No. _____

In the Supreme Court of the United States

ROBERT NAFTALY, chairperson of the Michigan State Tax Commission; ROBERT R. LUPI, member of the Michigan State Tax Commission; DOUGLAS B. ROBERTS, member of the Michigan State Tax Commission; DENNIS PLATTE, executive secretary of the Michigan State Tax Commission,

Petitioners,

v.

KEWEENAW BAY INDIAN COMMUNITY,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Court has held that when Congress makes reservation lands freely alienable, it intends that land to be taxable by state and local governments, unless a contrary intent is clearly manifested. Members of the Keweenaw Bay Indian Community received property in fee simple at their request as the express language of the *1854 Treaty with the Chippewa at LaPointe* provided. The questions presented are:

1. Does the *1854 Treaty with the Chippewa at LaPointe* show the necessary congressional intent to make lands freely alienable?

2. Do the Indian Treaty canons of construction allow courts to resolve on summary judgment factual issues about which experts disagree?

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OPINIONS BELOW

The opinions of the Court of Appeals (App. 1a-35a) are reported at 452 F.3d 514 (6th Cir. 2006). The opinion of the district court (App. 36a-53a) is reported at 370 F.Supp.2d 620 (W.D. Mich. 2005).

JURISDICTION

The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331, 1362, and 1367.

The judgment of the Court of Appeals was entered on June 26, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, TREATY, AND STATUTORY PROVISIONS INVOLVED

The relevant treaty provisions are Article 3 and Article 11 of the *Treaty with the Chippewa at La Pointe*.[1] They are set forth in this Appendix, App. 58a.

STATEMENT

In 1854, the predecessors to the Keweenaw Bay Indian Community entered into the *Treaty with the Chippewa at La Pointe*[2] with the United States ("1854 Treaty"). Besides ceding land in Minnesota and Wisconsin to the United States, the 1854 Treaty created the L'Anse Reservation in Michigan.[3] From the perspective of the United States, one goal of the 1854 Treaty was the "civilization" of the Indians through individual land

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[1] *Treaty with the Chippewa at La Pointe*, 10 Stat. 1109 (September 30, 1854).
[2] *Treaty with the Chippewa at La Pointe*, 10 Stat. 1109 (September 30, 1854).
[3] Article 1, *Treaty with the Chippewa at La Pointe*, 10 Stat. at 1109.

ownership. Accordingly, Article 3 of the 1854 Treaty authorized the President of the United States to allot[4] lands in severalty to individual Indians with such restrictions on alienation as he saw fit to impose.[5]

The Keweenaw Bay Indian Community feared removal to Minnesota. One way they sought to avoid removal was to own property individually and become citizens of Michigan. Another way was to include language in the 1854 Treaty directly addressing their fears. Article 11 stated in relevant part: "All annuity payments to the Chippewas of Lake Superior, shall hereafter be made at L'Anse, La Pointe, Grand Portage, and on the St. Louis River; and the Indians shall not be required to remove from the homes hereby set apart for them."[6]

Beginning in the mid 1870s the President began to allot land to individual Indians in the L'Anse Reservation by written regulations. Initially, only a few American Indians received allotments without restrictions on alienation. By 1912 almost all available land on the L'Anse Reservation had been allotted and assigned to individuals. The district court ruled and the Community conceded that the allotments and the removal of restrictions on the allotments complied with the 1854 Treaty and the law.[7]

In 1998, this Court decided *Cass County v. Leech Lake Band of Chippewa Indians*,[8] and announced the principle that "when Congress makes reservation lands freely alienable, it is unmistakably clear that Congress intends that land to be taxable by state and local governments, unless a contrary intent is clearly manifested."

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[4] Allotment is "the selection of specific land awarded to an individual allottee from a common holding." Black's Law Dictionary 76 (7th ed. 1999).

[5] Article 3, *Treaty with the Chippewa at La Pointe*, 10 Stat. at 1110.

[6] Article 11, *Treaty with the Chippewa at La Pointe*, 10 Stat. at 1111.

[7] *Keweenaw Bay Indian Community v. Robert Naftaly, et al,* 370 F.Supp. 2d 620, 628 (W. D. Mich. 2005).

[8] *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 113; 118 S. Ct. 1940; 141 L. Ed. 2d 90 (1998).

In February 1999, the Michigan State Tax Commission, of which petitioners are members or the executive secretary, sent a bulletin to assessors and equalization directors instructing them to place all real property owned in fee simple by American Indian communities and members on the assessment roles.

In August 2003, the Keweenaw Bay Indian Community (Community) brought an action for injunctive relief against members of the Michigan State Tax Commission and Department of Treasury (State) alleging that the State could not levy its *ad valorem* tax on property held in fee simple by the Community or its members within the Community's L'Anse Reservation. The District Court first denied an initial motion for dismissal or summary disposition by the State. The Community then filed a motion for summary disposition and the State filed a second motion for summary judgment. The District Court granted the Community's motion and denied the State's second motion on May 27, 2005. First, the District Court found that despite "conflicts" between experts, there was no genuine issue of material fact over Indian understanding of the 1854 Treaty.[9] The Court found "that the removal language in the 1854 Treaty includes removal due to a tax sale for non-payment of *ad valorem* property taxes."[10] Second, finding that "[n]one of the aforementioned Supreme Court decisions expressly apply to Indian reservation lands made alienable pursuant to a treaty, which is not an act of Congress, but rather, a contract between sovereign nations," the District Court then granted summary disposition to the Community.[11]

By a 2-1 vote the Court of Appeals affirmed the District Court's opinion on June 26, 2006. Finding defendants' expert reports "not . . . persuasive in the present context" (App. 20a), the majority ruled that there was no genuine issue of fact about the meaning of the 1854 Treaty and upheld the grant of summary

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[9] *Keweenaw Bay Indian Community*, 370 F.Supp. 2d at 627, 630.

[10] *Keweenaw Bay Indian Community*, 370 F. Supp. 2d at 628.

[11] *Keweenaw Bay Indian Community*, 370 F. Supp. 2d at 628.

judgment to the Keweenaw Bay Indian Community. The majority then ruled that the 1854 Treaty itself was not sufficient "to demonstrate the clear congressional intent necessary to allow state taxation of reservation lands" because it "is not a federal statute or act of Congress." (App. 28a.) In doing so it expressly disagreed with the Ninth Circuit's holding in *Lummi Indian Tribe v. Whatcom County*[12] that land made freely alienable under a treaty is taxable by state and local governments. (App. 30a, n 14.)

In a dissent, Court of Appeals Judge Guy followed *Lummi Indian Tribe*. He could not "find in the Treaty anything from which I can reasonably conclude that once this land became freely alienable, it should escape taxation." (App. 35a.) He also found that it "clear that, in a historical context, what was referenced when 'removal' was mentioned was relocation of the tribe, and it had nothing to do with what might happen when freely alienable land was under individual ownership." (App.35a.)

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[12] *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355 (9th Cir. 1993), *cert. den.*, 512 U.S. 1228 (1994).

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS DECISION CONFLICTS WITH THE PRINCIPLES OF *CASS COUNTY V. LEECH LAKE BAND OF CHIPPEWA INDIANS* AND CASTS DOUBT ON IMPORTANT FEDERAL INDIAN LAW QUESTIONS REGARDING TREATIES AND LAND.

In *Cass County v. Leech Lake Band of Chippewa Indians*, the Court held that "when Congress makes reservation lands freely alienable, it is unmistakeably clear that Congress intends that land to be taxable by State and local governments, unless a contrary intent is clearly manifested."[13] This case raises the question of whether this principle applies to land allotted and made freely alienable *under a federal treaty*. It should. The Sixth Circuit's refusal below to hold that it did conflicts with the *Cass County* principle that alienability is the crucial concept in deciding whether reservation land is taxable by state and local governments.

This Court in *Cass County* emphasized the importance of alienability in determining taxability in several ways. First, the decision clearly covers all reservation lands made freely alienable by statute. The question of whether it covers reservation lands made freely alienable by treaty remains technically open because *Cass County* did not involve land made freely alienable by treaty.

Nonetheless, the *Cass County* Court's broad statement of the principle applies equally well to land made freely alienable by treaty. Self-executing treaties are the law of the land.[14] The ratification process ensures that treaties reflect the considered judgment of two-thirds of the United States Senate. By declaring

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[13] *Cass County,* 524 U.S. at 113.

[14] *Foster v. Neilson*, 27 U.S. 253, 314; 7 L. Ed 14 (1829), *overruled on other grounds, United States v. Percheman*, 32 US 51; 8 L. Ed 604 (1833).

that treaties do not reflect the will of Congress as statutes do, the Sixth Circuit below has thrown into question the accepted constitutional position of self-executing treaties, including treaties with American Indian tribes, as law of the land.

Second, the *Cass County* Court emphasized that two earlier cases, *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*[15] and *Goudy v. Meath*,[16] turned on the reservation land being "rendered freely alienable."[17]

In *Goudy*, this Court directly considered land allotted and made freely alienable pursuant to a treaty.[18] In this Court Goudy argued that there was "no express repeal of the [tax] exemption" in Article 6 of the 1854 Puyallup Treaty.[19] The *Goudy* Court rejected this argument: "Congress may grant the power of voluntary sale, while withholding the land from taxation or forced alienation, may be conceded. For illustration, see treaty of January 31, 1855, with the Wyandots."[20] But to do so, Congress must make its intent "clearly [manifest]."[21] The *Goudy* Court did not make any distinction between land made freely alienable by treaty and land made freely alienable by statute.

In *Yakima*, this Court held that land made freely alienable pursuant to the General Allotment Act was taxable.[22] The *Yakima* Court also emphasized that *Goudy* turned on alienability. It held that the *Goudy* decision "did not rest exclusively, or even primarily, on the § 6 [of the General Allotment Act][23] grant of personal jurisdiction over allottees to sustain the land taxes at

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[15] *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation,* 502 U.S. 251, 263-264 (1992).
[16] *Goudy v. Meath*, 203 U.S. 146; 27 S. Ct. 48; 51 L. Ed 130 (1906).
[17] *Cass County*, 524 U.S. at 111.
[18] *Goudy v Meath*, 38 Wash. 126, 127 (1905), *aff'd*, 203 US 146 (1906).
[19] *Goudy*, 203 U.S. at 149.
[20] *Goudy*, 203 U.S. at 149. Article 4 of the 1855 Treaty with the Wyandotts specifically and expressly stated that freely alienable lands would not be taxable. *Treaty with the Wyandotts*, 10 Stat. 1159, 1161 (January 31, 1855).
[21] *Goudy*, 203 U.S. at 149.
[22] *County of Yakima*, 502 U.S. at 267-268.
[23] *General Allotment Act*, 24 Stat. 388 (1887).

issue. Instead, it was the *alienability of the allotted lands* . . . that the Court found of central significance."[24]

Finally, in *Cass County* this Court made no distinction between land made freely alienable pursuant to statute and land made freely alienable pursuant to treaty. It stated that "[i]n *Goudy*, Congress had made reservation land alienable by authorizing the President to issue patents to individual members of the Puyallup Tribe" in a treaty.[25]

This Court has addressed the taxability of freely alienable reservation land three times. Each time it has emphasized the principle that freely alienable land is taxable by state and local governments. It has never distinguished between land made freely alienable pursuant to treaty and that made freely alienable pursuant to statute. Distinguishing between the two raises serious and previously unknown questions about the legal status of treaties. In this important area of federal Indian law, the Court of Appeals decision threatens to create two rules where before there was only one. There is no basis to support such a distinction.

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[24] *County of Yakima*, 502 U.S. at 691.
[25] *Cass County*, 524 U.S. at 111.

II. THE COURT OF APPEALS CREATED A CONFLICT AMONG THE CIRCUITS BY HOLDING THAT LAND MADE FREELY ALIENABLE PURSUANT TO TREATY IS NOT TAXABLE.

The Court of Appeals acknowledged that it "disgree[d] with the holding of the *Lummi* decision." (App. 30, n. 4.) In *Lummi Indian Tribe v. Whatcom County*, the Ninth Circuit squarely held that that reservation land made freely alienable under a treaty is taxable.[26] The Court of Appeals decision below created, therefore, an irreconcilable conflict among circuits.

The *Lummi* Court primarily relied on *Yakima* and *Goudy* in reaching its decision. Noting that that the *Yakima* Court "made no distinction between fee land allotted by treaty and that allotted under the [General Allotment] Act,"[27] the *Lummi* Court stated:

> The logic propounded by the *Goudy* Court and approved by *Yakima Nation* requires an Indian, even though he receives his property by treaty, to accept the burdens as well as the benefits of land ownership. This proposition may be hard to square with the requirement, recently approved by the *Yakima Nation* Court, that Congress' intent to authorize state taxation of Indians must be unmistakably clear. The strength of the language in *Yakima Nation*, however, makes virtually inescapable the conclusion that the Lummi land is taxable if it is alienable.[28]

This conflict between *Lummi* and the Court of Appeals decision below is important because it creates doubt in an otherwise clear area of the law. Two different circuits have ruled differently on exactly same issue. There are many treaties that

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[26] *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355, 1356, 1358 (CA 9, 1993), *cert. den.*, 512 U.S. 1228 (1994).
[27] *Lummi Indian Tribe*, 5 F.3d at 1357.
[28] *Lummi Indian Tribe*, 5 F.3d at 1358.

allotted land to individual American Indians. Land allotted pursuant to those treaties now faces different treatment based on whether the Ninth Circuit or the Sixth Circuit precedent is followed. The Sixth Circuit precedent will also negatively impact state tax revenues by removing land from the tax rolls. In a time where state tax revenues are often declining, this is important.

III. THE COURT OF APPEALS INCORRECTLY DECIDED AN IMPORTANT FEDERAL QUESTION WHEN IT HELD THAT INDIAN TREATY CANONS OF CONSTRUCTION CAN RESOLVE GENUINE ISSUES OF MATERIAL FACT ON SUMMARY JUDGMENT.

The dissent in the Court of Appeals found that "it is clear that, in historical context, what was referenced when 'removal' was mentioned was relocation of the tribe, and it had nothing to do with what might happen when freely alienable land was under individual ownership." (App. 35a.) Relying on the canons of construction for Indian Treaties, however, the majority in the Court of Appeals held that there was no genuine issue of material fact sufficient to prevent the granting of summary judgment to Keweenaw Bay Indian Community on the issue of whether the 1854 Treaty prohibited State taxation of fee simple land owned by the Community or its members on the reservation because tax reversion was the equivalent of removal. (App. 22a.) This improper use of the canons of construction created an important question about whether the canons of construction for Indian treaties can resolve genuine issues of material fact on summary judgment.

The canons for construction for Indian treaties are well-known. In interpreting treaties with American Indian nations, courts should consider the "history of the treaty, the negotiations, and the practical construction adopted by the parties."[29] Courts "interpret Indian treaties to give effect to the terms as the Indians

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[29] *Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 196; 119 S. Ct. 1187; 143 L. Ed. 2d 270 (1999) (quotation marks and citation omitted).

themselves would have understood them." [30] Finally, "Indian treaties are to be interpreted liberally in favor of the Indians, and . . . any ambiguities are to be resolved in their favor."[31]

The canons of construction for Indian treaties are not, however, an excuse for resolving genuine issues of material fact on summary judgment. "Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties."[32] And while all doubts should be resolved in the tribe's favor, "language should be construed in accordance with the tenor of the treaty."[33]

Using these canons of construction, petitioners created a genuine issue of material fact on Indian understanding of the 1854 Treaty. Article 3 of the 1854 Treaty authorized the President to allot land to individual Indians with such restrictions on alienation as he saw fit as part of the "civilization" process.[34] It contained no language exempting the individual Indians from paying state taxes on the land held in fee simple by them.

Article 11 of the 1854 Treaty promised, however, that "the Indians shall not be required to remove from the homes hereby set apart for them."[35] Respondents argued that the Indians understood this language to mean that they would not have to pay taxes on allotted land held in fee simple because the Indians would have rejected a treaty that required them to pay taxes on the reservation. (App. 18a.)

This conflates the two separate issues, as petitioners' expert Dr. Anthony Gulig showed. He submitted a historical report that showed that the American Indians understood article 3 applied to individual land ownership through which they could become

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[30] *Mille Lacs*, 526 U.S. at 196 (citations omitted).
[31] *Mille Lacs*, 526 U.S. at 200 (citations omitted).
[32] *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943).
[33] *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 353 (1944).
[34] Article 3, *Treaty with the Chippewa at La Pointe*, 10 Stat. at 1110.
[35] Article 11, *Treaty with the Chippewa at La Pointe*, 10 Stat. at 1111.

citizens of the state of Michigan and that article 11 applied to removal of the Tribe from Michigan to Minnesota or elsewhere by the federal government. This created a genuine issue of material fact sufficient to withstand a motion for summary judgment.

By resolving a conflict between experts on summary judgment, the Court of Appeals has created an important question about how to interpret Indian treaties. Should treaties be interpreted in their historical context as the dissent argued, or should the canons of construction for Indian treaties be mechanically applied to resolve genuine issues of material fact on summary judgment?

CONCLUSION

This Court should accept certiorari to resolve conflicts between the principles of its cases and to resolve the conflict that now exists between the Sixth and Ninth Circuits. The Court of Appeals also resolved a genuine issue of material fact on summary judgment through its mechanical application of the canons of construction for Indian treaties. This creates an important issue about how history is used in interpreting Indian treaties.

The petition for writ of certiorari should be granted.

Respectfully submitted

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