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 IN OPPOSITION

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QUESTION PRESENTED

To be treated as an Indian reservation, land must be (1) "set apart," (2) "for the use of Indians as such," and (3) "under the superintendence of the Government." *United States* v. *John*, 437 U.S. 634, 649 (1978) (quoting *United States* v. *Pelican*, 232 U.S. 442, 449 (1914)). Accord, *e.g.*, *Okla. Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 511 (1991) (reaffirming test). The parties to the 1855 Treaty of Detroit, 11 Stat. 621, agreed that the United States would temporarily withdraw from sale unsold public lands in designated townships for eligible band members to select or purchase before the federal government disposed of the remaining lands. After those members received their fee patents, including a right to alienation after only 10 years, the government returned the remaining lands to market, disposed of them, and did not exercise jurisdiction in the relevant area. The question presented is:

Whether the lower courts correctly held that the terms of the 1855 Treaty—considering the contemporaneous historical evidence that neither the United States nor the band believed they were creating a reservation—created a reservation under the *John* test.

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INTRODUCTION

Petitioner Little Traverse Bay Bands of Odawa Indians seeks to create a reservation the United States never granted and which the Band did not want. This reality is plain from the Treaty of 1855's text, which provided Ottawa and Chippewa families the ability to select from federally owned land "individual tracts of land, with the title to the land being held in fee by each head of household," Pet.App.83a, while preserving the right of the United States to sell remaining lands to third parties, Pet.App.81a–82a. At the very first step, the Band's reservation claim collapses; the Treaty "failed to create an Indian reservation because it did not create a federal set aside of land for Indian purposes." Pet.App.83a (citing *Okla. Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 511 (1991). Indeed, "the Treaty could not simultaneously set the lands aside as reservations while also allowing for the United States to dispose of the land in any manner it wished." Pet.App.97a. "[T]he only reasonable conclusion is that the plain and unambiguous terms do not create a federal set aside of land for use as a reservation, nor did the Tribe's predecessors understand them to do so." Pet.App.82a.

In addition, "the Treaty lacks the hallmarks of ongoing federal superintendence" that this Court requires for the establishment of a reservation. Pet.App.86a (citing *Citizen Band*, 498 U.S. at 511). And the contemporary historical record makes clear the Band "did not want reservations." Pet.App.99a. Rather the Band's members "wanted to hold lands as white settlers did," Pet.App.99a, individually, in fee, and with the right to alienation.

The Band's merits argument rests on the fact that the Treaty used the words "reserved" and "reservations" one time apiece. "But when these references are put into context …, such evidence does not present a sufficient disagreement to require submission to a factfinder, even with all justifiable inferences in the Tribe's favor." Pet.App.100a (citation omitted).

The Band's justifications for certiorari are weaker still. To begin, the Band says that the Sixth Circuit ignored the 1855 Treaty's plain text. Pet.2–3. But as the district court recognized, the Band's "discussion of the Treaty in the briefing is … flawed because it does not provide a cohesive interpretation of the Treaty as a whole and instead isolates particular phrases from the Treaty." Pet.App.93a.

The Band also argues that the Sixth Circuit's decision conflicts with this Court's decisions by holding that individual land allotments did not create a reservation. Pet.3–4. Not so. The Sixth Circuit recognized that allotments are not "inherently incompatible with reservation status." Pet.App.29a n.8 (quoting *McGirt* v. *Okla.*, 140 S. Ct. 2452, 2464 (2020)). "But a lack of inherent incompatibility with reservation status does not mean that an Indian reservation is established wherever allotments are provided for," Pet.App.29a–30a n.8, and the Treaty's text and context show no reservation was created here.

Finally, the Band criticizes the Sixth Circuit for following this Court's numerous precedents holding that establishment of a reservation requires active federal government supervision. Pet.3. In so doing, the Band fails to discuss this Court's many decisions imposing that very requirement, *e.g.*, *Citizen Band*,

498 U.S. at 511; *United States* v. *John*, 437 U.S. 634, 649 (1978); *United States* v. *Pelican*, 232 U.S. 442, 449 (1914), despite initially citing the correct standard in the district court, see D.Ct.Dkt.80 at 1305–06. And the Band also ignores that this portion of the Sixth Circuit's decision is mere *dicta*, since the Treaty's text and the historical record are clear "that the Treaty did not provide land for Indian reservation purposes." Pet.App.29a.

The Band claims that the lower court's decision "will sow confusion nationwide." Pet.5. Hardly. The decision properly canvasses this Court's cases, meticulously applies those cases' legal standards, and reaches its conclusion based on the Treaty text and historical record that are unique to this case. The opinion engaged in a case-specific inquiry, one that will have no impact on any other litigation.

In the district court's words, the Band "has proffered pages upon pages of … hit-and-run argumentation with respect to the Treaty's language and the historical record." Pet.App.93a. Worse, the Band's "discussion of the Treaty in the briefing is similarly flawed because it does not provide a cohesive interpretation of the Treaty as a whole and instead isolates particular phrases from the Treaty." *Ibid.* That is why both lower courts rejected the Band's position—not due to some imaginary dispute with this Court's or another Circuit's decisions.

In sum, further consideration will not resolve a circuit conflict, or clarify unsettled law, or fix an error of law. It will only cast an unnecessary shadow on the Emmet County Townships and their citizens. It would be irregular to grant review in this one-off case where "the 1855 treaty cannot plausibly be read to create an Indian reservation." Pet.App.37a.

STATEMENT

A. The Treaty of 1836

Petitioner Little Traverse Bay Bands of Odawa Indians traces its history to bands that lived around the Little Traverse Bay in northwestern Michigan. In the 1830s, the Odawa and Chippewa Indians became aware of the federal government's removal policies and attempted to reach an agreement to stay in Michigan. Pet.App.38a. This resulted in the Treaty of 1836. *Ibid.*

This Treaty shows that the Band and the federal government knew how to negotiate for a reservation, albeit a temporary one. In exchange for the relinquishment of certain Michigan lands, the Odawa and Chippewa Bands "were to receive six reservations within Michigan, to be 'held in common,' including a 50,000-acre reservation on Little Traverse Bay, various annuities and payments of debt, and other improvements such as schoolhouses and blacksmiths." Pet.App.40a. But the U.S. Senate did not want to create a permanent reservation and "added language rendering the reservations effective for only five years" in exchange for $200,000 that the United States agreed to pay "whenever [the Bands'] reservations should be surrendered." *Ibid.* While the Bands "strenuously opposed" this amendment, they ultimately agreed to the Treaty. *Ibid.*

When the five-year term expired, in 1841, Odawa and Chippewa leaders wrote President John Tyler, asking to extend the reservation term. Pet.App.42a. They received no response, and the United States took no actions to remove the Band from Michigan during the 1840s. *Ibid.*

B. The 1855 Treaty

The federal government and the Band sat down again in July of 1855, in Detroit, Michigan, to discuss what would eventually become the 1855 Treaty. "The negotiations were recorded in a journal, although it is admittedly not a word-for-word transcript. Nevertheless, the journal provides significant insight into the negotiations." Pet.App.47a.

When talks turned to the type of land ownership the Band would have, "[m]any of the Indian representatives emphasized that they had already been successfully purchasing lands and requested that the lands to be given to them be issued with patents." Pet.App.49a. As a Band leader put it, "[w]e wish that you would give us titles – good titles to these lands." Pet.App.12a. Federal negotiators agreed: "It shall be an absolute title, save a temporary restriction upon [the] power of alienation." Pet.App.49a. George Manypenny, the U.S. Commissioner of Indian Affairs, explained that "it is the intention of the Government to allow each head of a family 80 acres of land & each single person over 21 years of age[,] 40 acres." Pet.App.50a. These lands would provide "permanent homes for individual families," lands that the families' "children may inherit." *Ibid.*

All agreed that the goal was for the Band's members to be "citizens of the State [of Michigan]—taking care of yourselves." Pet.App.51a. The Band's members' "connection with the U.S. shall cease." Pet.App.52a. Accordingly, the parties further agreed that the United States would "end its administration of the Tribes' monetary affairs within ten years." Pet.App.53a. The Band "agreed to those terms." *Ibid.*

The 1855 Treaty provided a five-year period for the United States to "withdraw large swaths of land in Michigan from sale for each Band, so that eligible Indians (heads of families, unmarried adults, and orphans) within each Band could make their own selections of land within their Band's designated area, for which they would hold the patent (after a ten-year restraint on alienation)." Pet.App.53a. After those five years, the United States would, for an additional five years, make the unselected lands "available for purchase exclusively to members of the Bands." Pet.App.53a. And after the second of those five-year periods, "any lands that had gone unselected and unpurchased would remain the property of the United States which could dispose of it just as it could 'other public land.'" Pet.App.53a–54a. In other words, there was no block of land being reserved or set aside solely for the Band or even its members.

Speaking of the Treaty in his annual report, Commissioner Manypenny explained that the Band's members were "to have assigned permanent homes to be hereafter confirmed to them in small tracts, in severalty." Pet.App.54a. In a second report, negotiator and federal Indian Agent Henry Gilbert similarly described the arrangement: "the main feature is a provision securing to each family and to such single persons as are provided for, a home in Michigan." Pet.App.55a.

The U.S. Senate and President ratified the 1855 Treaty with minor modifications. Pet.App.55a.

C. Post-Treaty events

There was "significant turnover among the federal officials charged with implementing the treaty terms after 1855." Pet.App.57a. Specifically, Commissioner Manypenny and Agent Gilbert left their positions, and Michigan had at least four new Indian Agents *after* Gilbert during the relevant timeframe. *Ibid.*

Predictably, this turnover "led to confusion." Pet.App.57a. In one writing, Agent Leach referred to the "Little Traverse Bay Reservation." *Ibid.* In another, Commissioner Dole referred to concentration of the Band's members and other Bands' members on "two reserves." Pet.App.58a. These writings were followed by additional references to a "reservation," by Congress and subsequent federal officials, Pet.App.58a–61a, but not by the Treaty negotiators.

D. Proceedings below

1. The district court acknowledged that "when construing an Indian treaty, the Court must 'look beyond the written words to the larger context that frames the Treaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.'" Pet.App.37a (quoting *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999), itself quoting *Choctaw Nation* v. *United* States, 318 U.S. 423, 432 (1943)).

"Once versed in the relevant history," the court continued, "'[c]ourts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' runs counter to a tribe's later claims." Pet.App.37a (quoting *Or. Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, 473 U.S. 753, 774 (1985)). Given these standards, the court concluded, "summary judgment is warranted on the Tribe's claims because the 1855 treaty cannot plausibly be read to create an Indian reservation, even when giving effect to the terms as the Indian signatories would have understood them and even when resolving any ambiguities in the Treaty text in favor of the Indians." *Ibid.*

After an exhaustive review of the factual record, Pet.App.38a–61a, the district court turned to this Court's holding "that the principal test for assessing whether land was an Indian reservation was 'whether the land in question 'had been [1] validly set apart [2] for the use of the Indians as such, [3] under the superintendence of the Government.'" Pet.App.67a (quoting *United States* v. *John*, 437 U.S. 634, 649 (1978), itself quoting *United States* v. *Pelican*, 232 U.S. 442, 449 (1914)). Although the Band initially advanced that same standard before the district court, see D.Ct.Dkt.80 at 1305–06, the Band advanced a different standard at the summary judgment stage. The district court rejected the Band's newly proposed standard: "There is no basis for concluding that the test for whether a reservation was created should be different in this case and distinguished from the chosen test the Supreme Court has repeatedly cited to evaluate whether a reservation was created." Pet.App.69a.

Turning to the pre-Treaty negotiations, the district court agreed with the Band that Agent Gilbert had initially "favored the creation of reservations for the Bands." Pet.App.70a. But the views of his boss, Commissioner Manypenny, "diverged significantly from the proposals Gilbert had continually promoted." *Ibid.* He desired "to substitute as far as practicable, for [the Band's] claims in common, titles in fee to individuals for separate tracts." Pet.App.71a.

Commissioner Manypenny also specified where the land would come from: the "existing reservations" from the 1836 Treaty "as opposed to creating new reservations." Pet.App.71a. "Manypenny was suggesting that because the temporary reservations had never been settled, the government could draw from those lands to provide permanent homes to the Individual Indians, who hold fee title to their separate parcel of land." *Ibid.* And "the Indian motives in the lead-up to the 1855 Treaty are also readily apparent." Pet.App.72a. The "unmistakable intention of the Bands … was securing additional monetary compensation so that they could continue to successfully buy up lands." *Ibid.*

Applying this Court's *John* test, the district court then considered the "first element for creation of a reservation": "a federal set-aside of land for use as an Indian reservation." Pet.App.74a (citing *John*, 437 U.S. at 648–49). Surveying the text, the court parsed (1) the five-year window for individual families in the Band to select their own tract to be held in fee with a right of alienation after ten years, (2) the second five-year window for Band members to make additional land purchases, and (3) the government's right to sell to anyone the remaining lands. Pet.App.74a–82a.

Given this text, placed "in the proper historical context," "the only reasonable conclusion is that the plain and unambiguous terms do not create a federal set aside of land for use as a reservation, nor did the Tribe's predecessors understand them to do so. Pet.App.82a. And "[t]hese terms are perfectly consistent with Manypenny's stated desire" to provide "individual tracts of land, with the title to the land being held in fee by each head of household." Pet.App.83a. The agreement "did not create a federal set aside of land for Indian purposes," *ibid.* (citing *Citizen Band*, 498 U.S. at 511), consistent with the U.S. Senate's rejection of a much larger permanent reservation just two decades earlier. Pet.App.99a n.4.

Next, the district court considered whether the Treaty satisfied *John*'s requirement for "ongoing federal superintendence." Pet.App.83a. That was an easy "no." The five-year period for individual tract selection and purchase—including the right to sell selected tracts after ten years and to sell purchased tracts immediately—"provides a vivid demonstration of the *lack* of federal superintendence." Pet.App.85a. "If the parties understood the land to be set aside as an Indian reservation, the United States could have (and likely would have) rescinded [subsequent] sales by the Indians [to third parties] because the sales frustrated the primary objective of the Treaty—establishing 'permanent homes.'" *Ibid.*

That conclusion was buttressed by the fact that all federal payments to the Band were designed to cease "within ten years." Pet.App.85a. Based on the Treaty Journal's negotiation notes, "the Bands clearly understood that the 1855 Treaty did not provide for ongoing federal superintendence."

Pet.App.85a–86a. And the Treaty's other articles "do not implicate federal superintendence in any fashion." Pet.App.86a. In sum, "the Treaty lacks the hallmarks of ongoing federal superintendence and the Tribe's claim that a reservation exists must fail for this additional reason." *Ibid.* (citing *Citizen Band*, 498 U.S. at 511).

The district court rejected the Band's cherry-picking of the factual record as "misleading" and akin to "hit-and-run argumentation." Pet.App.91a, 93a; see generally Pet.App.86a–93a. And it also rejected the Band's rewriting of the Treaty text. Contrary to the Band's arguments, the Treaty was "not intended to demarcate reservation boundaries." Pet.App.96a. And if "the remaining lands (those that had not been selected or purchased) could be disposed of by the United States 'as other pubic lands[,]' then the lands described … could not be an Indian reservation." Pet.App.97a. "In other words, the Treaty could not simultaneously set the lands aside as reservations while also allowing for the United States to dispose of the land in any manner it wished," *ibid.*, a problem that the Band's petition does not discuss.

Finally, the court rejected the Band's heavy reliance on the post-Treaty historical record, with its sporadic references to "reserves" and "reservations" in statements and correspondence by federal officials not involved with the Treaty. Pet.App.100a. "[W]hile the land may have colloquially been referred to as 'reserves' or 'reservations,' the surrounding context makes clear that those terms *were not used* in the sense that the United States had created a permanent set-aside of land for Indian purposes through the 1855 Treaty." Pet.App.101 (emphasis

added). "[I]t is only through a vast re-writing of the Treaty, that the Tribe arrives at its conclusion that an Indian reservation was created." Pet.App.103a. And the court could not "ignore plain language that, viewed in historical context and given a 'fair appraisal,' runs counter to [the Band's] later claims." *Ibid.* (quoting *Or. Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, 473 U.S. 753, 774 (1985)).

2. Sixth Circuit judges Batchelder, Clay, and Bush affirmed. Pet.App.3a. They too canvassed the unique historical record. Pet.App.4a–18a. And, like the district court, the panel followed this Court's command in *Citizen Band* and *John* as to the appropriate test to use when considering if a treaty establishes a reservation. Pet.App.22a (citing *Citizen Band*, 498 U.S. at 511, and *John*, 437 U.S. at 649).

As to whether the government had set land apart for Indian purposes, the court recognized that the 1855 Treaty "created an arrangement closer to a land allotment system than a reservation," i.e., one where individual Indians obtained individual parcels "subject to temporary restrictions on alienation." Pet.App.25a (citing *Cohen's Handbook of Federal Indian Law*, §§ 3.04[2]c][iv], 16.03[2][e] (2019)). Indeed, the panel said, "the language in the Treaty of 1855 is quite different from the Treaty of 1836 that clearly established a reservation between the Band's predecessors and the federal government" by stating that "the tribes reserve for their own use, to be held in common," identified tracts of land. Pet.App.25a.

The court's reading of the Treaty text was consistent with the negotiation history, Pet.App.26a–27a, as well as the fact that "although the federal government tracked Indian reservations generally, it did not identify the Article I lands listed in the

Treaty of 1855 as a reservation." Pet.App.28a. That reading was also consistent with Congress's Act of 1876 which, in discussing the 1855 Treaty, "omitted the word 'reservation' included in the 1872 Act, demonstrating that the lands were no longer withheld from sale and, therefore, were not even reserved in the common sense of the word." Pet.App.29a (citing Act of 1876, 44 Con., Ch. 105, 19 Stat. 55 (May 23, 1876)).

In sum, the Treaty's text, negotiation history, and construction by the parties all "demonstrate that the Treaty did not provide land for Indian reservation purposes; but rather, it was intended to allot plots of land so members of the Band could establish permanent homes." Pet.App.29a (citing *Minn.* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999)).

The Sixth Circuit next considered this Court's longstanding requirement that "[f]ederal superintendence is also required to establish an Indian reservation under federal law." Pet.App.30a (citing *Citizen Band*, 498 U.S. at 511). As the panel explained, this Court has "[r]epeatedly" "included federal superintendence as a requirement for establishing Indian Country generally." Pet.App.30a–31a (citing *United States* v. *McGowan*, 302 U.S. 535, 537 (1938), and *United States* v. *Pelican*, 232 U.S. 442, 447 (1914)). The panel explained that it would "follow the Court's lead." Pet.App.31a.

The Sixth Circuit noted that the land selected and purchased in the 1855 Treaty's phase II—not to mention the government's right to sell land outright in phase III—constituted evidence that no federal superintendence existed. Pet.App.32a.

"Further, during the negotiations, the leaders of the Band made clear that *they did not want* land under federal superintendence or federal control." Pet.App.33a (emphasis added). "Indeed, tribal members made repeated requests during treaty negotiations to have title to land that would be equal to that of their white counterparts." *Ibid.*

And government officials, too, made clear their "desire for Band members to be independent from government support." Pet.App.33a. As a result, "the Treaty of 1855 did not create a system of federal superintendence sufficient to establish an Indian reservation of the Band." Pet.App.34a.

Because the Sixth Circuit concluded that the 1855 Treaty did not create a reservation under the well-established test that this Court has consistently required and affirmed, it declined to address additional arguments that could have brought the court to the same result but for different reasons, namely judicial estoppel and issue preclusion. Pet.App.34a–35a n.10.

In other words, even if this Court grants the Band's petition, and even if this Court rules in favor of the Band by overruling the Court's own precedents and construing the 1855 Treaty contrary to its plain terms, the Band is still not entitled to relief.

REASONS FOR DENYING THE PETITION

I. The Sixth Circuit's analysis of the 1855 Treaty's text does not conflict with precedents of this or any other Court.

The Band's first contention is that the Sixth Circuit's opinion conflicts with decisions of this Court and other circuits. Pet.16–28. But the Band makes that argument by ignoring the 1855 Treaty's actual text and surrounding circumstances. There is no conflict.

1. The lower courts did not "disregard" the Treaty's text or Congress's identification of the Band's lands as a "reservation." Contra Pet.17. The Band begins with the proposition that, when a treaty mentions the words "reserved" and "reservations," it is unnecessary to determine whether the treaty set apart land for Indian purposes. Pet.17–19 (citations omitted). As a result, the Band's analysis of the 1855 Treaty's text is superficial. Pet.19a–20a.

As explained at length above, the 1855 Treaty was very specific in the way it parceled out land, and it did so—consistent with the Band's desires—in a way that created individual ownership, not a reservation. During the first five years of implementation, individual families were allowed to select an 80-acre parcel of land within the identified tract. Those families held fee-simple title to their selected tract with only a 10-year restraint on alienation. During the second five years, Band members could purchase additional tracts, and for those tracts, there was no restraint on alienation at all. After expiration of the second five-year period, the federal government could sell all remaining tracts to whomever it pleased, members of the Band

or not. Nothing in this land-distribution process indicated that the government was fixing borders for what was to be a permanent reservation for the Band. Indeed, the Senate had rejected a permanent reservation only two decades prior. Pet.App.40a.

This Court's decision in *McGirt* v. *Oklahoma*, 140 S. Ct. 2452 (2020), is not to the contrary. There, in a series of treaties, Congress "establish[ed] boundary lines which [secured] *a country* and permanent home to the *whole Creek Nation of Indians*." *Id.* at 2460 (emphasis added, quoting treaty language). This was not land that the Creek Nation could alienate; rather, Congress authorized the President "to assure the tribe … that the United States will forever secure and guaranty to [the Tribe] the country so exchanged with them." *Ibid.* (quoting Indian Removal Act of 1830, § 3, 4 Stat. 412). And while the government was willing to issue a patent for the land, such patent would provide a right of reverter to the United States "if the Indians become extinct, or abandon the same." *Ibid.*

When the Creek Nation accepted the offer, the government granted "a patent, in fee simple," not to individual families, but "to the Creek nation of Indians," and that patent came with a caveat that "the right thus guaranteed by the United States shall be continued to said tribe of Indians, so long as they shall exist as a nation." 140 S. Ct. at 2461 (citing 1833 Treaty, preamble, 7 Stat. 418, and Art. III, *id.* at 419). This language was sufficient to create a reservation, particularly given a later Congressional Act affirming the land to "be forever set apart as a home for said Creek Nation" as "the reduced Creek reservation." 140 S. Ct. at 2461. "Under any definition, this was a reservation." *Id.* at 2462.

The situation here is different in every respect. The 1855 Treaty fixed no borders; quite the opposite, the government was free to sell tracts that went unselected and unpurchased in phases I and II. The Treaty was not intended to "secure a country," as did the Creek Nation reservation. The lands purchased by Band members in phase II could be flipped and sold immediately, and the land selected in phase I could be sold ten years after the patents issued, with no restraints on alienation. The government did nothing to "secure and guaranty" these lands to the Band or its members." And the United States did not grant a patent to any of the lands to the Band as a whole, nor did the government have to retain a right of reverter; it had the right to dispose of any remaining lands after the Article I process ended.

The Band's reliance on *Minnesota* v. *Hitchcock*, 185 U.S. 373 (1902), is equally inapposite. Pet.18. There, the government identified a particular tract and retained title to it subject to the Chippewa Indians' right of occupancy. The "effect was to leave the Indians in a distinct tract reserved for their occupation, and in the same act this tract was spoken of as a reservation." *Id.* at 389. It was enough that the government had created "a certain defined tract appropriated to certain purposes." *Id.* at 390.

Not so here. The 1855 Treaty created no omnibus tract with lasting borders dedicated to the Band. If, in 1866, the government and the Band's individual members chose to sell all their tracts to third parties, there would be no land left for any Band member on which to remain. The property was not set aside for permanent Band use but instead was allocated to individual Band members who had the right to use and dispose of their tracts as they wished.

The other, lower-court decisions on which the Band relies are not in conflict, either. Pet.18–19. *Chemehuevi Indian Tribe* v. *McMahon*, 934 F.3d 1076, 1080 (9th Cir. 2019), involved an executive order directing that a specified tract of federal land "be withdrawn from all form of settlement" to create the Chemehuevi Reservation.

United States v. *McIntire*, 101 F.2d 650, 651 (9th Cir. 1939), arose out of a treaty in which several tribes ceded a large body of land to the United States but reserved from the lands so ceded a defined tract "for the use and occupation of said confederated tribes, and as a general Indian reservation upon which may be placed other friendly tribes."

Klamath & Moadoc Tribes & Hahooskin Band of Snake Indians v. *United States*, 85 Ct. Cl. 451, 454, 456 (1937), involved another tribal cession of land that again specifically described a large tract to be "set apart as a residence for said Indians [and] held and regarded as an Indian reservation."

Devils Lake Sioux Tribe v. *North Dakota*, 917 F.2d 1049, 1051 (8th Cir. 1990), did not involve the question of whether a reservation had been established but merely whether the bed of Devils Lake was encompassed in that reservation.

And *Pittsburgh & Midway Coal Mining Co.* v. *Yazzie*, 909 F.2d 1387, 1405 (10th Cir. 1990), involved the issue of whether restoration of certain reserved lands to the public domain cancelled what had been undisputed reservation properties.

Rather than examine how the 1855 Treaty actually treated the land at issue, the Band deems it enough that the words "reserved" and "reservations" appear once each in the Treaty. Pet.19 (citing Pet.App.116a, 120a). But the district court debunked that shallow analysis. The phrase "tract reserved," "[w]hen placed in the proper context," "clearly and unambiguously refers to the numbered paragraphs that immediately precede it." Pet.App.94a. "It simply means that eligible Indians were entitled to make their selection of land from within the larger tract designated for this Band." *Ibid.*

For example, "the head of a family within the Beaver Island band was thus limited to selecting an 80-acre parcel from within the land description referenced in the Paragraph Third, rather than any of the other seven parcels withheld from sale for the other Bands to make their selections." *Ibid.* In no way is the "use of 'tract reserved'" "capable of a broader meaning when placed in this context." *Ibid.*

The same is true when the Treaty references "tracts of land within the aforesaid reservations." The "use of the word 'reservations'—or a similar term—was necessary here to *avoid* creating an ambiguity." Pet.App.95a. The phrase merely "refer[s] back to the land descriptions contained within the number paragraphs that would be withdrawn from [general] sale." *Ibid.* What's more, "[t]his interpretation is confirmed by the language in the following sentence as the drafters reverted to referring to the withdrawn parcels as 'aforesaid tracts.'" *Ibid.*

The Band also criticizes the Sixth Circuit for purportedly violating the rule "'that Indian treaties are to be interpreted liberally in favor of the Indians,' with ambiguities 'resolved in their favor.'" Pet.22 (quoting *Mille Lacs*, 526 U.S. at 200). But that criticism is impossible to reconcile with the fact that the Sixth Circuit began its analysis by citing *Mille Lacs* for that very proposition. Pet.App.21a. The problem was that even under a liberal interpretation, the 1855 Treaty's text did not create a reservation of land but land freely alienable by Band members *and* the federal government itself, with no limitations.

2. The Band says that the Sixth Circuit compounded its error by "holding that allotment treaties cannot create reservations." Pet.23. Not so.

The Sixth Circuit appreciated that the Band was arguing that the 1855 Treaty had to have created Indian reservations if it provided Band members the chance to own lands in severalty. But what the Sixth Circuit understood—and the Band ignores—is that the 1855 Treaty never created reservations to divide up, i.e., allot, in the first place. The land selections were simply land grants, not the division of a reservation as a common land holding. That is why the Sixth Circuit viewed the land selections under the 1855 Treaty like public domain allotments under 25 U.S.C. § 336, where the lands given to individuals did not come from Indian reservations.

Indeed, although the Band neglects to mention it, the Sixth Circuit "recognize[d], as *McGirt* did, that allotments are *not* 'inherently incompatible with reservation status.'" Pet.App.29a n.8 (emphasis added, quoting *McGirt*, 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." Pet.App.29a–30a n.8 (citing *Pelican*, 232 U.S. 442, 449 (1914), and *Cohen's Handbook of Federal Indian law*, § 3.04[2][c][iv] (2012)). Contrary to the Band's characterization of what the panel did, the Sixth Circuit reached its conclusion "based on the Treaty negotiations, and the Treaty's text and construction," not a myopic focus on allotments. *Ibid.*

The cases on which the Band relies are again not to the contrary. Indeed, the Band's characterization of its favored cases cannot be reconciled with what those opinions actually say.

Take *McGirt*. The Band quotes from the opinion using ellipses for the notion that allotment is "completely consistent with … reservation status." Pet.24 (quoting *McGirt*, 140 S. Ct. at 2464). To begin, the question in *McGirt* was not whether a treaty allotment scheme could create a reservation; the issue is whether "allotments automatically *ended* reservations," a question to which this Court answered no. 140 S. Ct. at 2464 (emphasis added). The full quote from *McGirt* is that allotment "is completely consistent with *continued* reservation status." And "[i]t isn't hard to see why. The federal government issued its own land patents to many homesteaders throughout the West. … But no one thinks any of this diminished the United States' claim to sovereignty over any land. To accomplish that would require an act of cession." *Id.* Accordingly, "there is no reason why Congress cannot reserve land for tribes in much the same way, allowing them to continue to exercise governmental functions over land even if they no longer own it communally." *Id.*

Here, the 1855 Treaty did not contemplate that the Band would govern the land that the Treaty addressed. The Band's members desired to be acknowledged as Michigan "citizens." Pet.App.8a. (Articles 4 and 7 of Michigan's 1850 Constitution gave certain Indians the right to vote and the right to be counted for the purpose of legislative apportionment.) And after the Treaty was executed, a leader and historian of the co-signing Ottawa Indians of Michigan wrote to the Office of Indian Affairs requesting additional educational assistance, explaining that the tribe was now "under the laws of the State of Michigan and the United States," with "equal rights and privileges with American citizens." Pet.App.27a.

And again, the legal problem inherent in the Band's claim is how the land selections and purchases worked in the unique factual context of the 1855 Treaty. There was no omnibus land set aside for a reservation. There was no restraint on individual Band members selling their property to non-Band members. There was no need for a right of reverter so the United States could ensure control of the property if Band members ceased to live on the land, as in the Creek Nation treaty. And there was no discussion of the Band exercising governmental sovereignty over a designated tract of land.

To the contrary, every Band member that selected or purchased land was an individual landowner, and the government had the right to sell unselected, unsold tracts to third parties, creating a "Swiss Cheese" tract with some parcels owned by Band members and many more parcels owned by non-Indians.

To the extent the Band claims conflict with decisions of other circuits, it is wrong. For instance, *Murphy* v. *Royal*, 875 F.3d 896, 919 (10th Cir. 2017), did not decide what constituted a reservation but rather held that allotments did not disestablish or diminish large tracts previously set aside "for Indian reservations." All the *Murphy* court held was that "[a]llotment on its own does not disestablish or diminish a reservation." *Id.* That is because, again, allotment *can be* "completely consistent with *continued* reservation status." *Id.* (emphasis added, quoting *Mattz* v. *Arnett*, 412 U.S. 481, 497 (1973)).

Likewise, *Bugenig* v. *Hoopa Valley Tribe*, 266 F.3d 1201 (9th Cir. 2001), involved the issue of whether the federal government vested itself of jurisdiction over an acknowledged Indian reservation. The Ninth Circuit merely held that "federal jurisdiction within a reservation is not dependent *solely* on the ownership status of the land in question." *Id.* at 1220. Where a reservation remained "97.2 percent intact," with "[l]ess than one percent of the land [ ] owned in fee simple by non-Indians," the court held that Congress did not intend to divest itself of jurisdiction. *Id.* There is no conflict with the Sixth Circuit's holding here that a Treaty did not create a reservation through its mechanisms of individual property ownership and *no* collective ownership, government, or sovereignty.

The Band points to other sundry circuit decisions, asserting conflicts with the Sixth Circuit's conclusion that in the unique circumstances here, granting patents for land parcels with only short limitations on alienation was inconsistent with the establishment of a reservation. But the cherry-picked quotes from these decisions create no conflict.

For example, *Thurston County* v. *Andrus*, 586 F.2d 1212 (9th Cir. 1978), involved a treaty whereby "the Omaha and Winnebago tribes ceded or sold most of their land by treaty to the United States *with the exception of reservation lands on which the Indians could live under the protection of the United States*." *Id.* (emphasis added).

The treaty at issue in *Wisconsin* v. *Stockbridge-Munsee Community*, 554 F.3d 657, 660 (7th Cir. 2009), arose out of an agreement to cede and relinquish certain tribal lands "in exchange for a new reservation in Wisconsin." And while it is true that new reservation involved allotments with alienation rights after ten years, individual members could not sell without "getting permission from both the Tribe and the United States government." *Id.* There is no such permission requirement here.

The Band's Treaty descriptions and summaries never once mention the second or third phases of the land-selection process, nor do they cite the parties' understanding that they were creating a path to Michigan citizenship. As the district court put it, "when the United States allows for individual Indians to select land, which they would hold in fee, it does not meet the requirement of a federal set aside for Indian purposes or federal superintendence." Pet.App.103a. Likewise, "when the United States maintains its ability to dispose of the alleged Indian reservation after a finite time 'as in the case of other public lands,' then no Indian reservation is established." *Ibid.* "[I]t is only through a vast re-writing of the Treaty, that the Tribe arrives at its conclusion that an Indian reservation was created." *Ibid.*

It is the Band's position which creates conflicts with other precedents. The petition should be denied.

II. The Sixth Circuit's conclusion, in *dicta*, that the Band's reservation claim fails for a lack of federal superintendence, does not conflict with precedents of this or any other Court.

As an independent ground for affirmance, the Sixth Circuit applied this Court's precedents and concluded that the lack of any ongoing federal superintendence likewise counseled against the finding of a reservation. The Band attacks this *dicta* and claims yet more conflicts of authority. But those conflicts do not exist.

Start with this Court's unambiguous holdings in *Citizen Band*, *John*, and *Pelican*, each of which states the test for assessing whether land is an Indian reservation as: "whether the land in question '[1] had been validly set apart [2]for the use of the Indians as such, [3] under the superintendence of the Government.'" *Citizen Band*, 498 U.S. at 511; *John*, 437 U.S. at 649; *Pelican*, 232 U.S. at 449. It is telling that after originally citing *Citizen Band* to the district court as supplying the proper test, the Band's petition never once cites *Citizen Band* or *Pelican* and cites *John* only for unrelated propositions.

The lower courts' reliance on this Court's trilogy of reservation cases did not conflict with *McGirt*. Contra Pet.28. The issue of federal superintendence wasn't even raised in that case. And if it had been, the result would not have changed because the United States promised to "secure and guaranty" the land it was creating as a reservation, agreed to the possible military enforcement of tribal ownership, and retained a power of reverter to ensure the government could keep that promise. 140 S. Ct. at 2460–61.

Indeed, the Band's citation to *United States* v. *Thomas*, 151 U.S. 577 (1894), and *Leavenworth, Lawrence, & Galveston R.R. Co.* v. *United States*, 92 U.S. 733 (1875), see Pet.29, demonstrates that federal superintendence over land was a requirement for Indian reservations even before the Court decided *Citizen Band*, *John*, and *Pelican*. As *Thomas* noted, Paragraph 3d of the Treaty with the Chippewa, Sept. 30, 1854, 10 Stat. 1109, authorized the President to establish the boundaries of the reservation at Lac Court Oreilles. See 151 U.S. at 583. The treaty itself provided active federal superintendence, including the President's right to allot the reservation lands and his right to continue a prohibition against liquor being "made, sold, or used" on reservation lands. See 10 Stat. 1109. Thus, *Thomas*'s observation that the United States has "full authority" to pass laws concerning Indians on an Indian reservation is fully grounded in the federal government having *already* established its active superintendence over the reservation land. *Thomas*, 151 U.S. at 585. That's the opposite of how the government treated the lands it agreed to patent to Band members in the 1855 Treaty.

As for *Leavenworth*, it too acknowledged that the federal government held the fee to unceded Indian lands, which gave the United States substantial powers over the lands to ensure the Indian right of occupancy. *Leavenworth*, 92 U.S. at 747. Vesting the fee to the unceded lands in the federal government "deprived" the Indians "of the power of alienation" and granted the United States the "exclusive privilege of buying" the lands, both of which worked as a hedge against intrusion by settlers on Indian lands. *Id.*

That power to restrict the sale of land and to ensure Indian occupation to the exclusion of others are classic examples of federal superintendence. See *Alaska* v. *Native Village of Venetie Tribal Government*, 522 U.S. 520, 532–33 (1998). This type of superintendence is also compatible with *Stockbridge-Munsee*, discussed above, where individual members could not sell without "getting permission from both the Tribe and the United States government." 554 F.3d at 660. It is incompatible with the 1855 Treaty, which allowed the Band's members to select parcels and sell them without restriction or permission ten years after the issuing of land patents, and which allowed the government to sell remaining parcels to third parties of its choice.

There is no conflict between this Court's precedents and the en banc Tenth Circuit's decision in *Hydro Resources, Inc.* v. *United States EPA*, 608 F.3d 1131 (10th Cir. 2010), either. The en banc court began its analysis by referencing this Court's decision in *Venetie*. According to the en banc court, *Venetie* "explained that 'dependent Indian communities' under [18 U.S.C.] 1151(b) embrace 'a limited category of Indian lands that are neither reservations nor allotments' encompassed by" 18 U.S.C. 1151(a) or (c). 608 F.3d at 1148 (quoting *Venetie*, 118 S. Ct. at 948). The en banc court continued: "The Court then identified two necessary 'requirements' for lands falling into § 1151(b)'s 'dependent Indian communities' category," "*much like reservations or allotments*, 'first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, *they must be under federal superintendence.*'" *Id.* (quoting *Venetie*, 118 S. Ct. at 948) (emphasis added).

In other words, the en banc Tenth Circuit followed *Venetie*—and *Citizen Band*, *John*, and *Pelican*—in recognizing unequivocally that a reservation requires ongoing federal superintendence. Nowhere does the en banc court describe the federal-superintendence requirement as one that applies only to the "dependent Indian community" analysis and not to a "reservation" analysis.

In further support, the Band points to the Second Circuit's decision in *Oneida Indian Nation of New York* v. *City of Sherrill*, 337 F.3d 139 (2d Cir. 2003). Pet.32. But that only compounds the Band's *Hydro Resources* problem. *City of Sherrill* likewise turned to this Court's decision in *Venetie* in establishing the analytical framework for deciding whether the Oneida reservation could be considered Indian Country under 18 U.S.C. 1151. The court described *Venetie* as concluding that the land at issue in that case "was not Indian Country because it neither had been 'set aside by the Federal Government for the use of the Indians as Indian land' nor was '*under federal superintendence*'" requirements "that applied *equally to reservations*, dependencies, and allotments." 337 U.S. at 155 (quoting *Venetie*, 522 U.S. at 527, 532–34).

The Second Circuit then rejected the City of Sherrill's argument that the land the City sought to tax was not Indian country. Citing *John*, the court held that "[w]hile questions may arise as to whether nonreservation property owned by Indians is in Indian country, there are no such questions *with regard to reservation land, which by its nature was set aside by Congress for Indian use* <u>*under federal supervision*</u>." 337 F.3d at 155 (citing *John*, 437 U.S. at 634) (emphasis added).

Far from a conflict, then, this Court's precedents and those of the Second, Sixth, and Tenth Circuits are in perfect harmony; each includes ongoing federal supervision or superintendence as a foundational element of a reservation. So, in the Sixth Circuit, as well as the Second and the Tenth, the Townships would have prevailed on the Band's claim that the 1855 Treaty established a reservation in Michigan.

III. The question presented does not warrant review, and there is no need to call for the views of the Solicitor General.

"[W]hen the [1855] Treaty is placed in the relevant historical context, it cannot plausibly be read to have created an Indian reservation, and the Tribe's predecessors did not believe that it did so." Pet.App.104a. So, the Band's petition asks this Court to engage in mere error correction when the Treaty's plain text and accompanying historical evidence show that no such error was made.

As demonstrated above, there are also no conflicts to resolve. Both the Sixth Circuit and the district court reached the same decision by fastidiously examining this Court's precedents and applying them to the unique treaty and historical record here. And the lower court's analyses do not conflict with a single circuit-court decision in any applicable case. It is only by mixing and matching cases in noncomparable contexts and carefully snipping quotes that the petition can create even an *appearance* of a conflict. Careful examination of those cases shows no conflicting holdings, no unsettled law, and no error of law in the decisions below whatsoever.

For that reason, the Sixth Circuit's decision will not create "broad legal confusion that will plague reservation-status disputes nationwide." Pet.34. The decision is a carefully crafted opinion that slavishly adheres to this Court's precedents. The overarching legal issue is not whether a stray use of the word "reservation" in a treaty or historical discussion creates a reservation. Contra Pet.34. The issue is whether a reservation was created here under this particular treaty and these particular facts. It was not.

What's more, there is no need for this Court to call for the views of the Solicitor General. The 1855 Treaty's text and context are clear, and the Solicitor General's views will do nothing to add to or subtract from that clarity.

The Band tries to justify such a request by invoking Congressional enactments that referred to the 1855 Treaty as creating a "reservation," such as the Acts of 1872 and 1875. Pet.35, 20. But as the Sixth Circuit explained, "when Congress further discussed the Treaty of 1855 in the Act of *1876*, it omitted the word 'reservation' included in the 1872 Act, demonstrating that the lands were no longer withheld from sale and, therefore, were not even reserved in the common sense of the word." Pet.App.28a–29a (emphasis added). And when the Band lobbied Congress to reaffirm the Band's federal trust relationship, "it did not ask Congress to reaffirm an 1855 Treaty reservation." *Ibid.* If the Band believed that the 1855 Treaty created a reservation, that would have been an ideal time to raise the subject.

* * *

This litigation concerns a significant amount of land and casts a long jurisdictional shadow over, among other areas, the Township of Bear Creek, the Township of Bliss, the Township of Center, the Township of Cross Village, the Township of Friendship, the Township of Little Traverse, the Township of Pleasantview, the Township of Readmond, the Township of Resort, the Township of West Traverse, and all these Townships' residents. Upsetting the settled expectations of the Treaty's negotiators would have substantial disruptive consequences on arrangements that have been in place for over a century, including criminal and zoning laws, taxation, and even adoption, custody, and child-placement to name just a few, creating jurisdictional chaos for the foreseeable future.

The Sixth Circuit made no new law. It applied this Court's well-established framework from *Citizen Band*, *John*, and *Pelican* for determining when a treaty establishes a reservation. And when one compares the language of the 1855 Treaty and accompanying negotiating history to this Court's and other Circuits' decisions, the Sixth Circuit's conclusion falls neatly in line with every precedent.

For its part, the Band seems to suggest that this Court should hear every case involving the establishment of a reservation, or at a minimum, should ask for the views of the Solicitor General in every case involving that issue. Pet.33–36. But this Court has never said that, and reservation cases as a class are not within the Court's original jurisdiction. The Circuits must decide many of these cases—just as they decide many other important cases—and they have mechanisms to ensure that the most important are given requisite attention.

The Band's arguments here could not persuade even a single member of the Sixth Circuit to request that a poll be called on rehearing by the full court. Pet.App.112a. Where this Court has established a clear framework for resolving these types of cases, and the lower courts have properly applied that framework, there is no good reason for this Court to exercise its discretionary authority and to grant certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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