No. 21-769

# In the Supreme Court of the United States

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS,
PETITIONER

v.

GRETCHEN WHITMER, GOVERNOR OF MICHIGAN, ET AL.

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

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

## PARTIES TO THE PROCEEDING

Petitioner is the Little Traverse Bay Bands of Odawa Indians (the Band), a federally recognized Indian Tribe. The Band was the plaintiff in the district court and the appellant and cross-appellee in the U.S. Court of Appeals for the Sixth Circuit.

Respondents are Gretchen Whitmer, in her official capacity as the Governor of Michigan; the City of Petoskey, Michigan; the City of Harbor Springs, Michigan; Emmet County, Michigan; Charlevoix County, Michigan; the Township of Bear Creek, Michigan; the Township of Bliss, Michigan; the Township of Center, Michigan; the Township of Cross Village, Michigan; the Township of Friendship, Michigan; the Township of Little Traverse, Michigan; the Township of Pleasantview, Michigan; the Township of Readmond, Michigan; the Township of Resort, Michigan; the Township of West Traverse, Michigan; the Emmet County Lake Shore Association; The Protection of Rights Alliance; the City of Charlevoix, Michigan; and the Township of Charlevoix, Michigan.

Governor Whitmer was the defendant in the district court and an appellee in the Band's appeal to the Sixth Circuit. All other Respondents intervened as defendants in the district court and were appellees in the Band's appeal to the U.S. Court of Appeals for the Sixth Circuit. Additionally, Intervenors City of Petoskey, the City of Harbor Springs, Emmet County, and Charlevoix County were cross-appellants in the Sixth Circuit.

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## JURISDICTION

The Supreme Court has jurisdiction over the petition for a writ of certiorari pursuant to 28 U.S.C. § 1254. Governor Whitmer (the State) agrees that the petition was timely filed.

## CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The State's appendix provides the relevant treaties, statutes, and treaty council journals not in the Petitioner's Appendix.[1]

## INTRODUCTION

Petitioner Little Traverse Bay Bands of Odawa Indians (the Band) claims that Article I, Paragraphs Third and Fourth of the Treaty of Detroit, July 31, 1855, 11 Stat. 621 (1855 Treaty) created a 337-square-mile Indian reservation in Michigan for its ancestors.

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[1] The Petitioner's Appendix has typographical errors and amendments in the 1855 Treaty text, omitting or making the original text unclear. Pet.App.113a-132a. The State's Appendix includes the version of the 1855 Treaty used in the lower courts, which states the original and amended text separately. Resp.App.4a-26a; Dkt.558-6 at 6893-6901.

Dkt.1-1 at 19.[2] According to the Band, that land constitutes "Indian country as that term is used in 18 U.S.C. § 1151 and United States Supreme Court decisions." Dkt.1 at 17, ¶57.

In *United States* v. *John*, 437 U.S. 634 (1978), this Court held that whether a place is an Indian reservation within the meaning of 18 U.S.C. § 1151 depends on whether the land has been " 'validly set apart for the use of the Indians as such, under the superintendence of the Government.' " *Id*. at 648-49 (quoting *United States* v. *Pelican*, 232 U.S. 442, 449 (1914)). The lower courts applied the *John* test to the 1855 Treaty and concluded that it did not create Indian reservations. The historical evidence revealing how the Anishinaabek (Odawa/Ottawa and Ojibwe/Chippewa) treaty negotiators understood the treaty in 1855 confirmed that conclusion.

The Band now asks this Court to dismantle *John*'*s* well-settled framework. The Band would have the Court simply look for the word "reserved" or "reservations" in the 1855 Treaty, regardless of context or meaning and in the absence of federal jurisdiction. That approach does not do justice to the parties' agreement or the law. The Court should deny the petition for two reasons.

*First*, there is no conflict with the Court's precedent or circuit split to resolve. The Sixth Circuit applied the correct precedent to reach the right result. The cases the Band cites do not question *John* as the controlling authority for a reservation-creation claim.

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[2] The docket and page number refer to the entry in the district court ECF system, followed by the PageID citation.

Nor do they suggest that public domain lands patented without restrictions and free of active federal superintendence, like the lands in the 1855 Treaty, are Indian reservations.

*Second*, endorsing the Band's approach to treaty interpretation will undermine the Indian canons of construction, which the Sixth Circuit faithfully applied. See *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999). In addition to disregarding the treaty language, the Band ignores significant historical evidence and relies on federal policy to interpret the 1855 Treaty *contrary* to its ancestors' understanding. Doing so violates the obligation to interpret treaties "as the Indians themselves would have understood them." *Id*. Reading the 1855 Treaty in this way may serve the Band's goals, but it does so at the expense of all other tribes that rely on the Indian canons to enforce their own treaty rights. The petition should be denied.

## STATEMENT OF THE CASE

### A. The 1836 Treaty

In 1835, several Anishinaabek bands in Michigan offered to cede land to the United States. Resp.App.120a-123a. Harsh circumstances prompted the offer, including threats of removal. *Id*., 120a-123a, 127a; Dkt.335-4 at 3712.

The bands sent a delegation to Washington, D.C., in 1836 to engage in treaty negotiations. Dkt.559-14 at 8087-8088. As the bands said to Secretary of War Lewis Cass, they sought to remain in "Michigan in the

quiet possession of our lands, and to transmit the same safely to our posterity." *Id.* at 8087. To stay, they offered to cede certain islands and "also our claims (with some reserves) on the North side of the Straits of Michilimackinac" in the Upper Peninsula. *Id.*

Cass appointed Henry Schoolcraft to secure a land cession from the bands and outlined the treaty's terms. Dkt.559-15 at 8096. At the treaty council, Schoolcraft complied with Cass's instructions and offered only "proper and limited reservations to be held in common…." Resp.App.123a. Following negotiations, the bands confirmed the lands they would cede or reserved. *Id.*, 129a-131a.

When the parties signed the Treaty of Washington, Mar. 28, 1836, 7 Stat. 491 (1836 Treaty), the bands "cede[d] to the United States" almost 14 million acres. Resp.App.100a; Dkt.558-31 at 7266, Area 205. Articles Second and Third identified the reserved lands, which were "to be held in common," including "[o]ne tract of fifty thousand acres to be located on Little Traverse [B]ay…." Resp.App.101a. In Article Eighth, the United States assured the bands that removal would be voluntary and that a "suitable location shall be provided for them, among the Chippewas [in Minnesota], if they desire it," or on lands west of the Mississippi. *Id.*, 107a. Other articles addressed usufructuary rights (hunting, fishing, trapping, and gathering) on the ceded lands, a twenty-year annuity, and additional support. *Id.*, 102a-104a, 106a, 110a.

But the Senate refused to ratify the 1836 Treaty as it had been negotiated. It limited the reservations to "five years from the date of ratification of this treaty, and no longer unless the United States grant

them permission to remain on said lands for a longer period." Resp.App.116a. The treaty provided $200,000 to compensate the bands for "changing the permanent reservations in articles two and three to reservations for five years only…." *Id*. The United States promised to pay the $200,000 "whenever their reservations shall be surrendered, and until that time the interest on said two hundred thousand dollars" would be paid annually. *Id*.

Removal remained voluntary under the Senate-ratified 1836 Treaty, but the destination changed to Kansas. Resp.App.116a. The treaty promised that the bands would be able to "select a suitable place for the final settlement of said Indians, which country, so selected, and of reasonable extent, the United States will forever guaranty and secure to said Indians." *Id*. 117a. The bands "strenuously opposed" the treaty changes. Dkt.600-24 at 10689. But they eventually agreed to the new terms. Dkt.558-5 at 6879-6881, 6885-6890.

### B. A new strategy

After the United States broke its promise of permanent Michigan reservations, the bands focused on purchasing land and becoming subject to state jurisdiction to avoid removal. As the bands from the Little Traverse Bay said in an 1839 petition to Michigan Governor Stevens T. Mason, they were sufficiently "civilized" to remain in Michigan and planned to "purchase homes for ourselves and children," "submit ourselves to the laws of this state," and "support the United States." Dkt.559-20 at 8132. The bands knew that other Indians in Michigan were "buying lands

from the United States Government" and had "been told that by that act they became citizens and are so acknowledged by the white people." *Id*. They hoped to do the same and asked if they could "buy this very place the Little Traverse Bay where we are at present…." *Id*.

Governor Mason responded to the bands, saying that Indians could purchase land, the state constitution allowed them to remain in Michigan if they followed the law, and they would have "all the privileges of citizens," except the right to vote. Dkt.600-32 at 10719. He added that they could buy the lands at the Little Traverse Bay when the federal government sold them, a sale that the bands might hasten by expressing their interest in becoming citizens. *Id*.

In 1841, band leaders asked President John Tyler to extend the Michigan reservations under the 1836 Treaty. Dkt.559-22 at 8143. But they received no response and there is no evidence the federal government extended the reservations.

In the following years, band members used treaty annuities to purchase from the United States public lands amounting to more than 16,000 acres at the Little Traverse Bay and thousands of acres elsewhere in Michigan. Dkt.558-50 at 7558. Federal officials viewed these purchases favorably. Dkt.559-24 at 8164.

By 1850, male band members had achieved the right to vote under the state constitution, which Governor Mason had described as a privilege of citizenship. Dkt.559-28 at 8190; Dkt.600-32 at 10719. Band members also made efforts to present themselves as acculturated, with some adopting Christianity (at

least outwardly), taking English names, and sending their children to English-language schools. Dkt.559-12 at 8075; Dkt.335-4 at 3718-3719; Dkt.559-22 at 8143; Dkt.335-11 at 3780-3781. Moreover, Michigan wanted the bands to remain and asked the federal government "to make such arrangements for said Indians as they may desire, for their permanent location in the northern part of this State…." Dkt.559-29 at 8205.

### C. A new treaty

In the 1850s, the bands remained on the lands they had ceded but continued to fear removal. Dkt.559-30 at 8211. Indian Agent Henry Gilbert knew that the bands would "never consent to remove west of the Mississippi; and the people of Michigan have no desire to exile them from the homes of their fathers." Dkt.558-46 at 7464. Yet, Gilbert realized that when the treaty annuities ended in 1856, landless band members would have no means of support, which would pose problems for the State. Dkt.559-33 at 8288.

In 1853, Gilbert proposed to Commissioner of Indian Affairs George Manypenny that the bands be moved to federal or state reservations. Dkt.558-46 at 7464. By 1854, however, Gilbert hoped "that within three or four years all connection with & dependence upon Government on the part of the Indians [in Michigan] may properly cease." Dkt.559-33 at 8285-8286. For the bands that signed the 1836 Treaty, Gilbert proposed to create reservations solely under state jurisdiction. *Id*. at 8286.

But the bands had their own plan. In January 1855, they wrote to federal officials, explaining that they were "unanimous" in their desire to "accumulate property" for their children; learn the amounts due to them under prior treaties; and have the government keep the money while continuing to make annual interest payments they would use to "pay for lands and the Taxes…." Dkt.559-34 at 8305-8306. They said, "We have purchased lands to make us homes" and were traveling to Washington, D.C. in the hope "that our wish and desire may be granted" by the government. *Id*. at 8305. In Washington, the band leaders met with Manypenny and discussed their proposal to obtain more money to buy lands. Resp.App.29a-30a, 33a-35a, 57a.

In February 1855, band leaders sent two letters to Manypenny asking about money due under existing treaties. Dkt.600-45 at 10762; Dkt.559-35 at 8313. They wanted the information "soon, that we may know what we should do – we need means to buy more lands and make improvements before the land shall be taken by the white settlers near us." Dkt.559-35 at 8313.

Manypenny subsequently wrote to John Wilson, General Land Office Commissioner, that designated survey townships "be withheld from sale until it shall be determined whether" the lands "may be required for said Indians." Dkt.559-36 at 8320. As Wilson told Interior Secretary Robert McClelland, withdrawing the lands was intended to "enabl[e]" the Indians "to purchase homes and farms for themselves" while advancing toward assimilation, just as the bands had proposed. Dkt.559-37 at 8329. McClelland

recommended that President Franklin Pierce grant the request "with the express understanding" that the Indians would have no claim "to any of the land so withdrawn … until after they shall by future legislation be invested with legal title thereto." Dkt.559-39 at 8343. President Pierce ordered "the withdrawal [to] take place with the express understanding contained in" McClelland's letter. Dkt.559-37 at 8328.

In May 1855, Manypenny asked McClelland for permission to negotiate a new treaty. Dkt.559-43 at 8376. Manypenny did not propose new reservations. He asked to "secure permanent homes for the Ottawas and Chippewas, either on the [former 1836] reservations or on other lands in Michigan belonging to the Government, and at the same time, to substitute as far as practicable, for their claim in lands in common, titles in fee to individuals for separate tracts." *Id*. McClelland approved the proposal. Dkt.559-42 at 8372. Federal officials communicated their offer to give land to band members so the band leaders could discuss the issue before the treaty council. Resp.App.46a, 52a, 72a.

### D. The 1855 Treaty council

Manypenny opened the treaty council by expressing his intent to "talk of general matters & especially of locations for homes." Resp.App.28a. Early on, Assagon,[3] the *ogima-giigido* (principal speaker) for the Odawa, pressed for an accounting of unpaid funds under five treaties. *Id*., 35a-46a. The questions he and

[3] Assagon was the Cheboygan band chief and at times he spoke for all the bands. Dkt.335-10 at 3769.

other band leaders asked about the money due to the bands were so pointed that some of Gilbert's responses were written as if they were accounting entries. Dkt.558-7 at 6914.

When the band leaders failed to convince Manypenny that the United States owed more money than had been agreed, Waubojeeg,[4] the *ogima-giigido* for the Ojibwe, raised the federal land offer. Resp.App.46a. He said, "Before we left the Saut [Sault Ste. Marie] we were told that we should receive lands in this state in the place of lands West of the Mississippi. If so, in what manner will the matter be arranged?" *Id*. Waubojeeg described what the Indians wanted, saying, "We wish if it is your design thus to give us lands to accept them & to locate them where we please. That is all." *Id*.

Gilbert responded to Waubojeeg that the "Government is willing to provide you with homes & is willing that those homes shall be in the State of Michigan." Resp.App.48a. Assagon asked about the title and amount of land being offered, saying that if "you wish us to have lands we want strong titles to them," referring to patents.[5] *Id*., 49a. Manypenny said that the federal government planned to "give each individual & head of a family such a title as that he can distinguish what is his own. There will be some restriction on the right of selling. Except that your title will be

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[4] Waubojeeg was a chief from Sault Ste. Marie. Dkt.335-10 at 3769.

[5] The Odawa and Ojibwe language (Anishinaabemowin) calls patents or deeds *zwaangangin mazin'iganan*, meaning strong papers. Dkt.335-12 at 3795-3796.

like the White man's. This restriction will, when it seems wise & proper be withdrawn." *Id.*

The next day, Assagon responded to the land offer, saying:

> When a white man wants to buy land, he does not go blind fold, & buy a piece he does not know, & so it is with us. The lands where we come from are not so good as the lands here. Much of them are heavy & swampy & we must select only such as are good for agriculture. And this is the decision we have come to, that we cannot select any lands until we see them, & know whether they are good.

Resp.App.51a. Manypenny replied that the "difficulty in selecting land can be easily remedied." *Id.*, 53a. At the council, band leaders would "determine generally the sections of the state in which communities of you wish to locate." *Id.* Band members would choose their "individual farms" later, after determining which lands were good. *Id.*

Manypenny's land selection process addressed the band leaders' concerns, allowing the negotiations to continue. Waubojeeg said his band members had already identified the lands they wanted, and he had brought maps of those lands with him. Resp.App.55a. Paybahmesay, Wasson, Nahmewashkotay, Shawwasing, and Kenoshance, who were both Odawa and Ojibwe band leaders, also accepted the offer and asked questions about the amount and location of lands, title, and taxes. *Id.*, 55a-58a.

Manypenny answered the band leaders' questions and explained the land selection process a second time, saying:

> We do not expect that each head of a family can select his own particular piece of land here today, but that each band has its mind fixed, or can have it fixed, on some particular part of the country, within which they can select the tracts they desire. ***Now it is necessary that the body of land you so select shall be withdrawn from sale, so that you may select your particular homes in it hereafter***. In relation to the patents I think there will be no difficulty. It shall be an absolute title, save a temporary restriction upon your power of alienation.

Resp.App.59a (emphasis added). That afternoon, Gilbert met with the band leaders to "designate the points where they wish to locate." *Id.*, 60a.

The next day, Manypenny quelled concerns that band members would forfeit lands they already owned by accepting lands under the treaty, saying, "Your lands are your own, as mine are mine, & they cannot be taken from you." Resp.App.61a. Gilbert also addressed locations that had to be adjusted to avoid conflicts and ensure there were adequate lands available to select. *Id.*, 61a-63a. The parties bargained over the amount of land, who would be entitled to select lands, money for improvements, and when band members would take care of the land and money themselves. *Id.*, 66a-80a.

Gilbert also raised the parties' future relationship when Assagon asked that money under the treaty be paid as an annuity. Resp.App.79a. Gilbert refused, explaining that it was a financial burden for the government "to manage your affairs" and that it would prevent the band members from "attain[ing] the civilization & citizenship of the whites." *Id.* The United States' goal was "to have you civilized citizens of the State-taking care of yourselves." *Id.* Band members "should be restricted in the full care of this land & money for a few years, yet we think that the time will shortly come, when you can take care of them for yourself." *Id.* He proposed to "fix a time, when your connection with the U.S. shall cease," suggesting ten years. *Id.*, 80a.

The next day, after addressing remaining issues, the parties signed the 1855 Treaty. Resp.App.91a.

### E. The 1855 Treaty

In Article I of the 1855 Treaty, the United States promised to "withdraw from sale for the benefit of said Indians as hereinafter provided, all the unsold public lands within the State of Michigan" in townships listed in eight numbered paragraphs. Resp.App.5a-7a. Article I set the "rules and regulations" for selecting, purchasing, inheriting, and resolving disputes over the lands withdrawn from sale. *Id.*, 8a-11a.

The treaty divided the land provisions into two five-year periods. In the first period, eligible band members could select lands within "the tract reserved herein for the band to which he may belong…." Resp.App.8a. The land selections were subject to a

certificate restricting alienation, which would be replaced with an unrestricted patent after ten years. *Id.*, 9a. The President could issue a patent early or withhold it longer, but only "in individual cases…." *Id.*, 10a. Lands not selected during the first five years of the treaty "remain[ed] the property of the United States…." *Id.*, 10a-11a.

During the second period, remaining public lands were "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…." Resp.App.11a. Lands that band members purchased were immediately alienable and patented without restrictions. *Id.* When the purchase period ended, "all lands remaining unappropriated by or unsold to the Indians … may be sold or disposed of by the United States as in the case of all other public lands." *Id.* However, nothing in the treaty prevented the United States from appropriating "by sale, gift, or otherwise" any "tract or tracts of land within the aforesaid reservations for the location of churches, school-houses, or for other educational purposes…." *Id.*

Article 2 provided $538,400 to the bands, including $200,000 for surrendering the reservations recognized in the amended 1836 Treaty. Resp.App.11a-12a; Dkt.559-45 at 8411. The remaining articles addressed issues important to the parties' relationship. Critically, the treaty had no removal provision.

After the council ended, the parties adjusted the lands subject to Article I. Dkt.559-41 at 8356-8359; Dkt.559-49 at 8435-8437; Dkt.558-12 at 7162-7164. They also added treaty language preserving pre-existing land claims and earlier Indian land purchases.

Dkt.558-12 at 7163-7164; Resp.App.20a. The Senate ratified the amended treaty in April 1856. Resp.App.18a. After the bands approved the amendments, President Pierce proclaimed the treaty on September 10, 1856. *Id.*, 25a.

### F. After the 1855 Treaty

The treaty process encountered difficulties from the start. Indian agents failed to implement the land selection and purchase process as the treaty dictated. Dkt.559-61 at 8538. Some patents were issued more than a decade late. Dkt.582-4 at 9713. Many band members were unable to purchase lands. Dkt.600-106 at 10974.

By 1864, Indian Agent William Leach believed that band members would lose their lands if the United States issued patents. Dkt.558-64 at 7701. He proposed a new treaty that would create a large reservation at the Little Traverse Bay or a small number of reservations where "[a]ll the lands" would "be forever set apart for the use and occupancy of said Indians & their descendants," i.e., language that did not exist in the 1855 Treaty. Dkt.600-143 at 11308. But the United States never entered into another treaty with these bands.

As time passed, non-Indians began demanding access to the lands withdrawn from sale. Dkt.559-60 at 8528; Dkt.559-62 at 8553. Congress stepped in to correct the problems with the treaty's implementation by enacting the Act of June 10, 1872, 17 Stat. 381 (1872 Act). Pet.App.133a-134a. Among other things, Congress required the Interior Secretary to issue the missing patents and return the remaining lands to

market to dispose of them under the public land laws. *Id*. In the Act of March 3, 1875, 18 Stat. 516 (1875 Act), Congress again required that Interior issue patents, fix problems, and dispose of the remaining lands. Pet.App.135a-136a. In the Act of May 23, 1876, 19 Stat. 55 (1876 Act), Congress required for a final time that patents be issued and the remaining lands not valuable for pine timber be opened to homestead entry. Resp.App.2a-3a.

Federal agents did issue the patents and returned the remaining lands to market. Dkt.335-17 at 3822; Dkt.560-6 at 8699; Dkt.582-5 at 9715. The population in what are now Emmet and Charlevoix counties rapidly became majority non-Indian. Dkt.582-6 at 9716-9754. Many band members eventually lost the lands they had selected under the 1855 Treaty to tax forfeiture and fraud. Dkt.558-74 at 7837.

From the 1870s onward, state and local government assumed jurisdiction over the Little Traverse Bay region. Dkt.560-47 at 9099-9101. When the descendants of band members appear in records over the following decades, they are described as state citizens, not inhabitants of federal Indian reservations. Dkt.560-50 at 9128; Dkt.560-51 at 9130-9131; Dkt.560-54 at 9144-9146, 9150-9156; Dkt.560-55 at 9162.

### G. The proceedings below

In the district court, the State moved for summary judgment arguing that: (1) the language of, and history surrounding, the 1855 Treaty demonstrate that it did not create an Indian reservation that meets any element of the test for Indian country; (2) if the 1855

Treaty created an Indian reservation, it terminated when band members received their patents; and (3) if the 1855 Treaty created a permanent Indian reservation, Congress disestablished it in the 1870s Acts. Dkt.582 at 9619-9691. The Band and Intervenors filed their own dispositive motions. Dkt. Nos. 567, 571, 579, 585.

The district court applied the test used to determine Indian country under 18 U.S.C. § 1151, which is stated in *John*. Pet.App.66a-70a. The court concluded that the treaty language neither set apart lands for the bands nor subjected any lands to ongoing federal superintendence. *Id.*, 74a-85a. The court, which had detailed the history surrounding the treaty, also described in unsparing terms how the Band had attempted to re-write the 1855 Treaty and that history. *Id.*, 38a-61a, 86a-103a. The court also rejected the Band's argument that the phrase "tract reserved herein" and "aforesaid reservations" in Article I referred to Indian reservations. *Id.*, 93a-100a. Thus, the court granted summary judgment to the State and Intervenors. *Id.*, 104a. Because the 1855 Treaty did not create reservations, the district court did not address the diminishment and disestablishment defenses.

The Sixth Circuit likewise applied the Indian country test under *John*. Pet.App.20a-22a. The court liberally construed the withdrawal language in Article I to conclude that the treaty set apart lands. *Id.*, 23a. However, it drew on some of the same factors the district court viewed as significant to hold that those lands were not dedicated to Indian purposes. *Id.*, 24a-25a. It noted that all lands selected or purchased under the treaty were intended to be alienable and thus

the United States was entitled to sell or dispose of the remaining lands like other public lands. *Id*. The court also noted that the 1855 Treaty did not have the language used in the 1836 Treaty or other treaties to create Indian reservations. *Id*., 25a. Further, the court held that the 1855 Treaty lacked federal superintendence over the lands because it had no restraints on alienation or restrictions and the parties mutually desired to have the band members living independently of the federal government. *Id*., 30a-34a.

The Sixth Circuit saw similarities between the land selections under the 1855 Treaty and public domain allotments available roughly thirty years later under 25 U.S.C. § 336. Pet.App.25a, 35a. Though it used the term "allotment" to describe lands selected under the treaty, it meant "smaller lots owned by individual tribal members." *Id*., 21a. In the court's view, the history surrounding the 1855 Treaty and subsequent events confirmed that the parties did not seek to establish Indian reservations. *Id*., 25a-29a., 33a-34a. Thus, it affirmed the district court. *Id*., 35a. The Sixth Circuit denied rehearing en banc. *Id*., 111a-112a.

## REASONS FOR DENYING THE PETITION

### I. The Sixth Circuit properly applied this Court's precedent and did not cause a conflict with other circuits.

"Treaty analysis begins with the text, and treaty terms are construed" in the way the Indians would have understood them. *Herrera* v. *Wyoming*, __ U.S. __; 139 S. Ct. 1686, 1701 (2019). The Band looks only at the words "reserved" and "reservations" in the 1855 Treaty and hopes that this Court will agree that "a reservation is a reservation." Pet.18.

But a "reservation is not necessarily 'Indian country.'" *United States* v. *Celestine*, 215 U.S. 278, 285 (1909). The Court adopted the *John* test to determine whether a reservation is Indian country. The Band fails to find precedent from the Court or other circuits that would rely on the words "reserved" or "reservations" in place of language setting apart lands for Indian purposes. Nor does it find any authority that eliminates the federal superintendence requirement. Moreover, when read in context, the treaty used the words "reserved" and "reservations" in their ordinary sense to mean "keeping back" something or "something withheld," i.e., the lands withdrawn sale. Dkt.600-53 at 10790.

#### A. The *John* test is the correct test, and the Sixth Circuit properly applied that test to determine that the 1855 Treaty did not create Indian reservations.

The Sixth Circuit correctly recognized that the Indian country test in *John* decides the Band's

reservation-creation claim. Pet.App.20a, 22a. *John* decided whether the federal government had created an Indian reservation within the meaning of 18 U.S.C. § 1151, making it directly relevant here. See 437 U.S. at 646-50.

Since 1978, this Court has used the *John* test to decide whether a location is Indian country under 18 U.S.C. § 1151—even in civil cases and regardless of the form of Indian country at issue. See *Alaska* v. *Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 530 (1998); *Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114, 124-25 (1993); *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991). The appellate courts have followed suit. See, *e.g.*, *HRI, Inc.* v. *EPA*, 198 F.3d 1224, 1254 (10th Cir. 2000), as amended on denial of reh'g and reh'g en banc (Mar. 30, 2000); *Narragansett Indian Tribe of Rhode Island* v. *Narragansett Elec. Co.*, 89 F.3d 908, 919-22 (1st Cir. 1996); *United States* v. *Azure*, 801 F.2d 336, 338-39 (8th Cir. 1986); *United States* v. *Sohappy*, 770 F.2d 816, 822-23 (9th Cir. 1985).

The Sixth Circuit was fully in accord with this Court's precedent and the other circuits when it considered whether the 1855 Treaty set apart land for Indian purposes subject to federal jurisdiction. And the court explained why the 1855 Treaty failed the *John* test. Pet.App.24a-25a, 30a-32a. Tellingly, the Band never suggests that the 1855 Treaty passes the *John* test. Instead, the Band argues that it does not have to satisfy that test. Thus, because the Sixth Circuit applied the right legal test and reached the right legal conclusion, the petition should be denied.

### B. There is no conflict or circuit split concerning the Band's obligation to prove that the 1855 Treaty set apart lands for Indian purposes.

The Band cites a fragment of a sentence from *Minnesota* v. *Hitchcock*, 185 U.S. 373, 389-90 (1902), to suggest that the words reserved and reservations in the 1855 Treaty make it unnecessary to examine whether the treaty set apart lands for Indian purposes. Pet.17. But *Hitchcock* and the other cases the Band cites are not relevant and, therefore, there is no conflict or circuit split to resolve.

*Hitchcock* held that unceded lands with recognized Indian title cannot be conveyed until the Indian title is extinguished and, even then, Congress may prevent the lands from being granted under public land laws. See 185 U.S. at 389, 394; see also *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 283 n.15 (1955) (describing *Hitchcock* as a recognized Indian title case). The sentence the Band quotes comes from a section explaining *how* the United States recognizes Indian title in unceded lands:

> Now in order to create a reservation, it is not necessary that there should be a formal cession or a formal act setting apart a particular tract. It is enough that from what has been done there results a certain defined tract appropriated to certain purposes. Here the Indian occupation was confined by the treaty to a certain specified tract. That became, in effect, an Indian reservation.

*Hitchcock*, 185 U.S. at 389-90. In other words, because title to unceded lands is coextensive with the Indian right of occupation, the United States must acknowledge a tribe's right to occupy "a certain specified tract" to recognize the Indian title. *Id.* at 390.

But *Hitchcock* did not give the word reservation any special weight. See 185 U.S. at 388-89 (calling lands a reservation was "a matter of little moment"). The decision also distinguished between unceded Indian lands and reservations involving "a formal act setting apart a particular tract," i.e. reservations of lands in the public domain, which were not firmly established as Indian country until *Donnelly* v. *United States*, 228 U.S. 243, 269 (1913). Congress eventually adopted *Donnelly's* view of Indian country in 18 U.S.C. § 1151, which *John* interpreted. See 18 U.S.C. § 1151 (Historical and Reviser's Notes). Thus, *Hitchcock* does not determine whether the 1855 Treaty created Indian reservations because this case does not involve recognized Indian title to unceded Indian lands and this Court's concept of Indian country subsequently evolved.

The other cases the Band cites also do not demonstrate that the words reserved and reservations prove that the 1855 Treaty created Indian reservations. Several cases involve situations similar to *Hitchcock* in which parties who might otherwise have rights to public lands or resources on public lands found themselves stymied by Indians with a superior right, such as when Indian title had not yet been extinguished fully. See *United States* v. *Santa Fe Pac. R. Co.*, 314 U.S. 339, 359-60 (1941); *Leavenworth, L. & G.R. Co.* v. *United States*, 92 U.S. 733, 741-45 (1875); *United*

*States* v. *McIntire*, 101 F.2d 650, 653-54 (9th Cir. 1939).

More cases accepted that a reservation had been created to address a different dispute. For instance, in *Chemehuevi Indian Tribe* v. *McMahon*, 934 F.3d 1076, 1078-82 (9th Cir. 2019), the parties agreed that the Chemehuevi Reservation existed, but contested whether the county sheriff was exercising jurisdiction inside the reservation boundaries. The cases dealing with allotment or reservation diminishment/disestablishment generally fall in this second category. See *Nebraska* v. *Parker*, 577 U.S. 481, 484 (2016); *Hagen* v. *Utah*, 510 U.S. 399, 402 (1994); *Mattz* v. *Arnett*, 412 U.S. 481, 483 (1973); *Seymour* v. *Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 354 (1962); *Celestine*, 215 U.S. at 286.

None of the cases the Band cites overturn *John*, hold it inapplicable to a reservation-creation claim, or suggest that the words reserved or reservations are an adequate substitute for setting apart land for Indian purposes. Moreover, the numerous treaties involving other tribes that the Band cites do not demonstrate that its ancestors understood the 1855 Treaty to create reservations. See *Mille Lacs*, 526 U.S. at 202. Thus, there is no conflict with the Court's precedent or a split with other circuits that would justify granting the petition.

### C. There is no conflict or circuit split concerning the Band's obligation to prove that the 1855 Treaty imposed active federal jurisdiction over land.

The language of 18 U.S.C. § 1151(a) requires a reservation to be "under the jurisdiction of the United States Government" to be Indian country.[6] See *John*, 437 U.S. at 649. The Band incorrectly argues that it need not show active federal superintendence over reservations. Pet.28-32.

*Venetie* held that the United States must exercise active control over lands for them to be under federal superintendence. See 522 U.S. at 533. Active control may consist of the United States holding land in trust, restricting alienation of the land, or regulating the activities on the land. See *United States* v. *McGowan*, 302 U.S. 535, 539 (1938); *Pelican*, 232 U.S. at 447-49. However, as the Sixth Circuit held, the 1855 Treaty did not grant the United States active control over the lands in Article I once the band members received their unrestricted patents. Pet.App.30a-32a.

According to the Band, the 1855 Treaty did not have to impose federal jurisdiction over the lands in Article I because superintendence is an inherent feature of reservations, and the United States can pass laws to protect reservations. Pet.29, 30. But that argument merely assumes that the 1855 Treaty created

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[6] Had Manypenny followed Gilbert's recommendation to create state reservations, they would not be Indian country. See *Cohen's Handbook of Federal Indian Law* § 3.04[2][c], p. 191 (Nell Jessup Newton ed., 2012) (reference to federal jurisdiction in 18 U.S.C. § 1151 "was likely to added to exclude from the scope of the statute Indian reservations governed by certain states").

reservations subject to federal jurisdiction in the first place.

The Band also inaccurately suggests that the United States established other reservations without active federal superintendence. Pet.29. For instance, it cites the Treaty with the Omaha, March 16, 1854, 10 Stat. 1043, and the Treaty of LaPointe, Sept. 30, 1854, 10 Stat. 1109. But both treaties established the President's authority to control the land itself by setting or approving the location of the reservations, surveying and dividing the reservation into allotments, setting land inheritance rules, and imposing restrictions on allotments. The President has no similar powers over the lands patented to band members under the 1855 Treaty. Resp.App.8a-11a.

Nor does the Sixth Circuit's decision conflict with *McGirt* v. *Oklahoma*, __ U.S. __; 140 S. Ct. 2452 (2020), which the Band claims did not identify federal jurisdiction in the underlying treaties. Pet.31. *McGirt* identified treaty language satisfying every part of the *John* test, including federal superintendence. For instance, the federal government set the Creek reservation boundaries, adjusted those boundaries, reduced the size of the reservation, and precluded states and territories from annexing the reservation. See 140 S. Ct. at 2460-61. The 1855 Treaty does not have terms that would allow the United States to take similar actions concerning the lands in Article I.

The Band goes further off course when it argues that the Tenth and Second Circuits require evidence of active federal jurisdiction only for dependent Indian communities, not reservations. Pet.28, 31-32.

The Band relies on the Tenth Circuit's en banc decision in *Hydro Res., Inc.* v. *EPA*, 608 F.3d 1131 (10th Cir. 2010), which involved uninhabited, non-Indian fee land that the Environmental Protection Agency (EPA) claimed was a dependent Indian community. See *id.* at 1134. "Except for the brief period from 1907-11," the land had "not been set aside by Congress for Indians *or placed under federal superintendence* for their benefit." *Id.* at 1137 (emphasis added). For that reason alone, the court said that the land was not Indian country. *Id.* at 1166. The court also rejected EPA's argument in favor of a "community of reference" test, which denies Congress its authority to designate dependent Indian communities, just like it designates reservations by proclaiming them or designates allotments by distributing them. See *id.* at 1151. Thus, the court held reservations to the *same* legal standard as other forms of Indian country—not to the lesser standard the Band proposes.

The Band should have cited *HRI*, an earlier phase of the *Hydro Resources* litigation involving adjacent trust lands. See 198 F.3d at 1231. *HRI* held that the trust lands met the definition of a reservation in 18 U.S.C. § 1151(a) under decisions that had interpreted *John*. *Id.* at 1249 (citing *Citizen Band*, 498 U.S. at 511, and *United States* v. *Roberts*, 185 F.3d 1125, 1131 (10th Cir. 1999)). The Tenth Circuit expressly noted that federal jurisdiction existed, stating that "the federal government directly retains title to the land in question, and exercises federal control over the acquisition of interests not only in the land itself but also in its use, just as it does for formal reservation land." *HRI*, 198 F.3d at 1253. Retaining title and regulating land uses are the type of active control required to

prove federal superintendence. See *Venetie*, 522 U.S. at 533.

The Second Circuit's decision in *Sherill* is even less helpful to the Band. *Oneida Indian Nation of New York* v. *City of Sherrill*, *New York*, 337 F.3d 139, 153 (2d Cir. 2003), rev'd and remanded sub nom. *City of Sherrill*, *N.Y.* v. *Oneida Indian Nation of New York*, 544 U.S. 197 (2005). In *Sherill*, there was no dispute that the parcels had been part of the tribe's "aboriginal lands and the tribe's reservation as recognized" in a treaty with the United States. *Id*. Congress had never diminished or disestablished that reservation. *Id*. at 156, 165. *Sherill* cited *John* as authority for its statement that the lands were Indian country under 18 U.S.C. § 1151 because they were "set aside by Congress for Indian use *under federal supervision*." *Id*. at 155 (emphasis added).

Like the Court, the Second, Sixth, and Tenth Circuits all require active federal superintendence for land to be an Indian reservation. By requiring the patents to be issued in fee and without restrictions, the 1855 Treaty ensured that the federal government could not exercise active jurisdiction over those lands. Once again there is no conflict or circuit split to justify granting the petition.

### D. The words "reserved" and "reservations" in the 1855 Treaty do not refer to Indian reservations.

As the Sixth Circuit recognized, the United States promised to withdraw unsold public lands in the operative sentence at the beginning of Article I of the 1855

Treaty. Pet.App.12a, 23a, 24a. The United States did not promise to "reserve" lands.

Withdrawing and reserving public lands are separate acts. See *S. Utah Wilderness All.* v. *Bureau of Land Mgmt.*, 425 F.3d 735, 784 (10th Cir. 2005). "A withdrawal makes land unavailable for certain kinds of private appropriation under the public land laws." *Id.*; see also *Bullard* v. *Des Moines & Ft. Dodge R. Co.*, 122 U.S. 167, 171 (1887). "A reservation, on the other hand, goes a step further: it not only withdraws the land from the operation of the public land laws, but also dedicates the land to a particular public use." *S. Utah*, 425 F.3d at 784; see also *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 481 (1915) (distinguishing withdrawals from reservations). But as the Sixth Circuit concluded, this treaty did not dedicate the land withdrawn to use as an Indian reservation. Pet.App.24a-25a.

When read in context, the phrases "tract reserved herein" and "aforesaid reservations" refer to the land withdrawn from sale, consistent with the common meaning of the word reservation in the 1850s. Dkt.600-53 at 10790. The treaty used these phrases interchangeably with "land hereinbefore described" and "tracts hereinbefore described" to refer to the numbered paragraph at the beginning of Article I, reinforcing that they do not have a technical meaning. Resp.App.8a, 10a, 11a. The 1855 Treaty promised that, for ten years, the United States would *withhold or keep back from sale* the unsold public lands in the areas listed in Article I.

The phrases "tract reserved herein" and "aforesaid reservations" did not promise the bands Indian

reservations. In the first example, the phrase "tract reserved herein" identified where eligible band *members* could select lands that would eventually be fee-patented to them. Resp.App.8a. In the second example, the treaty referred to the "aforesaid reservations" to protect the United States *own* right to dispose of lands described in Article I even while they were withdrawn from sale. *Id.*, 11a. Neither phrase made any promise to the bands, much less offered to set apart the lands or to allow the bands to hold them in common like Article Second of the 1836 Treaty.

The 1855 Treaty plainly promised to withdraw lands temporarily, which the United States did. But the government did not take any additional step to reserve lands for the bands themselves, which would have required setting apart those lands for Indian purposes under federal superintendence. Therefore, the 1855 Treaty cannot be read to promise Indian reservations.

### E. The documents the Band cites using the word reservation do not support its claim.

The Band implies that Congress or other officials recognize that the 1855 Treaty created Indian reservations. But none of those arguments compel this Court to second guess the Sixth Circuit.

For instance, the Band contends that the Sixth Circuit did not understand the Court's precedent holding that allotments and reservations are consistent. [7]

[7] The district court's analysis explained the allotment argument. Pet.App.101a-103a, 105a-110a.

Pet.3, 24-27. See *Affiliated Ute Citizens of Utah* v. *United States*, 406 U.S. 128, 142 (1972) (an allotment in federal Indian law is "a selection of specific land awarded to an individual allottee from a common holding," i.e., an Indian reservation). But the Sixth Circuit acknowledged "that allotments are not 'inherently incompatible with reservation status,' " and rejected the theory that the 1855 Treaty created reservations to be divided up in the first place. Pet.App.29a-30a n.8 (quoting *McGirt*, 140 S. Ct. at 2475).

The Band notes that Congress used the word reservation in the 1872 and 1875 Acts. Pet.20. But by 1875, the United States was already restoring the remaining lands to market. Dkt.560-6 at 8699. Congress omitted the word reservation from the 1876 Act, signifying that the lands were no longer withheld or kept back from sale, which the Sixth Circuit recognized. Resp.App.2a-3a; Pet.App.29a.

The Band mentions findings in committee reports related to the statute that reaffirmed its relationship with the federal government. Pet.13. See Little Traverse Bay Bands of Odawa Indians and Little River Band of Ottawa Indians Act, Pub. L. No. 103-324, 108 Stat. 2156 (Sept. 21, 1994) (Reaffirmation Act). But Congress did not enact the findings and the Band did not ask Congress to "reaffirm an 1855 Treaty reservation." Pet.App.29a.

Substantively, the Reaffirmation Act established a federal service area that extends seventy miles from the "reservations" described in Paragraphs Third and Fourth of Article I, "notwithstanding the establishment of a reservation for the tribe after the date of the

enactment of this Act." 108 Stat. at 2157-2158, § 4(b)(2)(A). Plainly, federal service areas are not Indian country under 18 U.S.C. § 1151 and Congress did not conclude that reservations under the 1855 Treaty existed in 1994. Resp.App.1a. Moreover, the geographic footprint of the federal service area and the two counties where the United States must take land into trust for the Band do not match the boundaries of the treaty reservation it claims.

The Band points to a single sentence mentioning a reservation in the Indian Lands Opinion that Interior issued concerning the Band's casino property near Mackinaw City. Pet.13, 34, 35. See Little Traverse Indian Lands Opinion (Nov. 12, 1997), available at https://tinyurl.com/Indian-Lands-Opinion-1997. But the opinion cites no evidence. The Band's Mackinaw City casino is also in T39N, R04W, not one of the survey townships listed in the 1855 Treaty, making it unlikely that Interior intended to resolve the Band's claim. Resp.App.5a-7a.

The Band walks a very thin line when it says that Michigan settled litigation with the United States and the Saginaw Chippewa Indian Tribe of Michigan concerning the Isabella Reservation under a "materially identical" 1855 treaty. Pet.2. See Treaty with the Chippewa of Saginaw, Etc., Aug. 2, 1855, 11 Stat. 633. Not only are the two 1855 Treaties distinct, but the Band intentionally omits the fact that the Saginaw Tribe is party to the Treaty with the Chippewa of Saginaw, Etc., Oct. 18, 1864, 14 Stat. 657 (1864 Saginaw Treaty). The 1864 Saginaw Treaty is an express basis for the settlement, uses clear reservation-creation language, and imposes active federal

superintendence over the land, unlike the 1855 Treaty. See *Saginaw Chippewa Indian Tribe of Mich.* v. *Granholm*, No. 1:05-cv-10296, Order for Judgment entered Dec. 17, 2010 (E.D. Mich.), ¶ 3.

Moreover, as the Sixth Circuit noted, the United States tracked Indian reservations under its jurisdiction. Pet.App.28a. The United States identified the Michigan reservations under the 1864 Saginaw Treaty and the 1854 LaPointe Treaty. Dkt.558-28 at 7260; Dkt.558-29 at 7262; Dkt.558-30 at 7264; Dkt.558-72 at 7824; Dkt.558-73 at 7833; Dkt.558-74 at 7840. But it did not identify reservations in the areas described in the 1855 Treaty.

## II. The Sixth Circuit properly applied the Court's Indian canons when it interpreted the 1855 Treaty from the Indian perspective.

The Court's Indian canons require "an analysis of the history, purpose, and negotiations" of an Indian treaty. *Mille Lacs*, 526 U.S. at 202. That broader analysis is intended to provide insight into Indian treaties from the perspective of "the tribal representatives at the council …." *Tulee* v. *State of Washington*, 315 U.S. 681, 684 (1942). The Sixth Circuit properly looked to the 1855 Treaty council journal and other relevant historical documents to determine that the band leaders understood the 1855 Treaty to provide individual landownership without federal superintendence. Pet.App.33a; *id.*, 10a-12a, 33a-34a.

### A. The band leaders who negotiated the 1855 Treaty understood it to provide individual landownership without federal jurisdiction.

The Sixth Circuit correctly looked to the 1855 Treaty council journal for evidence of the Indian understanding of the 1855 Treaty. Pet.App.10-12a, 26a-27a, 33a-34a. Even the abbreviated history in the statement of the case leaves no doubt that the Anishinaabek band leaders who negotiated the treaty did not seek Indian reservations under federal jurisdiction. A closer look at the negotiations confirms that the parties never even discussed Indian reservations under the 1855 Treaty.

If the treaty negotiators wanted to create reservations, they had all the necessary tools. They had negotiated reservations in 1836. Resp.App.123a, 126a, 129a-130a. The bands had a word for reservations, which was *ashkonigan* (Odawa dialect) or *ishkonigan* (Ojibwe dialect). Dkt.335-13 at 3800. They also had highly skilled interpreters. Resp.App.34a, 46a; Dkt.335-10 at 3770-3772. As the Band's linguist conceded, "[Y]ou couldn't get better interpreters than were at this treaty." Dkt.616-8 at 12073.

The parties used the word reservation and its variants in four ways at the treaty council in 1855. Assagon, Gilbert, and Manypenny each referred to "reservations" or a "reservation" under the 1836 Treaty. Resp.App.37a, 38a, 71a, 72a. Gilbert used the term "reservation of land" and "a section reserved" when addressing a question about money provided in lieu of an individual reservation (i.e., fee land) in the 1836 Treaty. *Id*., 45a. Gilbert referred to a $20,000

"reserved annuity." *Id.*, 47a. Manypenny said that the parties had "held in reserve" some important issues. *Id.*, 76a. Thus, the treaty negotiators used the word reservation only in its ordinary sense or to refer to the 1836 Treaty.

Had the band leaders understood the 1855 Treaty to create reservations, that would have been recorded in the treaty council journal. See *Mille Lacs*, 526 U.S. at 185, 198. Instead, treaty negotiators simply referred to "land" or "lands," which appeared dozens of times and was used by at least nine band leaders, Manypenny, and Gilbert. Resp.App.46a-96a. Manypenny and Gilbert additionally used "farm," "farms," "tract," and "tracts." *Id.*, 49a, 53a, 54a, 59a, 62a, 96a. Wasson, a band leader from the Little Traverse Bay area, also referred to "lands for a homestead." *Id.*, 58a.

These land references were consistent with the band leaders' repeated demands for "strong titles," "titles-good titles," "patents," and "good paper." Resp.App.49a, 55a, 56a, 57a, 67a, 68a. As Blackbird (aka Jackson from the Little Traverse Bay bands) said, the band leaders wanted "papers, so that each may locate for himself, where he pleases," meaning that band members should be able to "choose like the whites & have their titles." *Id.*, 65a. The band leaders also wanted band members to be able to inspect the lands before making their individual selections, which Manypenny facilitated by offering to withdraw the lands from sale. *Id.*, 53a, 59a, 96a. The parties did not discuss creating reservations in the 1855 Treaty.

The discussions in the 1855 Treaty council journal reflect the treaty language to a remarkable degree, making it key evidence of the Indian understanding.

The band leaders understood the 1855 Treaty to allow band members to become individual landowners. Given their fear of removal and their mistrust of the federal government after 1836, they had no reason to abandon their long-term strategy of owning property under state jurisdiction to live on Indian reservations under federal control. And the United States did not offer reservations as part of the bargain, either.

The Band relies on a handful of documents written after 1855 that used the word reservation. Pet.2, 5, 10-14. But none of those documents discusses the Indian understanding of Article I, much less that understanding at the council. See *Tulee*, 315 U.S. at 684. Further, all the documents were written while the lands in Article I were withdrawn from sale, which meant the word reservation could have been used in its ordinary meaning. Pet.App.27a-28a. Those documents do not change the bargain that the band leaders struck for individual landownership under state jurisdiction. Thus, the petition runs counter to the Indian understanding of the treaty and should be denied.

### B. Federal policy did not require the 1855 Treaty to create reservations.

Rather than look at the 1855 Treaty through its ancestors' eyes, the Band asks this Court to interpret the treaty through the lens of federal Indian reservation policy. The Indian canons do not permit that viewpoint when interpreting the treaty.

At best, federal policy might have supplied the United States' motive *if* it had sought reservations in the 1855 Treaty. See *Lac Courte Oreilles Band of Lake*

*Superior Chippewa Indians* v. *Voigt*, 700 F.2d 341, 357 (7th Cir. 1983). But the United States did not seek to establish reservations for the bands and motive is not evidence of the Indian understanding of the treaty. See *id.* at 356; *Cheyenne-Arapaho Tribes of Oklahoma* v. *State of Okl.*, 618 F.2d 665, 668-69 (10th Cir. 1980). If the Court accepted federal policy in place of the Indian understanding, it is hard to know what treaty rights could have ever survived the federal policies concerning removal, reservations, and allotment, in which federal and tribal interests diverged significantly.

Additionally, while it is unnecessary to know the finer points of federal policy to see through the Band's argument, it is important to understand that it oversimplifies the reservation policy. Reservations in the nineteenth century were places subject to harsh military rule. See *Cohen's Handbook of Federal Indian Law* § 1.03[6][a] and [b], pp. 60-61 (Nell Jessup Newton ed., 2012). They played a role in the federal effort to take commonly owned lands away from native people. See *id.* at § 1.03[6] [b], p. 61. But assimilation was the ultimate federal policy goal, see *id.*, and Manypenny thought landownership, not reservations, was appropriate for tribes that were already sufficiently advanced toward assimilation. Dkt.558-45 at 7421.

Federal reservation policy did not dictate reservations for these bands. Before the treaty council, they already owned thousands of acres of private property and planned to buy more. Dkt.558-50 at 7558; Dkt.559-35 at 8313. They had no commonly owned land to cede after 1841. Dkt.559-20 at 8133. And it

would have been wholly inconsistent with federal policy to give the bands at the Little Traverse Bay a reservation of more than 215,000 acres, which would have been more than ***four times larger*** than the 50,000-acre reservation in the 1836 Treaty. See Francis Paul Prucha, *The Great Father* 326 (1984). Further, federal officials viewed these Anishinaabek bands as more assimilated than other Indians. Dkt.558-46 at 7464; Dkt.558-50 at 7558.

As Gilbert explained at the treaty council, the federal government wanted the members of these bands to be "civilized citizens of the State-taking care of yourselves." Resp.App.79a. Landownership served that purpose. Living on reservations would have been a step backward for these bands.

If federal policy were relevant, it would not support the Band's claim to a reservation and even considering the Band's arguments imperils the Indian canons. Therefore, the Court should deny the petition.

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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