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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

As the Sixth Circuit recognized, and as Respondents' lengthy briefs underscore, this case raises "important questions of federal Indian law." Pet. App. 35a; *see* Municipal Br. 30-35. It concerns the rights and responsibilities of the Band, the federal government, and the State across hundreds of square miles in upper Michigan. Pet. 33-35; Township Br. 31; Municipal Br. 30-35. It likely decides the reservation-establishment question for several other tribes. Tribal Amicus Br. 23. And it involves a decision that, if allowed to stand, will unsettle reservations nationwide. Pet. 34-35.

The need for review, moreover, is particularly acute because the decision below implicates two splits. Respondents' contrary arguments are unpersuasive. First, Respondents say the decision below applies the same reservation-establishment test as other circuits. But that is wordplay. The language they cite—from *United States v. John*, 437 U.S. 634 (1978)—is not even the test for reservation establishment. More important, until the decision below, the unanimous view was that Indian treaties setting aside "reservations" for Indians create Indian reservations. The decision below shatters that consensus.

Second, Respondents deny that the Sixth Circuit—by importing the "active" supervision test from *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998), into a reservation case—split from then-Judge Gorsuch's *en banc* Tenth Circuit opinion or the decisions of the Second Circuit and this Court. That denial, however, withers upon examination. Other

circuits do not require active federal supervision for land Congress declares a "reservation."

Then there is the United States. Respondents do not dispute that the decision below conflicts with the long-held views of the Executive Branch and Congress. And those views are no surprise, given the repeated recognition of the Band's lands as a "reservation" in the Treaty, in subsequent federal legislation, and in numerous statements of Executive Branch officials (including President Lincoln's executive order) in the Treaty's wake. Pet. 10-11.

All that provides ample reason for this Court's immediate review or, alternatively, a call for the Solicitor General's views.

I. THE COURT SHOULD GRANT.

A. The Court Should Resolve The Split About Whether A Treaty That Withdraws A "Reservation" For The Benefit Of Indians Creates An Indian Reservation.

1. Although Respondents offer many merits arguments, they have no persuasive answer to how the decision below conflicts with multiple decisions of this Court and other circuits holding that treaties that withdraw land for Indians to create "reservations" do just that. To establish a reservation, it "is enough that from what has been [done] there results a certain defined tract appropriated" for Indian purposes. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2475 (2020) (quoting *Minnesota v. Hitchcock*, 185 U.S. 373, 390 (1902)). Previously, courts had uniformly found this test satisfied where a treaty set aside lands for Indians and identified

them as a "reservation." Pet. 18-19. Yet the Sixth Circuit held that the Band's Treaty—which "withdr[e]w [land] from sale for the benefit of" the Band and called the lands "reserved herein" a "reservation[]," Mich. App. 5a, 8a, 11a[1]—did *not* create a reservation. Indeed, the Sixth Circuit so held even though contemporary Congresses repeatedly identified the Band's lands as a "reservation" in statute, Pet. 20, and President Lincoln's Executive Order did the same, Pet. 11. Per the decision below, the Indians who signed the Treaty understood "reservation" to mean "no reservation." And George Manypenny—the architect of the Indian reservation system, Pet. 4—either intended "reservation" here to mean something it meant in no other treaty or sought to deceive the Indians, neither of which is plausible.

Michigan disputes the split, claiming that *John*, not *Hitchcock*, provides the relevant test. Mich. Br. 19-22. But Michigan's premise is wrong. The test from *John* that Michigan cites is for "Indian country." 437 U.S. at 648-49 & n.18; *see Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 511 (1991) (citing *John* for "Indian country" test). While *John* concerned reservation lands, and while an Indian reservation is a form of Indian country, *see* 18 U.S.C. § 1151(a), this Court applies a *reservation-specific* establishment test, just as it applies a reservation-specific test for disestablishment, *see McGirt*, 140 S. Ct. at 2462-63. Hence, when *McGirt* addressed reservation

[1] The Band cites here to the 1855 Treaty in Michigan's appendix, which is identical to the Band's version in all relevant respects.

establishment, it looked to *Hitchcock*, not Michigan's language from *John*. *See id.* at 2475.

Indeed, the portion of *John* that *does* concern reservation-establishment only confirms that *John* does not displace *Hitchcock* and that the decision below conflicts with both. *Hitchcock* found a reservation when land "was spoken of as a reservation." 185 U.S. at 389.[2] *John* likewise held that the reservation status of trust lands was "completely clarified by the proclamation … of a reservation." 437 U.S. at 649.

Respondents next seek to avoid the split by parroting *McGirt*'s language that "each tribe's treaties must be considered on their own terms." Alliance Br. at 19 (cleaned up). But that misses the point. Respondents cite no case holding that land withdrawn for the benefit of Indians and identified by treaty and statute as a "reservation" did not qualify as an Indian reservation; indeed, this Court and other circuits have repeatedly held the opposite. Pet 18-19. Given that, the conflict created by the Sixth Circuit's atextual approach is plain. *Cf.*, *e.g.*, *Menominee Indian Tribe of Wis. v. United States*, 577 U.S. 250, 255 (2016) (resolving split where circuits applied same test but disagreed as to whether "tribal entit[ies]" were entitled to "equitable tolling under similar circumstances").

Respondents dismiss *Hitchcock* and similar cases—like *Klamath & Moadoc Tribes & Yahooskin Band of*

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[2] Michigan's assertion that *Hitchcock* concerned Indian title alone, Mich. Br. 21-22, is incorrect. *Hitchcock* explained it had "little doubt that this was a reservation within the accepted meaning of the term." 185 U.S. at 389.

Snake Indians v. United States, 85 Ct. Cl. 451 (1937), *aff'd*, 304 U.S. 119 (1938)—as involving tribal land cessions. Township Br. 18. But that is irrelevant: An "Indian reservation" "refer[s] to [any] land set aside under federal protection for the residence or use of tribal Indians, *regardless of origin*." *Cohen's Handbook of Federal Indian Law* § 3.04[2][c][ii], at 190-91 (Nell Jessup Newton ed., 2012) (emphasis added). *McGirt* thus found lands carved by treaty from the public domain to be an Indian reservation. 140 S. Ct. at 2460.

Respondents also fail to explain away *Chemehuevi Indian Tribe v. McMahon*, 934 F.3d 1076 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 1295 (2020), which found a reservation where an executive order, in setting aside land, noted that Congress might wish "to authorize the addition of certain lands to [such] Mission Indian Reservations." *Id.* at 1080. Respondents emphasize that the *Chemehuevi* land was "withdrawn from all form of settlement." Township Br. 18 (quoting *Chemehuevi*, 934 F.3d at 1080); *see id.* (similar as to *Klamath*). That, however, describes a *similarity with*, not a difference from, this case. Here, the Treaty "withdr[e]w [land] from sale for the benefit of [the] Indians." Mich. App. 5a.

Finally, Respondents say that establishment was not directly at issue in some cases. Mich. Br. 22-23; Township Br. 18; Alliance Br. 20-22. But they do not say that about *John* or *Klamath*. As to *Hitchcock* and *Chemehuevi*, *see* Mich. Br. 19-23, they are wrong, *supra* 4 n.2 (discussing *Hitchcock*); *see* Answering Br. at 32, *Chemeheuvi*, No. 17-56791, 2018 WL 3018835 (contesting reservation's establishment by the executive order), *Chemehuevi*, 934 F.3d at 1080-81 (rejecting appellees'

reservation argument). And that courts and parties viewed the language in other cases as *obviously* establishing reservations only underscores the conflict.

2. Respondents also have no sound answer to how the Sixth Circuit exacerbated the conflict by holding that allotment treaties cannot create reservations. Pet. 23-27. First, they say the Sixth Circuit reached no such conclusion because it recognized that allotments are not inherently incompatible with reservation status. Mich. Br. 30; Township Br. 20; Alliance Br. 23; Municipal Br. 16 n.4. But the Sixth Circuit viewed this principle as applying only when a reservation *already* exists. Pet. App. 25a. Because the 1855 Treaty *itself* provided for allotment, the Sixth Circuit concluded it did not establish a reservation. *See id.*

Begrudgingly acknowledging this distinction, *see* Alliance Br. 24, Respondents say that the decisions cited by the Band did not "focus[] on the 'allotment' issue," *id.* That, however, is the point. Those decisions did not view allotment as an obstacle to creating a reservation. *See* Pet. 24-26. The Sixth Circuit did.

Last, Respondents contend that the treaties in the conflicting decisions did not allow the United States to dispose of unallotted land "however it saw fit." Alliance Br. 24. But Respondents point to not a single reservation-establishment case that has turned on the presence or absence of such a stipulation. And again, Respondents' claims are simply untrue: most of the relevant treaties *did* give the United States discretion over excess lands—either subject only to the requirement that sales to non-Indians "benefit" the Tribe, *e.g.*, Treaty with the Omaha, Mar. 16, 1854, 10

Stat. 1043 (at issue in *Nebraska v. Parker*, 577 U.S. 481, 484 (2016)), or without restriction, *e.g.*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 184 (1999) (President could dispose of uninherited and abandoned allotments "at his discretion," Treaty with the Chippewa, Sept. 30, 1854, 10 Stat. 1109); *United States v. Thomas*, 151 U.S. 577, 582 (1894) (same); *Thurston County v. Andrus*, 586 F.2d 1212, 1217 n.5 (8th Cir. 1978) (President could do anything "necessary and proper" with abandoned allotments, Treaty with the Winnebago, Feb. 27, 1855, 10 Stat. 1172).

3. The place to address Respondents' tens of thousands of words of merits arguments is at the merits stage. The arguments are also wrong, and provide no basis for denying review.

First, Respondents invoke "context" to inject into the reservation-establishment test a grab-bag of new requirements—for example, that a treaty must contain language found in other, cherry-picked treaties, Municipal Br. 25-30; that negotiators must use particular words, Mich. Br. 33-34; or that a treaty must not be preceded by a failed effort to create a reservation, Township Br. 16; Alliance Br. 22-23.

No court has imposed such gerrymandered requirements, and for good reason. This Court, again, asks only if "from what has been [done] there results a certain defined tract appropriated" for Indian purposes. *McGirt*, 139 S. Ct. at 2475 (quoting *Hitchcock*, 185 U.S. at 390). The Treaty satisfies that test because it "withdr[e]w [land] from sale for the benefit of" the Band and termed the "reserved" land a "reservation[]." Mich. App. 5a, 8a, 11a. Context, including the central role of

Commissioner Manypenny in negotiating the Treaty, confirms the conclusion, as the Band and *amici* have explained. Pet. 5-12; Tribal Amicus Br. 4-16.

Next, Respondents suggest that the Treaty created some type of "reservation" other than an "Indian reservation." Mich. Br. 19; Alliance Br. 20. Certainly, not all federal reservations are Indian reservations. *See United States v. Celestine*, 215 U.S. 278, 285 (1909). But an *Indian* treaty setting aside land *for Indians* has long been understood as creating an *Indian* reservation, as *Celestine* itself held. *Id.*

Michigan's argument that the Band's position undermines the Indian canon, Mich. Br. 32-37, is bizarre. No less than others, tribes are entitled to rely on the plain meaning of the promises made to them. *Mille Lacs*, 526 U.S. at 200. Reading "reservation" to unambiguously mean "no reservation" drains the canon of meaning.

Finally, Respondents are wrong that the Band's suit is inconsistent with the position its predecessors took before the Indian Claims Commission ("ICC"). Municipal Br. 24. Respondents observe that when the Band's predecessors sought compensation for the 1836 cession of their lands, they did not "offset" that compensation by the value of the 1855 reservation. *Id.* But the 1855 reservation was never understood to be compensation for the 1836 reservation, as the ICC recognized. Dkt.429-07 at 5244. Indeed, to the extent the ICC addressed the question here, it determined that

the Band's predecessors *did* live on reservations beginning in 1855. Dkt.429-11 at 5344.

B. The Court Should Resolve The Split About "Active" Supervision.

Respondents likewise cannot avoid the conflict the Sixth Circuit created with decisions of this Court, the en banc Tenth Circuit, and the Second Circuit about whether a treaty setting aside a "reservation" must also satisfy *Venetie*'s "active federal superintendence" test. Pet. 28-32; *see McGirt*, 140 S. Ct. at 2460; *Parker*, 577 U.S. at 484; *Mille Lacs*, 526 U.S. at 184; *Celestine*, 215 U.S. at 285; *Donnelly v. United States*, 228 U.S. 243, 255-59 (1913); *Hydro Res., Inc. v. United States EPA*, 608 F.3d 1131, 1151 (10th Cir. 2010) (en banc); *Oneida Indian Nation of N.Y. v. City of Sherrill*, 337 F.3d 139, 155 (2d Cir. 2003), *rev'd on other grounds*, 544 U.S. 197 (2005). The decision below held that reservation lands must be "actively controlled"—the supervision requirement this Court formulated for dependent Indian communities, Pet. 29-30—and that the Band's lands were "'under federal superintendence[]' … only for the time [alienation] restraints remained" on the Band's lands. Pet. App. 32a. But the Indian country statute "expressly contemplates private ownership within reservation boundaries," including by non-Indians. *McGirt*, 140 S. Ct. at 2464 (citing 18 U.S.C. § 1151(a) (reservations are Indian country "notwithstanding the issuance of any patent")). Indeed, the Sixth Circuit's position threatens the status of every reservation whose treaty provided for future allotment and patents.

Respondents' efforts to downplay the split fail. Michigan asserts that Tenth and Second Circuits *did*

require "active" superintendence. Mich. Br. at 25-27. But in *Hydro Resources*, then-Judge Gorsuch was clear: "[D]eclaring land to be part of a reservation" is, on its own, sufficient to establish land as "Indian country subject to federal jurisdiction." 608 F.3d at 1151. By contrast, placing a dependent Indian community under federal supervision requires some "*equally 'explicit action[']*"—that is, active control. *Id.* (emphasis added) (quoting *Venetie*, 522 U.S. at 531 n.6). Likewise, the Second Circuit determined that land "satisf[ied] the … superintendence requirement[] of 18 U.S.C. § 1151" "*[b]ecause* [it was] located on the Oneidas' historic reservation." *Sherrill*, 337 F.3d at 156 (emphasis added). Thus, in the Tenth and Second Circuits, but not the Sixth, a declaration of an Indian reservation places the land under federal supervision.

Other Respondents misstate the Band's position. They say the Band alleges that no federal-superintendence requirement *whatsoever* applies to Indian reservations. Alliance Br. 26-27; Townships Br. 25-28; Municipal Br. 22 n.6. The Band's position, however, is that the Sixth Circuit erred in requiring a promise of "*active* superintendence." Pet. 28 (emphasis added) (capitalization altered); *see* Tribal Amicus Br. 16-20. Although land—reservation or otherwise—must be under federal supervision to be Indian country, the Band maintains (with the Tenth and Second Circuits) that "reservation land[] … *by its nature* was set aside by Congress for Indian use under federal supervision," *Sherrill*, 337 F.3d at 155 (emphasis added), and no separate search for "indicia of active federal control,"

Pet. App. 33a (quoting *Venetie*, 522 U.S. at 534), is required.

As for the conflicts with this Court's precedent, Respondents make no real effort to address the absence of any "active" superintendence requirement in *Parker*, *Mille Lacs*, *Celestine*, and *Donnelly*. Pet. 30-31 & n.12. While Respondents claim that *McGirt*'s establishment analysis was based on "extensive evidence of federal supervision," Alliance Br. 26; *see* Mich. Br. 25, *McGirt* never even uses the words "supervision" or "superintendence," much less demands "active" supervision. *See* 140 S. Ct. at 2461 (suggesting that an Indian reservation is established when a treaty "refer[s] to … lands as a 'reservation'" and holding that a reservation can be established even without the term).[3]

II. ALTERNATIVELY, THE COURT SHOULD CALL FOR THE SOLICITOR GENERAL'S VIEWS.

Alternatively, the Court should call for the Solicitor General's views. Pet. 35-36. Respondents never contest that the decision below contradicts the positions of the Department of the Interior and Congress, both of which have confirmed that the 1855 Treaty created Indian reservations. *Id.* at 35. Neither do they dispute that the United States has rejected the "fictitious dichotomy"

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[3] Respondents incorrectly say that the Band wanted lands free of federal supervision. Mich. Br. 34-35; Alliance Br. 31. In concluding the negotiations, however, the tribal negotiators clearly explained: "We wish you to carry out the treaty as it is made…. We wish not only a rope to our lands but a forked rope, which is attached to all our interests so that you can hold on to it." Dkt.558-09 at 7083.

between allotment treaties and reservation-establishment treaties that the decision below embraced. Pet. 27. Nor can they deny that the United States has argued that the materially identical 1855 Saginaw-Chippewa Treaty established a reservation. *Id.* Particularly given the important federal interests at stake, a call for the views of the Solicitor General would be just as appropriate here as in the many recent cases—including *Ysleta del Sur*—where the Court has done so. Pet. 36; *accord* Pet. for Certiorari at 32-33, *United States v. Frey*, No. 21-840 (U.S. Dec. 3, 2021).

Respondents offer limp responses. Michigan says the *Saginaw Chippewa* litigation ended in a settlement based on the Saginaw Chippewa's 1864 treaty. Mich. Br. 31-32. But the United States' position was that "the Isabella Reservation … was set apart *under the 1855 Treaty*."[4] Indeed, the United States maintained, like the Band here, that "an Indian reservation is land withdrawn from sale or reserved by the federal government for the Indians' use."[5] Other Respondents say that requesting the Solicitor General's views will "place federal authorities in an awkward position" because the United States has thus far not participated. Alliance Br. 33-34. But that describes all the recent

[4] United States' Motion for Partial Summary Judgment at 19, *Saginaw Chippewa Indian Tribe v. Granholm*, No. 05-10296-BC (E.D. Mich. Mar. 5, 2010) (emphasis added), Dkt.222.

[5] *Id.* at 18.

cases cited by Band in which the Court invited the Solicitor General's views. Pet. 36.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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