of language "depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Thus, in

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[1] This brief was not authored in whole or in part by counsel for any party, and no person or entity other than amici and their counsel made a monetary contribution to the preparation or submission of this brief. All parties were timely notified of, and consented to, the filing of this brief.

construing an Indian treaty, "[h]istorical perspective is of central importance." Felix Cohen, *Handbook on Federal Indian Law* § 1.01 (2012). "Only with a full understanding of the relevant historical backdrop can a modern court" understand the agreement embodied by the text. *Id.* Amici write to stress this essential context, which in many ways embodies the history of the amici tribes themselves.

The 1855 Treaty of Detroit was negotiated against a backdrop of broken promises related to the tribes' lands in Michigan. In 1836, federal negotiators agreed that the tribes would retain permanent reservations. The Senate, however, unilaterally forced changes to that agreement, leaving the tribes vulnerable to further incursions and continuing threats of forced removal. By 1855, federal policy had shifted to concentrating Indians in limited areas. All parties to the new treaty thus envisioned creating fixed reservations under federal supervision and protection. The agreement they negotiated set aside federal land for each tribe, and provided for each eligible tribal member to select specific land "within the tract reserved herein for the band to which he may belong." Pet. App. 116a.

The Sixth Circuit misread those provisions as creating "an arrangement closer to a land allotment system than a reservation." Pet. App. 25a. The selection of individual parcels was fully consistent with the creation of Indian reservations, from both the federal and tribal perspectives. Indeed, tribal negotiators pushed for the issuance of "strong titles" to underscore the permanence and security of the arrangement, not undercut it. Given the text, the intent of both federal and tribal negotiators, and applicable principles of construction, there is no basis

for the Sixth Circuit's conclusion that the treaty provided for individual parcels *rather than* a reservation. It provided for both.

The court also erred in demanding evidence of "'active federal control over the Tribe's land,'" Pet. App. 33a (quoting *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 534 (1998)), before recognizing that the treaty "establish[ed] a reservation under federal law," *id.* 30a. That approach departs from settled law that a reservation is created where, as here, the United States withdraws a defined body of federal land from sale and sets it apart for Indian purposes. A degree of continuing federal jurisdiction and superintendence is inherent in such an arrangement. *Venetie* applied a more searching inquiry in a different context—deciding whether land whose reservation status had been "revoked," *id.* at 527, was *nonetheless* to be treated as "Indian country" for certain purposes. Reliance on inapposite authority led to confused and unfair analysis and the wrong result here, and threatens to unsettle established federal Indian law more generally.

Incompetence, malfeasance, and legal error by the United States after 1855 led to botched implementation of the treaty's provisions, and then to years in which the United States improperly suspended government-to-government relations with the tribes. The tribes nonetheless persisted, and over the course of the twentieth century federal policy slowly began to address some errors of the past. But the 1836 and 1855 treaties remain central foundations for present-day relations among the tribes, the United States, and the State of Michigan; and nothing about the history of implementation can

change the original import of the treaty. The Sixth Circuit's error in this case, denying that any reservation was ever created for petitioner, thus has serious implications for the amici tribes. Beyond that, however, the decision below misunderstands and misrepresents central aspects of the tribes' collective history, in a way that improperly discounts their sovereign interests and again betrays central promises made by the United States in 1855. This Court should grant review.

ARGUMENT

I. The Sixth Circuit misread the 1855 treaty.

A. History confirms that the 1855 treaty was negotiated to establish reservations for the tribes in Michigan.

The tribes that signed the 1855 treaty have deep ties to what is now northern Michigan. Indeed, the tribes and their ancestors have lived in the Great Lakes region for more than 10,000 years. *See, e.g.*, Matthew Fletcher, *The Eagle Returns: The Legal History of the Grand Traverse Band of Ottawa and Chippewa Indians* 4 (2012). When French explorers first reached the region in the early 1600s, they encountered flourishing societies located at strategic trade points along Lakes Huron, Michigan, and Superior. Charles Cleland, *The Place of the Pike (Gnoozhekaaning): A History of the Bay Mills Indian Community* 2-4 (2001). These were independent, sophisticated tribes with effective governance and diplomatic relations with other tribes and non-Indians. They became significant participants in the international fur trade. *See, e.g.*, H.R. Rep. No. 103-621, at 1-2 (1994); Richard White, *The Middle*

Ground: Indians, Empires, and the Republics in the Great Lakes Region, 1650-1815, at 94-141 (1991).

By the 1830s, however, Michigan tribes faced grave challenges. Congress adopted the Indian Removal Act of 1830, 4 Stat. 412, the Jackson administration pushed tribes to move west of the Mississippi, and white settlers swarmed into the Michigan territory. Fletcher, *The Eagle Returns* 20. Clearing of forests and depletion of game left many tribes heavily indebted to fur traders. *Id.* For tribes, the climate was one of fear and uncertainty about political and demographic changes and the threat of forced removal. John Bowes, *Land Too Good for Indians: Northern Indian Removal* 183-85 (2016). The treaties central to this case were negotiated against that backdrop.

1. The 1836 Treaty

The federal government's nationwide effort to relocate tribes hit a peak in 1836, with twenty new Indian treaties concluded that year alone. 2 Charles Kappler, *Indian Affairs: Laws and Treaties* 450-82 (1913). The tribes involved here also made a treaty in 1836, but they successfully resisted removal and instead negotiated an agreement that was costly but "allowed them to stay in Michigan." H.R. Rep. No. 103-621, at 2. The tribes ceded one-third of present-day Michigan to the United States, but bargained to retain some land in "permanent" reservations. *Id.*; *see United States v. Michigan*, 471 F. Supp. 192, 231-32 (W.D. Mich. 1979).

When the Senate ratified the treaty, it imposed an unnegotiated amendment "limiting the terms of the reservations to five years or longer, as the United States might permit." *Michigan*, 471 F. Supp. at 215.

The tribes accepted that change only based on false assurances that they could nonetheless "continue to use all their lands as before." *Id.* at 215-16. Thus, a treaty promising "reservations that preserved [the tribes'] towns and vital resources" became one that provided an "insecure promise of land tenure and an uncertain political future." H.R. Rep. No. 103-621, at 2. Facing ongoing incursions into their lands and a continuing threat of removal, the tribes faced some of their "darkest days." Bowes, *Land Too Good for Indians* 184. They "knew that they remained vulnerable without an official promise that they would not be removed from their ancestral lands." James McClurken, *Our People, Our Journey: The Little River Band of Ottawa Indians* 43 (2009).

2. The 1855 Treaty

Tribal leaders repeatedly "pressed the Federal government for a new treaty that ended the removal threat." H.R. Rep. No. 103-621, at 2. Finally, in the summer of 1855, tribal representatives and federal agents convened in Detroit to renegotiate the tribes' future in Michigan. Unsurprisingly, land issues took center stage.

As explained below, by this time federal policy had shifted to concentrating tribal communities on reserved land, away from white settlement. The lead federal negotiator, Commissioner of Indian Affairs George Manypenny, framed the issue: "[Y]ou are still here & the question is to fix your residence here." Proceedings of a Council with the Chippeways and Ottawas of Michigan Held at the City of Detroit, ECF

558-11, PageID 7144 (Proceedings).[2] Likewise, after their experience with implementation of the 1836 treaty, the tribes wanted to reaffirm their right to remain in Michigan.

The resulting treaty provided that specified federal lands in Michigan would be "withdraw[n] from sale for the benefit of said Indians as hereinafter provided," with a defined area assigned to each signatory tribe. Pet. App. 114a. Members of each tribe could select parcels of specified sizes from "any land within the tract reserved herein for the band to which he may belong." *Id.* 116a. Selections were to be made within five years of the preparation of lists of eligible members, *id.* 117a; and selected land would be held in trust by the United States, and protected from alienation, for at least ten years, *id.* 118a.

For an additional five years after the initial selection period, any remaining land in the reserved areas was to be available for entry and settlement "by Indians only." Pet. App. 119a. Thereafter, land could be "sold or disposed of" by the United States. *Id.* But until then, the United States could "appropriat[e]" otherwise unclaimed land "within the aforesaid reservations" only "for the location of churches, school-houses, or for other educational purposes." *Id.* 120a. The treaty further committed the United States to spending funds for teachers and schools, supporting "four blacksmith-shops for ten years," and providing the tribes with "agricultural implements and carpenters' tools, household furniture and building

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[2] ECF citations refer to the district court docket below, No. 1:15-cv-00850 (W.D. Mich.). Page citations are ECF PageIDs.

materials, cattle, labor, and all such articles as may be necessary and useful for them in removing to the homes herein provided and getting permanently settled thereon." *Id.* 120-121a.

B. Federal and tribal negotiators both saw division into individual parcels as central to the creation of a reservation.

The Sixth Circuit viewed provisions of the 1855 treaty calling for individual selection and titling of parcels "within the tract reserved herein for [a] band," Pet. App. 116a (treaty text), as inconsistent with the creation of "a collective Indian reservation," *id.* 22a (opinion below); *see also id.* 25a. In fact, federal negotiators at the time viewed this sort of allocation of parcels within a band's tract as an essential element of their new reservation policy, key tenets of which were concentrating tribes out of the way of white settlement and promoting "civilization" of their members as landholding farmers. Tribal negotiators, in turn, believed that securing individual titles would help safeguard the lands being reserved for their tribes against the sort of bad faith and depredations they had experienced in the past.

The treaty text clearly reflects these purposes of the parties. If there were ambiguity or divergence, the tribal understanding would ultimately control. *See, e.g.*, *Herrera*, 139 S. Ct. at 1701. Here, however, both sides intended to establish tribal reservations subdivided into individual plots, just as the text provides.

1. Federal perspective

By the mid-1800s, federal officials had "predicted a crisis in the removal policy and urged its

abandonment." Cohen § 1.03[6][a]. They constructed instead a system of assigning tribes to "'fixed and permanent localities.'" *Id.* (citation omitted). Thus, during "the 1850s, the modern meaning of Indian reservation emerged, referring to lands set aside under federal protection for the residence or use of tribal Indians." *Id.* § 3.04[2][c][ii]; *see also McGirt v. Oklahoma*, 140 S. Ct. 2452, 2461 (2020). Commissioner Manypenny, who led negotiation of the 1855 treaty, was a leading drafter of reservation treaties. *See* Francis Prucha, *American Indian Treaties: The History of a Political Anomaly* 11-14 (1997).

Manypenny and his colleagues saw no inconsistency between creating a reservation and dividing it into individual parcels. On the contrary, they viewed the two as complementary. *See, e.g.*, Francis Prucha, *The Great Father: The United States and the American Indians* 327 (1984) ("Allotment of land in severalty was a necessary corollary" of 1850s reservation policy). That fact is reflected in many treaties. *See, e.g.*, Paul Gates, "Indian Allotments Preceding the Dawes Act," *in The Frontier Challenge: Responses to the Trans-Mississippi West* 141-67 (John Clark ed. 1971). In "the seven years following 1854," for example, "forty treaties included provisions for surveying the reservations and allotting the lands to individual Indians." *Id.* at 163. Manypenny was the lead architect of many of these treaties, "allotting lands in the newly designated reserve in farm-sized plots to individual Indians." Prucha, *American Indian Treaties* 241-42. As the petition explains, the idea was to "concentrat[e]" the Indians into reservation communities that would serve as "schools for civilization." Pet. 6 (quoting Cohen § 1.03[6][a]).

Individual landholdings within the reservation were central to that vision. *See id.*

The federal drafters of the 1855 treaty had this version of a reservation system in mind. Given that context, the Sixth Circuit had no basis for perceiving any tension between providing for individual parcels and creating a reservation. *See, e.g.*, Pet. App. 25a. To the contrary, federal policymakers saw the two as linked. At the treaty negotiations, Manypenny told the tribes that "[t]he Government is desirous to aid you in settling upon permanent homes." Proceedings 7135. In his later writings, he explained that it was "imperative" to give Indians a "fixed and settled home," because individuals and communities would invest in and improve land if they knew they could hold it for the long term. George Manypenny, *Our Indian Wards* xii (1880). He approvingly quoted another Commissioner of Indian Affairs: "To each head of a family there should, *within the reservation*, be assigned a homestead." *Id.* (emphasis added). Individual parcels within reservations facilitated the federal project of promoting gradual assimilation while guaranteeing a "permanent home of the tribe FOREVER." *Id.* at x.[3]

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[3] State lawmakers shared this conception. Six months before the 1855 negotiations began, the Michigan Legislature's Committee on Indian Affairs posited that providing Indians with "permanent homes, and an individual title to the soil, inalienable for a time" was critical to their "civilization." H.R. 33, at 5 (Mich. 1855). "To this end it is necessary to obtain reservations for them, in compact bodies, and divide off individual farms[.]" *Id.* The report spoke of this policy as a "transitive state" on the road to Indians' eventually "abandoning their tribal relations." *Id.* But that was a prediction about the

Significantly, Manypenny conceived of these reservations as distinctly Indian communities, protected by isolation and federal supervision from incursions and pernicious influences. "In fact (though it may seem paradoxical), it is yet true, that the white man's conduct and example, instead of aiding, has been the chief obstacle in the way of the civilization of the Indian." *Id.* at xi. Indeed, when Michigan Indian Agent and fellow negotiator Henry Gilbert wrote to Manypenny after the treaty was signed to propose minor amendments to the bounds of the new "reservations," nearly all the changes were calculated to make Indian communities subject to "less interference from white settlers." ECF 558-12, PageID 7164.

Manypenny expected that as reservations gradually "civilized" the Indians, tribal political identities and federal trust relationships would wither. For example, he told the tribes that "when your band dies, as it must when you become citizens," federal annuities would stop. Proceedings 7154. But whatever the expectations for the distant future, the treaty itself maintained both the tribes' identities as distinct Indian communities and their relationships of trust, protection, and dependency with the United States. Indeed, on the same afternoon that negotiators urged the tribes to look forward to a time "when your connection with the U.S. shall cease," they rebuffed the tribes' request to manage treaty

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future—which, policymakers thought, could only be realized by first creating stable Indian reservations with individual but restricted titles.

education funds and "hire our own school masters." Proceedings 7151-52. The treaty instead provided for education "under the direction of the President of the United States," with the Indians merely "consulted." Pet. App. 120a.

In discounting the contemporaneous evidence and finding tension between creating a reservation and providing for individual titles, the Sixth Circuit may have been led astray by historical hindsight and the word "allotment." After the Civil War, there was a shift toward a "radical reformist Indian policy" involving dissolution of tribal relations. Prucha, *American Indian Treaties* 279. The General Allotment Act of 1887, 24 Stat. 388, was one expression of that broad new policy, and emblematic of what became known as the "allotment era" of the late nineteenth and early twentieth centuries. *See, e.g.*, *Cnty. of Yakima v. Confed. Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 254-56 (1992). In holding that the 1855 treaty "created an arrangement closer to a land allotment system than a reservation," the Sixth Circuit cited two treatise sections dealing with similar later developments. Pet. App. 25a.

One of those passages discusses a statutory provision enacted in 1948 to address scattered, non-reservation allotments. *See* Cohen § 3.04[2][c][iv] (discussing 18 U.S.C. § 1151(c)). The other discusses "public domain allotments," which were made from non-reserved public lands under statutes from 1875 and later, including the General Allotment Act. *Id.* § 16.03[2][e] & n.49. The court's reasoning on this critical point is thus at best anachronistic. In 1855, the concepts of creating a reservation and providing

for the selection of individual parcels within it were complementary, not conflicting.

Moreover, if the 1855 drafters had wanted to depart from then-prevailing general policy and provide for individual parcels *instead of* reservations, they would have had a ready model. Just six months earlier, Manypenny had negotiated a treaty that both ceded tribal lands to the United States for allotment and "declared tribal bands abolished." Cohen § 1.03[6][b]. Under that treaty, individual Indians were declared to be U.S. citizens and subject to territorial laws, and those deemed competent received immediate, unrestricted titles. Treaty with the Wyandotte, arts. 1, 4 (Jan. 31, 1855), 10 Stat. 1159, 1161. In sharp contrast, no treaty term here provides for tribal termination, U.S. citizenship, or immediate fee titles.[4] The 1855 treaty identified specific areas that would be "withdraw[n] from sale" and reserved for particular tribes. Pet. App. 114a-116a. Tribal members could select parcels "within the tract[s] reserved" for their respective bands, *id.* 116a, and receive restricted "certificates," *id.* 118a. Those provisions created tribal reservations.

2. Tribal perspective

The perspective of the tribal negotiators in 1855 is likewise at odds with the Sixth Circuit's decision. The tribes' clear focus was on securing permanent

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[4] As the petition explains, article 5 of the treaty, Pet. App. 122a, "dissolved" an umbrella organization formed to negotiate the treaty, not the individual tribes themselves. *See* Pet. 12; S. Rep. No. 103-260, at 2-3 (1994).

reservations and federal protection of their right to remain in Michigan.

Before and during the treaty negotiations, the tribes expressed their strong desire to remain in Michigan, "where our Forefathers bones are laid." McClurken, *Our People* 44 (quoting letter expressing goals for 1855 treaty). Tribal leaders consistently focused on the need to protect the bands' lands for future generations. Proceedings 7128 ("We are now acting for our children."). After years of living in fear of removal and the progressive loss of lands to white settlement, tribal negotiators were determined to secure their land tenure.

That focus dovetailed with their understanding of the question of titles. When federal negotiators raised "the question in regard to lands," Proceedings 7135, a principal Ottawa chief immediately asked about the "titles we shall have," fearing that "if they are given by word of mouth only they will in time be taken from us. If, then, you wish us to have lands we want strong titles to them," *id.* at 7136. Six different tribal representatives raised the issue of title—insisting on "strong titles," *id.*, "good paper," *id.* at 7145, and "a patent to hand down to our children from generation to generation" as conditions of agreeing to the treaty, *id.* at 7140. Taken in context, this demand for "strong titles" did not reflect a desire to facilitate sales or further erode the tribal nature of lands and communities, as the Sixth Circuit seems to have reasoned. *See* Pet. App. 26a-29a, 32a-34a. Rather, the tribes sought protection for their lands, this time with teeth: titles "so good as to prevent any white man, or anybody else from touching these lands." Proceedings 7139.

Thus, the treaty's provision for individual parcels comports with the tribes' understanding that they would be establishing tribal communities on land reserved for them under the protection of federally-conferred titles. As one tribal negotiator stressed at the end of the proceedings, "We wish not only a rope to our lands, but a forked rope, which is attached to all our interests so that you can hold on to it." Proceedings 7159. The same purpose is reflected in treaty terms providing for restrictions on alienation during an initial term (and potentially longer), and for a period when only Indian settlement would be allowed on any lands not claimed during the initial selection. *See also* Proceedings 7145 ("Any restraints put upon your titles is for yours, not the government's benefit."); McClurken, *Our People* 48. What tribal leaders sought and obtained was a renewed federal promise of stable tribal homes under federal protection.[5]

If there were any doubt about how to construe the text here, it would have to be resolved in favor of the tribes' understanding and their interests. Treaty terms are "'construed as they would naturally [have been] understood by the Indians,'" *Herrera*, 139 S. Ct. at 1701 (citation omitted), and courts must "construe any ambiguities against the drafter who enjoy[ed] the

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[5] Exemption from state taxes is another hallmark of reservations. Many tribal leaders voiced the belief their lands would be exempt. Proceedings 7139-41. Manypenny declared he was "disposed to manage [that question] for your benefit," *id.* at 7145, and treaty historians agree the tribes left the negotiations with that understanding, *see* Fletcher, *The Eagle Returns* 49; McClurken, *Our People* 89-90; Richard White, *Ethnohistorical Report on the Grand Traverse Ottawas* 41-43 (1979).

power of the pen," *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1016 (2019) (Gorsuch, J., concurring in the judgment).[6] Here, the Sixth Circuit not only strayed from the natural interpretation of the text, but construed the treaty's core land provisions *against* tribal interests, directly subverting the tribes' expectations and understanding of the agreement. Given the text, applicable legal principles, and both sides' priorities, there is no basis for the Sixth Circuit's conclusion that the 1855 treaty was drafted to create "individual titles" *rather than* a "reservation." Pet. App. 26a.

C. There is no "active control" test when a treaty creates a reservation.

The Sixth Circuit also erred in concluding that the "federal superintendence" contemplated by the 1855 treaty was "only for purposes of allotment, not reservation." Pet. App. 32a. Applying a separate test developed to assess the status of land already determined *not* to be a reservation, the court scrutinized the treaty for express "'indicia of active federal control.'" *Id.* 33a (quoting *Venetie*, 522 U.S. at 534). But where, as here, a treaty sets aside federal land for use by tribes, it creates a reservation. The requisite degree of federal "superintendence" is inherent in that act.

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[6] *See also, e.g.*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200 (1999) (treaties must be "interpreted liberally in favor of the Indians"); *Worcester v. Georgia*, 31 U.S. 515, 582 (1832) ("The language used in treaties with the Indians should never be construed to their prejudice.").

Questions of Indian land status generally involve how various types of jurisdiction are allocated among federal, state, and tribal sovereigns. As petitioner explains (Pet. 17-18), a "reservation" is simply "any body of land, large or small, which Congress has reserved from sale for any purpose"—including as "an Indian reservation." *United States v. Celestine*, 215 U.S. 278, 285 (1909). No "particular form of words" or special act is required; "'[i]t is enough that from what has been [done] there results a certain defined tract appropriated to certain purposes.'" *McGirt*, 140 S. Ct. at 2475 (quoting *Minnesota v. Hitchcock*, 185 U.S. 373, 390 (1902)). When federal land is thus set aside, it naturally remains under at least the "general care" and "special jurisdiction" of the United States. *Celestine*, 215 U.S. at 286-87.

Thus, when the 1855 treaty provided that the United States would "withdraw [specified lands] from sale for the benefit of said Indians as hereinafter provided," Pet. App. 114a—and then referred to "tract[s] reserved herein for the band[s]," *id.* 116a, and "tracts of land within the aforesaid reservations," *id.* 120a—it created federal "reservations." And absent any special provision to the contrary, the United States retained jurisdiction and supervision over those reserved lands. *See* Pet. 29-30; *Oneida Indian Nation of New York v. City of Sherrill*, 337 F.3d 139, 155 (2d Cir. 2003) (reservation land is "by its nature" set aside "for Indian use under federal supervision"), *rev'd on other grounds*, 544 U.S. 197 (2005).

In demanding a greater showing before it would recognize creation of a reservation, the Sixth Circuit relied on this Court's decision in *Venetie*. Pet. App. 30a-33a. But *Venetie* construed the phrase

"dependent Indian communities" in 18 U.S.C. § 1151(b)—describing another type of "Indian country," different from that at issue here, to which Congress has also extended special federal criminal jurisdiction. 522 U.S. at 527-28. Applying that provision, this Court sought special "indicia of active federal control," *id.* at 534, because the land was *not* a "reservation"—Congress had expressly "revoked the Venetie reservation," *id.* at 527. If it had still been reservation land, it would have been covered by Section 1151(a), which expressly defines "Indian country" to include "all lands within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent."[7] Nothing in *Venetie* purported to require that a treaty specify any particular sort or degree of "active federal control" before provisions setting aside land for Indian use would be recognized as creating a "reservation."

Here, again, the 1855 treaty "withdr[e]w from sale for the benefit of said Indians" specified tracts of "unsold [federal] public lands." Pet. App. 114a. Lands within those reserved tracts that were selected by tribal members were to be held in trust and restricted from alienation for at least ten years. *Id.* 118a. (As the Sixth Circuit acknowledged, *id.* 32a n.9, "for many . . . [restrictions] lasted much longer.") The treaty also, for example, charged federal agents with supervising land selection and the ultimate distribution of titles, *e.g. id.* 116a, 118a; provided for

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[7] The jurisdiction requirement makes clear that Congress did not intend to include a small number of state "reservations." *See* Cohen § 3.04[2][c][ii].

federal control of educational funding, *id.* 120a; and called for ten years' worth of federal annuities for education, blacksmiths, and agricultural implements on the reserved lands, *id.* 120a-121a. This Court has never required more (or even so much) evidence of "federal superintendence" to confirm that treaty text created "an Indian reservation." *Id.* 31a.

The additional analysis required by the Sixth Circuit would disrupt settled law, and could call into question the status of other reservations created through text that is clear but does not expressly provide for some specific sort of "active" supervision. And in any case in which the extra analysis would change an outcome, the court's new test would lead to wrong and unfair results.

Indeed, that test threatens to allow the federal government's neglect of its duties to cancel out the creation of a reservation. Here, for example, the tribes relied on promises of extended federal protection. As one tribal negotiator remarked, "We place all that is ours in your hand & trust that you will do us justice." Proceedings 7134. In reality, as the court recognized, Pet. App. 13a, the treaty's provisions were "poorly implemented," with actual federal actions ranging from ineffective to corrupt. *See, e.g.*, Office of Indian Affairs, *Annual Report of the Commissioner of Indian Affairs* IX (1878) ("All the circumstances connected with these sales point directly to collusion between the agent and the parties purchasing in the execution of these unmitigated frauds."). Many tribal members never received the individual land selections the treaty

promised within the tracts reserved for their tribes, let alone the promised federal protection of their interests. *See, e.g.*, *Michigan*, 471 F. Supp. at 243.[8] But using the government's failure to *perform* its promises to support a holding that the treaty never created a "reservation" in the first place has no basis in law or logic.

II. The Sixth Circuit's decision inflicts sovereign injuries that warrant this Court's review.

As noted, incompetence and malfeasance in the implementation of the 1855 treaty resulted in a betrayal of the promise that the tribes would not be disturbed in their reservations. Compounding the problem, in 1872 federal officials "misread the 1855 treaty" and "improperly severed the government-to-government relationship between the [tribes] and the United States." *Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Att'y W. Dist. of Mich.*, 369 F.3d 960, 961 (6th Cir. 2004); *see also, e.g.*, S. Rep. No. 103-260, at 2-3 (1994). From that time until well into the twentieth century, the United States refused to deal with the tribes on a government-to-govern-

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[8] "[C]riminal wrongdoing by federal agents profiting from the loss of individual Indian allotments" and fraud by "non-Indians and local governmental authorities acting in concert" gutted the land held within "the reservations[' . . .] exterior boundaries." S. Rep. No. 103-260, at 2. Indian Agent George Lee reported on the flood of white settlers into the reservations in the 1870s: "[I]t is robbery and cruelty in the extreme, and the greatest mistake our government has made in their case, was the opening of this reservation to the occupation of white settlers." White, *Ethnohistorical Report* 117 (quoting Lee to Commissioner Ezra Hayt, Jan. 13, 1877).

ment basis. But the federal government's failure to protect the tribes' land and the wrongful denial of their sovereign status did not reflect—or alter—the original terms of the treaty.

Against great odds, the tribes persevered. Despite loss of Indian ownership of much of the land within their reserved tracts, they maintained their distinctive cultural and political communities. For instance, when Indian Agent Horace Durant surveyed the region in 1908-1909, he recorded that the same Grand Traverse communities that had been there in the mid-nineteenth century were still there. Fletcher, *The Eagle Returns* 55. As Little Traverse Chairman Frank Ettawageshik testified to Congress in 1994, "We continued our traditions, we continued our feasts, we continued naming our children, and we continued telling the stories. . . . [W]e have survived. . . . We have continued to work as a people." *Hearings on S. 1066 and S. 1357 Before the S. Comm. on Indian Affairs*, 103d Cong. 2 (1994).

Over the course of the twentieth century, the United States eventually resumed dealing with each of the tribes on a government-to-government basis. After enactment of the Indian Reorganization Act in 1934, the government acknowledged the continued vitality of the Bay Mills Indian Community.[9] Years later and after decades of administrative proceedings, the United States acknowledged the Sault Ste. Marie Tribe of Chippewa Indians in 1972. *Sault Ste. Marie*

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[9] The Bay Mills constitution, which was drafted by federal officials in 1936, recognized the "original confines of the Bay Mills Reservation." Bay Mills Const., art. II; *see* Pet. App. 116a (1855 Treaty, language relating to lands at Iroquois Point).

Tribe of Chippewa Indians v. United States, 576 F. Supp. 2d 838, 841 (W.D. Mich. 2008). In 1980, the Grand Traverse Band became the first tribe acknowledged under new administrative procedures, which require extensive documentation of a tribe's continuous existence as a social and political community. 45 Fed. Reg. 19321-22 (Mar. 25, 1980). Finally, in 1994, Congress itself recognized both petitioner and amicus the Little River Band.[10]

Thus, the federal government has slowly begun to correct some of its past errors. But much remains to be done. For amici, the 1836 and 1855 treaties and the sovereign status they recognize have been central foundations for present-day relations with both the United States and the State of Michigan. The tribes' sovereign status has served, for example, as the basis for gaming compacts, tax and law enforcement agreements, and tribal-state court reciprocity agreements. *See*, *e.g.*, Michael Cavanagh, *Michigan's Story: State and Tribal Courts Try to Do the Right Thing*, 76 U. Det. Mercy L. Rev. 709 (1999); Matthew Fletcher, *The Power to Tax, the Power to Destroy, and the Michigan Tribal-State Tax Agreements*, 82 U. Det. Mercy L. Rev. 1 (2004); Matthew Fletcher, Kathryn Fort, and Wenona Singel, *Indian Country Law and Enforcement and Cooperative Public Safety Agreements*, 89 Mich. B.J. 42 (2010). Land status,

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[10] The Senate Report on the 1994 Act expressly recognizes that the "the 1855 treaty reaffirmed the political autonomy of the bands and created what were intended to be permanent reservations for the tribes with[in] their traditional homelands." S. Rep. No 103-260, at 2.

however, is also central to the proper exercise of tribal sovereignty.

This litigation began as an effort by petitioner to clarify the present-day allocation of various types of legal jurisdiction among federal, state, and tribal sovereigns in the area originally marked out for its reservation. *See, e.g.*, Pet. App. 18a-19a. Later stages of the litigation would present other questions. *See, e.g.*, *White Mtn. Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (balancing all sovereign interests in the context of preemption of state jurisdiction within reservation boundaries). But the Sixth Circuit made a grievous error by holding that the 1855 treaty never created a reservation in the first place, thus cutting off the modern effort for jurisdictional clarification at the outset.

That error has serious legal implications not only for petitioner but also for the amici tribes. The court's decision rejects out-of-hand the ability of the tribes to exercise the full extent of their modern sovereign powers. This Court has previously granted review to protect "important rights asserted in reliance upon federal treaty obligations," *Kolovrat v. Oregon*, 366 U.S. 187, 191 (1961), especially where a lower court has made a "doubtful determination" of an important question of federal, state, and tribal power, *Williams v. Lee*, 358 U.S. 217, 218 (1959). It should do so again here.

Beyond that, however, the decision rests on a mangled version of the tribes' collective history. The tribes' ancestors ceded to the United States more than a third of what is now Michigan, and then fought hard to avoid being expelled entirely despite treaty terms providing for permanent reservations. Forced to negotiate in a foreign language with a

superior power, they reached an agreement they had every reason to believe would at least guarantee them a reduced but protected homeland. Holding that the agreement never created a federally protected reservation erases that history, rewards broken promises, and dishonors the sacrifices of those who came before. For that reason, too, the decision below warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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