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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Treaty of Detroit, July 31, 1855, 11 Stat. 621, provided for land purchases for specific Indian persons and their families. The Petitioner ("the Band") never understood the Treaty as having created a reservation until very recently when it filed this lawsuit. The Band now claims that the inclusion, once each, of the words "reserved" and "reservations" in the Treaty to refer to the land made available for *land purchases* transforms the Treaty into one creating an Indian reservation even though the operative language of the Treaty plainly does not create a reservation. The question presented is whether the Treaty should be construed as having created a reservation encompassing more than 300 square miles of northern Michigan, contrary to the Band's long held understanding and contrary to the rulings of all four federal judges who have analyzed the issue.

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INTRODUCTION

The Little Traverse Bay Bands of Odawa Indians (the "Band") filed this action seeking a declaration that more than 300 square miles of Michigan's northern lower peninsula is an Indian reservation by virtue of an 1855 Treaty. The land borders lake Michigan and encompasses numerous cities, townships, and counties, including the City of Petoskey, City of Harbor Springs, Emmet County, Charlevoix County, Township of Bear Creek, Township of Bliss, Township of Center, Township of Cross Village, Township of Friendship, Township of Readmond, Township of Resort, and Township of West Traverse. All these municipalities and townships intervened in this case, as did several associations. The district court correctly held that the 1855 Treaty provided for individual Indian persons and their families to receive land selections or make land purchases, not a reservation, which is exactly what the Band desired, and is exactly what the Band understood was accomplished by the Treaty.

Until this lawsuit was filed, the Band and its predecessors had understood for over 150 years that the 1855 Treaty did not create a reservation. In fact, the Band's predecessor took this position in litigation before the Indian Claims Commission ("ICC"), and prevailed to its benefit by obtaining millions of dollars in compensation for land the Band ceded to the United States in an 1836 Treaty, none of which was returned in the form of a reservation in the 1855 Treaty.

The Band's petition urges the Court to misinterpret the 1855 Treaty to create a reservation on land that has been understood not to constitute an

Indian reservation for centuries. The Court should decline the Band's invitation, not only because of the lack of substantive merit in the Band's legal position, but because to hold that over 300 square miles of Northern lower Michigan is an Indian reservation, contrary to the understanding of all the communities in that area, as well as the Band itself, would wreak enormous havoc, and cause incalculable harm to those communities.

STATEMENT OF THE CASE

I. The 1855 Treaty and the Band's understanding of it before and after its enactment.

A. The Treaty Journal confirms the intent was to allow Indians to obtain land selections, not for the Band's predecessor to receive a reservation.

Throughout this litigation, the Band has sought to focus the lower courts, and now this Court, on anything but the key, operative language of the 1855 Treaty. The 1855 Treaty, unlike other treaties enacted in that era, created not an Indian reservation but a process by which individual Indians and their families could select or purchase individual plots of land on which to live. By relying almost entirely on selected statements cherry-picked by the Band from various sources, the Band has sought to obscure the origin, shared intent, and agreed-upon outcome of the 1855 Treaty. The Band not only ignores the Treaty's meaning and context, it ignores the interpretation that the Indians themselves held at the time the Treaty was negotiated and executed.

While there were treaties in the 1850s era that created reservations, not every treaty did so. The 1855 Treaty provided only for the selection or purchase of land that would be held in unrestricted fee by individual Indian persons that was merely temporarily withheld from the public domain, from land already ceded by the Band. This is exactly what the Indians desired.

The 1855 Treaty Journal confirms that the Indians did not want a reservation. Having conveyed their land by the 1836 Treaty, the Indians desired either money to enable individual Indians to purchase land, or land titles for individuals themselves. The Indian voice in the 1855 Treaty Council is absolutely clear in this regard: The Indian negotiators in 1855 wanted to own lands in the same fashion as their white neighbors owned lands. They had no interest in lands held exclusively in trust for them. The district court's thorough opinion correctly understood this.

The Treaty Journal describes the proceedings leading up to the entry into the treaty, and shows that both sides understood that what was being achieved was not a reservation, but land in fee for individual Indians, as well as money. (R.E.558-11, PageID##7124-7160). Assagon, the Odawa's representative, noted, for example, that in the Treaty of 1836, "reservations" had been created. (PageID#7130). He also understood that "the Treaty of 1836, provides that it will remove the Indians." (PageID#7133). Commissioner Gilbert pointed out that the government would be giving the Band "lands on which you can locate homes." (PageID#7135). Assagon made it clear that the Indian negotiators

wanted titles to the lands, not a weaker or less definitive interest in land on which they would be required to trust the government:

> [Assagon]: In speaking of giving us lands you have said nothing of the titles we shall have. Nothing has been said how much or in what matter we shall hold these lands. Perhaps, 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.
>
> Com. Manypeny [sic]: It will be our desire to give each individual and head of a family such a title as that he can distinguish what is his own. There will be some restrictions on the right of selling. Except that your title will be like the Whiteman's. This restriction will, when it seems wise & proper be withdrawn.

(PageID#7136).

Both Assagon and other Indian representatives repeatedly confirmed their desire was to acquire lands in fee for individuals, not a reservation. See PageID#7137 (Assagon comparing their desired interest to "[w]hen a white man wants to buy land"); PageID#7139 (Wawbegeeg confirming "we wish that you would give us titles—good titles to these lands"); (Paybahmesay inquiring "we wish to know how much land is to be given to us"); (Wasson confirming his desire "that patents be issued to us with our lands"); (Nahmewashkotay confirming his desire "that patents be issued to us for them"); PageID#7140 (Shawwasing confirming his desire "we wish you to give us patents

wherever we locate"); (Kenoshance confirming his desire "that we have a patent to hand down to our children from generation to generation"); (Wawbegeeg confirming, "we will pay our own taxes"); PageID#7146 (Assagon again confirming "it is your design to give every single person, over 21 years 40 acres of land. Now these Indians here wish you to grant this request—that is to give to each of us men, women & children 160 acres.").

Commissioner Manypenny also confirmed that this is what would be achieved in the 1855 Treaty. Manypenny said, "your lands are your own, as mine are mine, & they cannot be taken from you." (*Id.*).

After it was confirmed that the Treaty would be providing land in fee title to individual Indians, Assagon, speaking for the Band, turned his attention to the amount of money that would also be paid. (PageID#7146). The balance of the discussions was devoted to the money part of the treaty. No part of the negotiations was devoted in any way to the creation of a reservation.

B. The Treaty language created a mechanism for land selections by individual Indians and families, not a reservation.

The language of the 1855 Treaty, consistent with the negotiations and expressed intent of the two sides, created a process for land selections, not a reservation. Article 1 of the 1855 Treaty contains the operative language, which states, "[t]he United States will withdraw from sale for the benefit of said Indians as hereinafter provided, all unsold public lands within the State of Michigan embraced in the following

descriptions . . .” (Pet.App.114a). The Treaty then lists eight descriptions of public lands withdrawn from sale—one for each band or group of bands. The treaty then identified a system of individual selections of land for individual members of the Tribe within those eight areas. The treaty states:

> The United States will give to each Ottowa and Chippewa Indian being the head of a family, 80 acres of land, and to each single person over twenty-one years of age, 40 acres of land, and to each family of orphan children under twenty-one years of age containing two or more persons, 80 acres of land, and to each single orphan child under twenty-one years of age, 40 acres of land to be selected and located within the several tracts of land hereinbefore described, under the following rules and regulations:
>
> Each Indian entitled to land under this article may make his own selection of any land within the tract reserved herein for the band to which he may belong . . .

(Pet.App.116a). Nowhere does the 1855 Treaty create a reservation, which was consistent with the Band’s predecessors’ desires and understanding.

C. The Band’s claims with the ICC.

Nearly 100 years after the 1855 Treaty was enacted, the Band was still of the understanding that no reservation had been created by it. That was

manifested in proceedings commenced by the Band in the ICC.

1. Proceedings in Case Nos. 58 and 18-E.

The Band, calling itself the "Odawa Indians of Michigan," filed a Petition with the ICC on March 9, 1950, in which it sought compensation for ceding land to the United States, including the very area that it now claims has constituted an Indian reservation since 1855. In that Petition (R.E.429-1, PageID##5113-5118), which was assigned docket number 58, the Band asserted that it "ceded to the United States a large tract of country," including an area called Royce Map Mich. 205, which encompasses the area the Band now claims constitutes an Indian reservation. (Petition, ¶2, PageID#5114). That cession was done through the 1836 Treaty. The Band alleged that "[a]t the time of this cession of 1836, the said Ottawa and Chippewa Indians had exclusive occupancy and Indian title to the land ceded." (*Id.*, ¶6, PageID#5115). According to the Band, this "was their home-land." (*Id.*, ¶11, PageID#5116). The Band alleged that the consideration paid for that cession was grossly inadequate, and the Band sought compensation for the reasonable value of the land at the time of the cession. (*Id.*, ¶14, PageID#5117).

A separate Petition was filed with the ICC in 1949 by various Bands and members of the Chippewa Tribe, Docket 18-E. (R.E.429-2, PageID#5121). That Petition also asserted the 1836 Treaty made between the United States and the Ottawa and Chippewa Indians ceded "approximately 14,000,000 acres of land in Michigan territory" to the United States. (*Id.*,

¶¶58–59 and Map, PageID##5130-5133). The consideration for the cession of $2,300,000, was less than seventeen cents per acre. (*Id.*, ¶60, PageID#5130). Plaintiffs sought the reasonable and fair value of the lands ceded, interest and attorneys' fees.[1]

The ICC made very detailed findings in several ruling documents in cases 58 and 18-E. The Findings included lengthy discussion of the reservations addressed in the 1836 Treaty. (R.E.429-3, PageID##5141-5144). The Findings also specifically addressed the action taken in the 1855 Treaty at issue in this case. Paragraph 11 of the Findings states as follows:

> 11. On July 31, 1855, 11 Stat. 623, the "Ottawa and Chippewa Indians of Michigan, parties to the treaty of March 28, 1836", entered into a treaty whereby certain public lands were to be set aside for use of individuals and bands of Chippewa and Ottawa Indians. The treaty benefits were restricted to Indians then actually residing in the State of Michigan and entitled to participate in the benefits of the March 28, 1836, treaty . . . .

(PageID#5148).

The Findings concluded by finding that the Band (and Chippewa) had ceded all of Royce Area 205 except for a total of 4,100,971 acres that the Petitioner Indians had kept for themselves. (PageID#5163). See

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[1] Royce Area 205 can be seen on the map at PageID#5133. That map was included as an exhibit to the Petition in Case No. 18-E.

also Opinion of May 20, 1959, R.E.429-3, PageID#5164-5173, rendering similar findings.

In an Opinion issued December 23, 1968, the Commission concluded that the land ceded by the Band and the Chippewa to the United States in the 1836 Treaty had a fair market value of $10,800,000. (R.E.429-4, PageID#5178). The Commission concluded that Opinion by noting that the case would then proceed to a determination of the consideration received by the Petitioners under the 1836 Treaty, whether or not that consideration was unconscionable, "and if so, what offsets, if any, defendant is entitled to under the provisions of the Act." (*Id.*). (See also PageID#5215).

In an Opinion issued January 14, 1970 in both dockets, the ICC analyzed the consideration that had been paid to the Petitioners. Importantly, that analysis focused heavily on the actions taken in the 1855 Treaty, and whether it created any rights in the Band's predecessor that entitled the United States to an offset. In fact, that Opinion cited, "as a necessary first step toward meeting the issue of consideration," a motion filed by the United States arguing that the 1855 Treaty assigned land to individual Indians, and argued that that action comprised a portion of the consideration for the land cession in the 1836 Treaty. (R.E.429-5, PageID#5218). The Band's predecessor argued that the land made available for individual Indians in the 1855 Treaty should not be considered consideration for the 1836 Treaty. (*Id.*).

On December 29, 1971, the ICC issued its Opinion regarding value. (R.E.429-7, PageID#5237). That Opinion noted that Royce Area 205 had been deemed

to have an average fair market value of 90 cents per acre. (PageID#5238). The Opinion then analyzed the value of consideration the Tribe had received, as well as the value of consideration it had paid to the United States. (PageID##5239-5245). The Opinion noted, for example, that "during all the time the interest was being paid the plaintiffs had the possession and use of the reservations" that were the subject of the 1836 Treaty. (PageID#5242). The Commission also specifically noted "there remains the question of whether the [1855 Treaty] was for the most part additional consideration for the cessions made by the plaintiffs in the treaty of March 28, 1836." (PageID#5243). The Commission ultimately concluded that the 1855 Treaty did nothing other than provide lands to specific Indian individuals and their families, i.e., it did not create a reservation that warranted an offset. Notably, the Opinion expended great detail in analyzing offsets, including offsets for as little as $1,369 and $636.05. (PageID##5245-5247).

2. Proceedings in Case No. 364.

On August 13, 1951 the Ottawa-Chippewa Tribe of Michigan filed a separate Petition with the ICC, which was assigned Docket No. 364, seeking an accounting under the Treaty of 1855, 11 Stat. 621. See, 30 Ind. Cl. Comm. 288 (1973). (R.E.429-9, PageID##5253-5258). The Commission noted "[t]he petition in Docket 364 includes four claims arising in whole or in part under the treaty of July 31, 1855, 11 Stat. 621. Such claims are not duplicated in any other case decided by or pending before the Commission." *Id.* at 292. The ICC determined that the real parties in

interest in Docket 364 were identical to those in Dockets 18-E and 58. *Id*. at 288 – 289.

The ICC described the historical background of the 1855 Treaty in its Opinion of January 27, 1975, 35 Ind. Cl. Comm. 385 (1975) (R.E.429-10, PageID##5259-5291):

> The plaintiffs ceded their last remaining tribal land to the defendant by a treaty dated March 28, 1836, 7 Stat. 491. Originally, the treaty provided for permanent reservations in Michigan; but by Senate amendment, the reservations were each limited to a 5-year term, after which the Indians were to be removed west.
>
> The 1855 Treaty marked the Government's abandonment of the removal scheme. Article I partially restored the land ceded in 1836, this time in the form of individual allotments. Lake Superior Bands of Chippewa Indians v. United States, Dockets 18-E and 58, 22 Ind. Cl. Comm. 372, 375 (1970).

Id. at 386. (Emphasis added). The United States moved to dismiss the first claim in the Petition which was "for the value of the land which members of the tribe were entitled to have allotted to them under the 1855 Treaty, but which was allegedly not so allotted." *Id*. at 387. The Commission agreed and dismissed the claim:

> Assuming, without deciding, that the tribe had a claim for the value of such of its ceded lands as ought to have been allotted but were not, that claim has already been paid.

> In Lake Superior Bands, supra, the Commission excluded only the 121,450.75 acres which were actually allotted under the 1855 Treaty from the area ceded in 1836 for which the plaintiff was awarded additional compensation. We asked no questions about whether some of the rest of the land should have been allotted; we awarded compensation for it all. The plaintiff's first claim here, if valid, merely overlaps part of the claim that was satisfied in Lake Superior Bands.

Id. at 387 – 388. (Emphasis added). The ICC entered a Final Award in the amount of $25,233.11 in Docket No. 364. 40 Ind. Cl. Comm. 6, 88 – 89 (1977). (R.E.429-11, PageID##5292-5376).

3. Compensation recovered through the ICC proceedings.

Based on the final judgments rendered by the ICC the United States was obligated to appropriate funds to pay those judgments. *See* 25 U.S.C. § 70u; 31 U.S.C. § 724a; *United States v. Dann*, 470 U.S. 39, 41 – 43, (1985).

Although the funds to satisfy the judgment in Docket 18-E/58 were appropriated on October 31, 1972 and held in trust, no agreement was reached on distribution of the judgment funds until the enactment of H.R. 1604, a bill to provide for the division, use and distribution of the judgment funds, in December 1997. (R.E.429-13, PageID##5379-5394). By the time the distribution statute was enacted the fund had grown in value to approximately $70,000,000. (R.E.429-14, PageID##5395-5396).

Under the provisions of the statute the Band was to receive 17.3 percent of the judgment fund, and, in fact, the Band did receive $14,946,239.18 from the judgment fund, which it used to establish a Tribal Plan and Trust Fund Board to oversee use of the judgment funds. (R.E.429-15, PageID##5397-5408, Waganakising Odawa, Tribal Code of Law, Title VII, §§ 7.101, 7.203(C)).

D. The Band's position in this case.

Contrary to the position it took in the ICC proceedings, the Band's position in this case is that "Article I of the 1855 Treaty established reservations for the various tribes *and* set the terms on which the lands would be allotted." (Band's brief on appeal, p. 12 (emphasis added)). The Band acknowledges that in the 1836 Treaty the Band, and the Chippewa Tribe, "ceded approximately 1/3rd of present-day Michigan to the United States in exchange for small reservations for each tribe." (Band's brief, p. 8). The Band also acknowledges that the Senate unilaterally amended that treaty "to limit the Band's reservations to 'five years . . . and no longer,' . . . after which the United States could 'remove them' to the west . . ." (*Id.).* The Band contends that, based on the provision allowing the United States to remove them, "the Band and the other tribes thereafter lived in chronic fear of removal, which they 'strenuously opposed,'" . . . (*Id.*, p. 8). The Band also acknowledged that actual ownership of land by individual Indians through the land selection process provided by the 1855 Treaty was central to the endeavor of addressing the Indians' fear of removal. (*Id.*, p. 9).

The Band does not and cannot point to any language in the 1855 Treaty that actually creates a reservation. Instead, it relies on the mere fact that the words "reserved" and "reservations" are used in the Treaty to refer to the land made available for selections and purchases by individual Indians. Thus, according to the Tribe, any Treaty that contains the word "reserved" or "reservations" must be construed as having created an Indian reservation regardless of what the operative language of the Treaty actually did.

E. Lower court proceedings.

The parties filed cross-motions for summary judgment on the issue of whether the 1855 Treaty created a reservation.[2] On August 15, 2019, the district court issued a judgment granting summary judgment in favor of Defendants along with a 51-page Opinion. (R.E. 627). The district court opinion traced the historical background including the Treaty of 1836. (Pet.App.38a-47a). The court next described the Treaty Council that preceded entry into the 1855 Treaty. The court then described the resulting 1855 Treaty. (Pet.App.53a-56a). And the district court described the post-treaty events that followed, including the manner in which the terms of the treaty

[2] The litigation is in its first phase. The district court divided the case into phase 1-a and 1-b, followed by phase 2, which would address the applicability of equitable defenses. If summary judgment in favor of defendants were denied or were to be reversed, the issue of whether the 1855 Treaty created a reservation presumably would have to be tried. Assuming the Band prevailed, the litigation would then proceed to the issue of whether any reservation was disestablished by subsequent treaties. Thereafter, the case would move to phase 2.

were carried out. (Pet.App.56a-61a). The court then provided a thorough, detailed analysis of the 1855 Treaty and the fact that the treaty did not create a reservation. Rather, the treaty simply provided for land selections and purchases by individual Indians and their families. As the district court correctly recognized, the language of the 1855 Treaty so states. The Indians' understanding of that language at the time the treaty was negotiated and entered into was also consistent with the language *not* creating a reservation. Even the post-treaty events were consistent with the fact that the 1855 Treaty did not create a reservation.[3]

The Band appealed to the Sixth Circuit, which issued a unanimous Opinion affirming the judgment of the district court. Like the district court, the Sixth Circuit recognized, correctly, that the language of the 1855 Treaty did not create a reservation. Rather, "the treaty provided for land purchases by individual Indians and their families." The Sixth Circuit recognized that this was required not only by the language of the treaty but by the understanding of that language held by the Band's predecessors. As the Sixth Circuit held,

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[3] Before the summary judgment proceedings the Municipal Defendants moved for judgment on the pleadings, arguing that the Band's claim is barred by judicial estoppel, issue preclusion, and otherwise by the ICC proceedings. The district court issued a 24-page Opinion on January 31, 2019 in which it denied the Municipal Defendants' motion. (R.E.554, PageID##6713-6736). The Municipal Defendants filed a cross-appeal from that ruling, which requested affirmance of the judgment on alternative grounds. Because it affirmed, the Sixth Circuit did not reach this issue.

> When reviewed in full, 'the history of the treaty, [its precedent], negotiations, and the practical construction adopted by the parties' demonstrate that the Treaty did not provide land for Indian reservation purposes; but rather, it was intended to allot[4] plots of land so members of the Band could establish permanent homes.

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[4] The Sixth Circuit used the term "allot" and "allotment" not as a term of art but in accordance with its ordinary meaning to refer to "smaller lots owned by individual tribal members." (Pet.App.21a). *See Merriam Webster's Collegiate Dictionary* (10th Ed.) (defining "allotment" in pertinent part as "something that is allotted; *esp.* a plot of land let to an individual for cultivation"; and "allot" as "to distribute by or as if by lot"). The Band seizes on the use of the term "allotment" to argue that the Sixth Circuit held that creation of allotments in the technical legal sense is inconsistent with a reservation. That is not what the Sixth Circuit held. Indeed, the Sixth Circuit explicitly acknowledged,

> > We recognize, as *McGirt* did, that allotments are not "inherently incompatible with reservation status." 140 S. Ct. at 2475. But a lack of inherent incompatibility with reservation status does not mean that an Indian reservation is established wherever allotments are provided for. See *United States v. Pelican*, 232 U.S. 442, 449, 34 S.Ct. 396, 58 L.Ed. 676 (1914) (holding that even where a reservation was diminished, the allotments continued to be Indian Country); see also Cohen's Handbook of Federal Indian Law, § 3.04[2][c][iv] (2012) (noting that some Indian allotments were not made within reservations). In the final analysis, we hold that based on the Treaty negotiations, and the Treaty's text and construction, neither the Band nor the federal government intended to create an Indian reservation.

(Pet.App.29a-30a). This statement completely defuses the Band's claim that the Sixth Circuit Opinion will create confusion in this area of jurisprudence.

(Pet.App.29a). The Band moved for reconsideration en banc, which was denied without dissent. In fact, not a single judge on the Sixth Circuit called for a vote on the en banc petition.

REASONS FOR DENYING THE PETITION

I. Certiorari should be denied because the lower court rulings are correct.

Contrary to Petitioner's argument, the lower courts correctly held that the 1855 Treaty simply did not create a reservation. It created a mechanism for land selection or purchases by individual Indians and their families, that is all. Nor did the 1855 Treaty say that it created a reservation, contrary to the Petitioner's assertion. (Pet.2). Furthermore, the Band itself never understood that the Treaty created a reservation. The Band's predecessor did not hold such an understanding at the time the Treaty was negotiated and entered into. And the Band continued to be of the view that the Treaty did not create a reservation a century later when, in the mid-1950's, the Band filed several proceedings before the ICC taking the position that the land ceded to the government in the 1836 Treaty continued to belong solely to the government and was not the subject of a reservation created by the 1855 Treaty.

Whether the focus is on the language of the 1855 Treaty, on the Band's understanding at the time the treaty was negotiated, or on the Band's subsequent understanding, the lower court rulings are correct and this Court should deny the Petition.

A. Applicable principles of Treaty interpretation require enforcement of unambiguous language as would naturally be understood by the Indians.

The petition perversely accuses the lower courts of disregarding the text of the 1855 Treaty when it is the Band that does so. The lower courts correctly recognized that nowhere in the 1855 Treaty did the authors create an Indian reservation. The Treaty created a process for land selection and purchase by individuals, and nothing more. It is the Band's position that the mere use of the terms "reserved" and "reservation" in the Treaty, regardless of context, requires the Treaty to be read as having created a reservation despite the fact that the operative language of the Treaty quite clearly did not do so. It is the Band, not the lower courts, that ignores the rules for interpreting treaty language.

The Band also points out that, beyond the text, the historical context is to be considered. That is true, and the historical context further confirms that the 1855 Treaty did not create a reservation—because it confirms that the Band itself did not understand the 1855 Treaty as having created a reservation. To the extent the Band cherry-picks documents created years after the fact that could be construed as having understood that a reservation was created by the 1855 Treaty, such documents are not a substitute for the language of a treaty, and cannot be deemed to require a reading of a treaty that is unsupported by the text itself. Furthermore, whereas an ambiguity in the language of a treaty, i.e., more than one reasonable interpretation, one of which is beneficial to the

Indians, is to be construed in favor of the Indians, the text of a treaty cannot be completely disregarded in favor of some other meaning untethered to the language.

The lower courts rightly focused on the language of the 1855 Treaty with an eye toward how the Indians understood it. Both the language of the 1855 Treaty and the Band's predecessor's understanding of that language confirm that a reservation was not created.

B. The text of the 1855 Treaty provided lands for individual Indians, not a reservation.

The language of the 1855 Treaty quite clearly gave land in fee to individual Indians—as opposed to a reservation for the Band. The Band essentially glosses over this distinction, both by purporting to redefine the meaning of a "reservation," and also by ignoring the operative language of the treaty.

The plain, unambiguous language of the Treaty is clear and unambiguous, as the lower courts correctly recognized. The transcript of the Council at which the 1855 Treaty was negotiated also makes clear that the Indians understood the 1855 Treaty created only a land-selection process, not a reservation, as the district court correctly recognized. And the historical context, for whatever relevance that has, likewise confirms as much, as the district court also correctly recognized.

The Band seizes on the fact that the Treaty used the word "reservation," suggesting that the mere presence of that word is enough to construe the treaty as having created a reservation for the Tribe. As the Band has conceded, however, the word "reservation"

can be used in land law "to describe any body of land . . . reserved from sale for any purposes," i.e., for purposes *other than* an Indian reservation. (Band's brief on appeal, p. 24). And the language of the 1855 Treaty, unlike the language of treaties from that era that did create Indian reservations, quite clearly did not create a reservation for the Band.

The operative language of the 1855 Treaty is in Article I. The key paragraph in Article I states:

> All the land embraced within the tracts hereinbefore described, that shall not have been appropriated or selected within five years shall remain the property of the United States, and the same shall thereafter, for the further term of five years, be subject to entry in the usual manner and at the same rate per acre, as **other** adjacent public lands are then held, by Indians only; and all lands, so purchased by Indians, shall be sold without restriction, and certificates and patents shall be issued for the same in the usual form as in ordinary cases; and all lands remaining unappropriated by or unsold to the Indians after the expiration of the last-mentioned term, may be sold or disposed of by the United States as in the case of all **other** public lands.

(Pet.App.119a (emphasis added)).

Simply stated, the United States withdrew public lands from sale for five years to allow tribal members to select individual parcels. Tribal members had another five years to purchase the unselected public lands at the established price. After that ten-year

period, all public lands not selected or purchased by members of the Tribe could be sold or disposed of by the United States "as in the case of all **other** public land." The inclusion of the word "other," used twice in the paragraph, confirms that all eight tracts of land withdrawn from sale were—and remained—public lands of the United States, not reservation land held in trust for the Tribe. The only lands arguably held in trust were the individual selections in the brief period between the time of selection and the issuance of patents.

The Band seizes on the use of the word "reservation" in the next paragraph in Article I:

> Nothing contained herein shall be so construed as to prevent the appropriation, by sale, gift, or otherwise, by the United States, of any tract or tracts of land within the **aforesaid reservations** for the location of churches, school-houses, or for other educational purposes, and for such purposes purchases of land may likewise be made from the Indians, the consent of the President of the United States, having, in every instance, first been obtained therefor. It is also agreed that any lands within the **aforesaid tracts** now occupied by actual settlers, or by persons entitled to preemption thereon, shall be exempt from the provisions of this Article; provided, that such preemption claims shall be proved, as prescribed by law, before the first day of October next.

(Pet.App.120a, 127a (emphasis added)). [5]

The terms "aforesaid reservations" and "aforesaid tracts" in this paragraph clearly refer to the same thing: the eight described tracts withdrawn from public sale for a limited period of time. The term "aforesaid reservations" is used because the words immediately preceding it are "tract or tracts of land." To say "tract or tracts of land within the aforesaid tracts" would have been awkward, if not inherently ambiguous. The use of the interchangeable phrases "aforesaid reservations" and "aforesaid tracts" in this paragraph confirm that the word "reservation" was not intended to create or refer to Indian country, but was used in accordance with its common, ordinary meaning. The same is true of the previous use of the phrase "the tract reserved herein." The use of the word "reserved" is simply a shorthand way of referring to the land temporarily withdrawn from sale.

The Band also makes much of the fact that subsequent writings occasionally noted that the 1855 Treaty had created a reservation. But such references were a product of post-Treaty confusion and were in error, as the district court correctly recognized. (Pet.App.57a-60a). The Band cites no authority for the proposition that a treaty should be deemed to have created a reservation solely because a subsequent document mistakenly perceived that it had.[6]

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[5] The final sentence was added by amendment, which is why it is on a different page.

[6] The Band also argues that the lower courts erred by holding that there must be federal superintendence over reservations. But it is the Band that is wrong, not the lower courts. *See Alaska*

C. The Band and its predecessors always understood the 1855 Treaty did not create a reservation.

The Band correctly recognizes that, under the rules of treaty interpretation, courts are to construe treaties as they would naturally be understood by the Indians. Yet, the Band's petition, like its lower court briefing, says virtually nothing about how the 1855 Treaty was understood by the Indians who negotiated that treaty.

As the Treaty Journal makes abundantly clear, the Indians understood that the treaty was distributing land in fee for individual Indians and families, not creating a reservation. (See discussion, *supra,* at pp. 2-5). The 1855 treaty provided exclusively for lands in severalty, precisely as the Indians desired. The Indians were promised "every single [Indian] person over the age of 21 years 40 acres of land." In response to this promise, the negotiators responded, not by pressing for a reservation, but by providing for the individual allotments as desired and as promised.

The Tribe's acknowledgment that the Indians' understanding of treaty language is what matters, while the Band simultaneously says little about the Treaty Journal and its confirmation as to what the Indians understood, speaks volumes.

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v. Native Vill. Of Vennetie Tribal Gov't, 522 U.S. 520, 533-534 (1998) (recognizing that Indian reservation requires federal superintendence); *United States v. John*, 437 U.S. 634, 649 (1978) (same).

The Band's predecessor not only understood that the 1855 Treaty was not creating a reservation at the time it was enacted, that continued to be their understanding at the time they filed proceedings with the ICC. The Band's complaint in this case requests a declaration that the 1855 Treaty created a reservation that "is Indian country as that term is used in 18 U.S.C. § 1151 . . ." (Complaint, ¶57, R.E.1, PageID#17). This position is directly contrary to the position taken by the Band's predecessor in the ICC proceedings. There, the Band argued that the land included within what it now claims is an Indian reservation was ceded to the United States in the 1836 Treaty. That cession was the entire basis for the Tribe's claim to additional compensation through the ICC proceedings.

Nor did the 1855 Treaty restore any of those interests to the Band. Rather, that Treaty did nothing more than provide individual tracts of government-owned land to particular Indian persons and families. Had the 1855 Treaty created a reservation, the reservation would have had value to the Tribe that would have entitled the U.S. to an offset in the compensation paid by virtue of the ICC proceedings. Yet, the Band argued that no offset was warranted by the land selections created by the 1855 Treaty, precisely because those land selections were given to individuals and were not accompanied by the creation of any interest in the Band, such as a reservation. The ICC specifically considered this very issue, and determined that 1855 Treaty created no rights in the Tribe's predecessor that warranted an offset in the compensation owed.

D. Historical context further confirms that the 1855 Treaty did not create a reservation, in contrast with treaties that did.

At the time the 1855 Treaty was written, treaty drafters well knew the difference between reservations and land selections for individual Indians, and knew how to draft treaties that did one, or the other, or both. The 1855 Treaty that only provided lands for individuals stands in stark contrast with several treaties of that same era that created reservations.

1. The 1854 Treaty with the Chippewa.

The Treaty with the Chippewa of 1854, 10 Stat. 1109 (R.E.568-1, PageID##9242-9249), a Michigan treaty, is an example of a treaty that created permanent reservations, as the Court recognized. *United States v. Thomas*, 151 U.S. 577, 582 (1894). In fact, both that treaty and the 1855 Treaty shared a commissioner, in Henry Gilbert. And both were directed by George Manypenny. While some of the language of the two treaties is similar, dispositive differences with regard to the creation of a reservation in the 1854 Treaty, and the omission of such a provision in the 1855 Treaty, are apparent.

First, the 1855 Treaty at issue begins with the statement: "The United States will withdraw from sale for the benefit of said Indians as hereinafter provided, all unsold public lands within the State of Michigan embraced in the following descriptions . . . ."

Article 2 of the 1854 Treaty[7] begins with this: "The United States agree **to set apart** and withhold from sale, for the use of the Chippewas of Lake Superior, the following described tracts of land . . ." (Emphasis added). The 1855 Treaty does not contain the phrase "to set apart."

Second, there is a marked contrast between the key operative provisions of the two treaties. Assignments to individual Indians is not addressed until Article 3, which states that "the President may, from time to time, at his discretion, . . . assign to each head of a family or single person over twenty-one years of age, eighty acres of land **for his or her separate use**; and he may, at his discretion, . . . issue patents therefor . . . ." The treaty thus refers to two separate types of "use": the "set[ting] apart and withhold[ing] from sale, for the use of the Chippewas" in Article 2, and the "separate use" of individual Indians or heads of families in the event of discretionary assignments by the President.

The 1855 Treaty, by contrast, contains only one operative provision regarding the grant, and refers to only one type of use. While it describes the land sections being withdrawn for sale for "the use of" the various bands, the operative provision then states, in the granting provision, "The United States will give to each Ottawa and Chippewa Indians being the head of a family, 80 acres of land . . . ." The one and only grant regarding the use of the land is in the form of giving land to individual Indians; there is no separate

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[7] Article 1 addresses a cessation of land by the Chippewa to the United States.

operative provision regarding a reservation or collective use by the tribes.

Third, Article 3 of the 1854 Treaty also contains a provision for defining the boundaries of "the reserved tracts" by survey. There is no provision in the 1855 Treaty to define the boundaries of the reserved tracts—because it was the intent of the parties to the treaty the remaining land would be returned to public sale. This intent is reflected in the explicit language of the 1855 Treaty: "all lands remaining unappropriated by or unsold to the Indians after the expiration of the last-mentioned term, may be sold or disposed of by the United States as in the case of all other public lands." While both treaties provide for the selection of land by individual tribal members, only the 1855 Treaty provides for a return of all unselected land to public sale.

2. The 1854 Treaty with the Kaskaskia, Peoria.

The 1854 Treaty with the Kaskaskia, Peoria, Etc., 10 Stat. 1082, (R.E.568-4, Page ID##9260-9272) is another example of a treaty that created both a reservation[8] and individual land selections. Article 2 of the treaty describes an area of land the Tribe would cede to the United States, then states, "excepting and reserving therefrom a quantity of land equal to one hundred and sixty acres for each soul in said united tribe, according to a schedule attached to this instrument, **and ten sections additional, to be held as the common property of the said tribe** –

[8] The Court so held in *Peoria Tribe of Indians of Oklahoma v. United States*, 390 U.S. 468, 469 (1968).

and also the grant to the American Indian Mission, hereinafter specifically set forth." (Emphasis added).

Article 3 states the lands to be ceded would be surveyed and the individual selections would then be made by the members of the Tribe. The treaty requires the chiefs of the Tribe to make selections on behalf of any individual members who did not make selections within the time specified "and shall also, after completing said last-named selections, **choose the ten sections reserved to the tribe** . . . ." (Emphasis added). Article 3 then provides for the issuance of patents for the individual tribal members' selections.

As with the 1854 Treaty with the Chippewa, the 1854 Treaty with the Kaskaskia, Peoria illustrates the contrast with the 1855 Treaty at issue in providing for a reservation as well as individual land selections.

3. The 1855 Treaty with the Chippewa.

The Treaty with the Chippewa of 1855, 10 Stat. 1165, (R.E.568-5, PageID##9273-9292), also provides a helpful contrast. After Article 1 described land being ceded to the United States, Article 2 states, "There shall be, and hereby is, **reserved and set apart**, a sufficient quantity of land **for the permanent homes** of the said Indians; the lands so reserved and set apart, to be in separate tracts, as follows . . . ." (Emphasis added). This language created a reservation. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 184 (1999). And the following sentence referring back to the allotment of the reservation referred to it in the same terms.

The final paragraph of Article 2 then states, similar to the 1854 Treaty with the Chippewa, that

> at such time or times as the President may deem it advisable for the interests and welfare of said Indians, or any of them, he shall cause the said reservation, or such portion or portions thereof as may be necessary, to be surveyed; and assign to each head of family, or single person over twenty-one years of age, a reasonable quantity of land, in one body, not to exceed eighty acres in any case, for his or their separate use; and he may, at his discretion, as the occupants thereof become capable of managing their business and affairs, issue patents to them for the tracts so assigned to them respectively; said tracts to be exempt from taxation, levy, sale, or feature; and not to be alienated or leased for a longer period than two years, at one time, until otherwise provided by the legislature of the State in which they may be situate, with the assent of Congress.

(PageID##9279-9280).

The difference between the treaty with the Chippewa and the treaty at issue in this case is stark. The Chippewa treaty explicitly states the described reservations are for "the permanent homes" of the Tribe. Individual selections can be permitted for the members of the Tribe, but there is no reference to unselected lands being returned to public sale. Indeed, in addressing the usufructuary rights of the tribe under that treaty, the Eighth Circuit made this

observation: "As to the United States, we note first that the United States knew how to draft a treaty to revoke usufructuary rights, and did not do so in this case." *Mille Lacs Band of Chippewa Indians v. State of Minn.*, 124 F.3d 904, 920 (8th Cir. 1997), *aff'd sub nom. Minnesota v. Mille Lacs Band of Chippewa Indians, supra.* The same can be said of the 1855 Treaty at issue in this case: The United States knew how to draft a treaty to create permanent reservations and did not do so in this case.

II. Certiorari should be denied because the ramifications of declaring the existence of a reservation in Northern Michigan would be catastrophic.

The Band says one thing with which the Municipal Defendants agree—that the consequences for the sovereigns involved in this case are significant. (Pet.2). The Band recognizes that its Petition seeks to "shape jurisdiction in 140,000 acres of northern Michigan." *Id.* That, too, is correct, except the supposed reservation is 216,000 acres, not 140,000, as the Band acknowledged in its Complaint. (R.E.1 at 7). Where the Band errs is in stating that the consequences of the lower court decisions themselves are significant and are "an affront to the Band's history." *Id.* The lower court decisions, aside from being correct, do nothing more than reaffirm the understanding held by everyone—the Band, the Municipal Defendants, all the other defendants, and essentially all of northern Michigan's citizens and communities, both Indians and non-Indians, who have been living their lives for many decades under the

assumption that northern Michigan does *not* constitute an Indian reservation.

To declare the existence of a reservation on more than 300 square miles of northern lower Michigan would have severe deleterious consequences. It would wreak havoc in Michigan in the same fashion as has happened in Oklahoma in the wake of this Court's decision in *McGirt v. Oklahoma*, __ U.S. __; 140 S. Ct. 2452 (2020)—and then some.[9]

As the Chief Justice explained in his dissenting opinion in *McGirt,* "The Court has profoundly destabilized the governance of eastern Oklahoma. The decision today creates significant uncertainty for the state's continuing authority over any area that touches Indian affairs, ranging from zoning and taxation to family and environmental law." *McGirt,* 140 S. Ct. at 2482 (Chief Justice Roberts dissenting). The Chief Justice continued, "In addition to undermining state authority, reservation status adds an additional, complicated layer of governance over the massive territory here, conferring on tribal government power over numerous areas of life—including powers over non-Indian citizens and businesses." *Id.,* at 2502. *See also Rogers Co. Board of Tax Role Corr. v. Video Gaming Text, Inc.,* 141 F. Ct. 24; 208 L. Ed. 2d 239 (2020) ("Earlier this year, the Court disregarded the well settled approach required by our precedence and transformed half of Oklahoma into tribal land . . . That decision profoundly destabilized the governance of eastern Oklahoma and created significant uncertainty about basic

[9] *McGirt* focused on reservation disestablishment, not creation.

government functions like taxation." (Justice Thomas dissenting (punctuation omitted)).

The destabilization predicted by the dissenting Justices in *McGirt* has occurred. Oklahoma's Supreme Court justices have recently decried the fallout in Oklahoma from this Court's *McGirt* decision, as have lower court decisions in Oklahoma. See, e.g., *Hogner v. State,* No. F-2018-138, 2021 WL 958412 at *9 (Okla. Crim. App., March 11, 2021) (J. Hudson, Concurring); *State v. Lawhorn,* 499 P.3d 777, 780 (Okla. Crim. App., 2021); *Roth v. State,* 499 P.3d 23, 27-28 (Okla. Crim. App. 2021); *Oklahoma v. United States Department of the Interior,* No. Civ-21-719-F, 2021 WL 6064000, at *1 (W.D. Okla., December 22, 2021). See also *State ex rel. Matloff v. Wallace,* 497 P.3d 686 (Okla. Crim. App., 2021), cert. den. Sub. Nom. *PAR v. Oklahoma,* No. 21-467, 2022 WL 89297 (U.S. January 10, 2022).

As the district judge explained in *Oklahoma v. United States Department of the Interior,* "The *McGirt* decision 'put[] the state of Oklahoma, and millions of its citizens, in a uniquely disadvantaged position as compared to the other 49 states. Core functions of state government, relied upon by all Oklahomans for over 100 years, all called into question even though only a very small portion of the land within the newly-recognized reservation is owned by tribes or individuals with a tribal affiliation.'" The court continued, "The result the court reaches in this order is a prime example of the havoc flowing from the *McGirt* decision." *Id.* at *1.

Oklahoma Supreme Court Justice Hudson noted several specific effects of declaring the existence and

non-disestablishment of a reservation that went beyond the criminal conviction at issue in *McGirt.* In a concurring opinion in *Hogner,* Justice Hudson put it this way:

> The immediate effect under federal law is to prevent state courts from exercising criminal jurisdiction over a large swath of Greater Tulsa and much of eastern Oklahoma. Yet the effects of *McGirt* range much further. Crime victims and their family members in a myriad of cases previously prosecuted by the State can look forward to a do-over in federal court of the criminal proceedings where *McGirt* applies. And they are the lucky ones. Some cases may not be prosecuted at all by federal authorities because of issues with the statute of limitations, the loss of evidence, missing witnesses or simply the passage of time. All of this foreshadows a hugely destabilizing force to public safety in eastern Oklahoma.
>
> *McGirt* must seem like a cruel joke for those victims and their family members who are forced to endure such extreme consequences in their case.

Hogner, 2021 WL 958412, at *9 (J. Hudson, concurring).

The chronicling of the problems that have flowed from the *McGirt* decision focus to some extent on the fact that the reservation found not to have been disestablished in that case includes much of Tulsa. While the area in northern Michigan that the Band claims has constituted a reservation for the last 165

years (unbeknownst to essentially every person and entity that has resided there during that time) is not as large as the reservation in Oklahoma, it includes many self-governing municipalities and townships. To hold that that large swath of land is an Indian reservation would work a "hugely destabilizing force," *id.,* not in a small handful of cities and townships, but in dozens.

Inasmuch as the 1855 Treaty does not create a reservation, fortunately there is no basis to render a decision in this case that would wreak similar havoc in Michigan. Even if the Court were of the view that the lower court decisions were wrong, however, it would make little sense to grant the Petition and reverse the lower court decisions. The Band's proclamation that the lower court rulings are "an affront to the Band's history" is ludicrous. The Band *never,* until shortly before it thought to file this lawsuit, believed the land at issue constitutes a reservation. In fact, it benefited from arguing the contrary in the ICC proceedings. To uproot the settled understandings and expectations of all sovereigns and citizens in northern Michigan, both Indians and non-Indians, truly would be "an affront" to the thousands of Michiganders in those many communities, and to the many governing entities that have joined this lawsuit, among many others that have not joined but also have a vested interest in avoiding the destabilization of governance throughout the territory.

Simply put, there is no sensible reason to grant certiorari in this case, and many reasons not to, even

aside from the lack of substantive merit in the Band's position.

CONCLUSION

For the reasons set forth herein, by the other respondents, and by the lower court decisions, Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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