No. 21-769

In the

Supreme Court of the United States

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS,

Petitioner,

v.

GRETCHEN WHITMER, Governor of the State of Michigan, et al.,

Respondents.

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

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BRIEF IN OPPOSITION

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January 24, 2022

QUESTION PRESENTED

In the 1855 Treaty of Detroit, the United States agreed to a process under which certain individual members of the political predecessors of the Little Traverse Bay Bands of Odawa Indians ("Band") could select small parcels from a 337-square-mile area of public land in Michigan and obtain fee title. Through this process, Band members acquired fee title to only a small fraction of the land. For nearly 200 years, state and local authorities have exercised jurisdiction over the land, and today, it is populated overwhelmingly by non-Indians.

In 2015, 160 years after the 1855 Treaty, the Band belatedly asserted that the Treaty established a permanent reservation over all 337 square miles and sought to enjoin state and local authorities from exercising jurisdiction within that area. In a thorough 51-page opinion, the district court concluded that the Treaty did not establish a reservation. A Sixth Circuit panel unanimously affirmed, and the full court denied en banc review without dissent.

The question presented is:

Whether both courts below erred in applying traditional tools of Indian treaty interpretation and this Court's precedents to conclude that the 1855 Treaty did not establish a permanent 337-square-mile Indian reservation for the Band?

CORPORATE DISCLOSURE STATEMENT

Respondents Emmet County Lake Shore Association and The Protection of Rights Alliance have no parent corporation, and no publicly held corporation owns 10 percent or more of their stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statute

Rule

Other Authorities

INTRODUCTION

This case concerns a so-far unsuccessful attempt by the Little Traverse Bay Bands of Odawa Indians ("Band") to rewrite history and claim a sizable chunk of Michigan as a permanent reservation under a 167-year-old treaty. In 1836, the Band—along with other Odawa and Chippewa bands of Indians—negotiated a treaty with the federal government by which they collectively ceded millions of acres to the United States, retaining a 50,000-acre permanent reservation in the Band's territory. But the Senate ratified that treaty only after amending it to provide that the reservation would exist for just five years. After agreeing to the amendment, and determined to remain in Michigan, Band members devised an alternative solution: purchasing land in fee on the open market. And when the Band restarted treaty negotiations with the United States in the 1850s, both parties agreed that fee ownership provided the best path forward. The parties memorialized such an approach in the 1855 Treaty of Detroit, July 31, 1855, 11 Stat. 621 ("1855 Treaty").

Under the 1855 Treaty, the parties agreed that individual Band members could select small parcels from within a designated 337-square-mile (or 216,000-acre) area of public land in Michigan and obtain fee title. The United States would retain title to any unselected land, which the Treaty stated it could then sell or dispose of as it would any other public land. Through this process, Band members obtained fee title to numerous individual parcels, but the vast majority of the land remained in government hands to be sold in fee to others. Over the ensuing decades, members

transferred most of their individual holdings. Consistent with that history, state and local authorities have long exercised jurisdiction over the area, which today is overwhelmingly populated by non-Indians.

Nonetheless, 160 years later, the Band filed suit against Michigan's governor, asserting that the 1855 Treaty established a 216,000-acre permanent reservation (more than four times the size of the reservation rejected in 1836) and seeking to enjoin state and local jurisdiction within that area. After considering nearly 700 pages of briefing, tens of thousands of pages of historical documents, and two full days of oral argument, the district court concluded in an exhaustive 51-page opinion that the 1855 Treaty did not establish a reservation. The Sixth Circuit unanimously affirmed and then denied rehearing en banc without dissent.

The Band now seeks to convince this Court that every judge to consider this case has gotten it wrong. But, in fact, the decisions below faithfully follow this Court's precedents and are eminently correct. While the Band claims that the decision below splits from decisions of this Court and others, those cases involved different treaties with different language and largely considered different issues (such as whether a reservation concededly established by treaty was later disestablished or diminished by subsequent action). This case involves the distinct language of the 1855 Treaty and the distinct (and ultimately factbound) question of whether that Treaty established a reservation in the first place. The Band's claim that, by creating a process for individual members to take

fee title to individual plots, the 1855 Treaty established a permanent reservation for the Band over four times larger than the proposed reservation that Congress rejected twenty years earlier is both implausible and demonstrably wrong. The Band's contrary arguments depend on divorcing two words in the Treaty ("reserved" and "reservations') from all surrounding text and context—a method of analysis that this Court has emphatically rejected. And while the Band contends that this case has far-reaching consequences, in reality, the decisions below are specific to the 1855 Treaty and preserve decades and decades of status quo. The only far-reaching and expectations-defying consequences would be those that would result were this Court to grant review and reverse. The Court should deny the petition.

STATEMENT OF THE CASE

A. Legal Background

Congress has defined "Indian country" to include: (1) "all land within the limits of any Indian reservation under the jurisdiction of the United States Government," (2) "all dependent Indian communities within the borders of the United States," and (3) "all Indian allotments." 18 U.S.C. §1151(a)-(c). If land qualifies as Indian country, "jurisdiction is in the tribe and the Federal Government"—and generally not the states—for criminal and civil purposes. *DeCoteau v. Dist. Cnty. Ct. for Tenth Jud. Dist.*, 420 U.S. 425, 427 n.2 (1975).

This case concerns the first of these categories: purported reservation land. Congress has never expressly defined "reservation," leaving this Court to fill the gap. In undertaking that task, the Court has

expressly declined to adopt a magic-words test. *See, e.g.*, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 161 (1973) ("There is no magic in the word 'reservation.'"). Instead, as with the other two statutory categories, the test for determining whether land qualifies as a "reservation" is "[1] whether the area has been validly set apart for the use of the Indians as such, [2] under the superintendence of the Government." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 511 (1991) (quotation marks omitted); *see also, e.g.*, *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 530 (1998).

To determine whether a treaty between the United States and a tribe established a reservation, the Court applies long-settled principles of treaty interpretation. "Indian treaties must be interpreted in light of the parties' intentions," with "the words … construed in the sense in which they would naturally be understood by the Indians" who were parties to the treaty. *Herrera v. Wyoming*, 139 S.Ct. 1686, 1699 (2019) (quotation marks omitted). It is thus "a fundamental misunderstanding of basic principles of treaty construction" to argue that "similar language" in different treaties involving different tribes "has precisely the same meaning." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999). "Each tribe's treaties must be considered on their own terms." *McGirt v. Oklahoma*, 140 S.Ct. 2452, 2479 (2020). In addition to the treaty's "written words," this Court has instructed courts to examine "the larger context that frames the [t]reaty, including the history of the treaty, the negotiations, and the practical construction adopted

by the parties." *Mille Lacs*, 526 U.S. at 196 (quotation marks omitted).

If these analytical tools demonstrate that a treaty established a reservation, subsequent enactments or actions may result in its disestablishment (or diminishment). Most of this Court's recent cases focus on that distinct and subsequent question. *See, e.g.*, *McGirt*, 140 S.Ct. 2452; *Nebraska v. Parker*, 577 U.S. 481 (2016); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998); *Hagen v. Utah*, 510 U.S. 399, 411 (1994); *Solem v. Bartlett*, 465 U.S. 463 (1984). But just as this Court is reluctant to find that a reservation has been diminished or disestablished absent clear legislative action, *see, e.g.*, *Parker*, 577 U.S. at 488, a reservation cannot be initially established via ambiguities or implications.

B. Factual Background

1. The Band is a federally recognized tribe whose members have a long connection with Michigan. Pet.App.38a. In 1836, its predecessors, along with a number of other Odawa and Chippewa bands of Indians (collectively, the "bands"), agreed to treaty terms with federal negotiators. Specifically, the bands agreed to cede to the United States approximately one-third of present-day Michigan. Pet.App.38a-39a. In exchange, a permanent 50,000-acre reservation in the Band's territory would be retained and "held in common."[1] Pet.App.40a. The United States also

[1] Lands were also retained in the territory of other bands, whose modern-day successors consist of four federally recognized tribes.

promised the bands land "West of the Mississippi" if they chose to relocate. Pet.App.40a.

The Senate, however, opposed the creation of a 50,000-acre permanent reservation for the Band. Pet.App.40. The Senate thus amended the negotiated treaty language to provide that the reservation would expire after five years. Pet.App.40a. In return, the United States agreed to make a $200,000 principal payment to the bands at the time of the "surrender[]" of the reservation, along with annual interest payments until then. Pet.App.40a. The bands approved these modifications. Pet.App.40a.

2. The temporary reservation established by the 1836 treaty expired in 1841, and though the United States did not remove the bands, their future in Michigan remained uncertain. Pet.App.42a. Determined to stay in Michigan, individual Band members began purchasing land in fee, partly using the ongoing interest payments from the federal government. Pet.App.40a-41a.

In the 1850s, with more settlers moving to Michigan, the United States and the bands renewed their discussions. In 1855, the bands wrote to George Manypenny—the new Commissioner of Indian Affairs—to explain that "we need means to buy more lands." Pet.App.44a. In internal federal correspondence, Manypenny recognized that "[t]here is no prospect of [the bands] ever being willing to emigrate, nor does Michigan desire to have them expelled." Pet.App.45a. Accordingly, Manypenny supported a policy of giving "titles in fee to individuals for separate tracts." Pet.App.46a. The Secretary of the Interior "approved" that policy. Pet.App.46a.

3. In July 1855, the United States and the bands (which the United States amalgamated as a single political entity) convened in Detroit to negotiate a new treaty. Pet.App.47a. Still scarred by their experience with the 1836 treaty, the bands' delegates opposed any arrangement under which the United States would hold land "by a big string ready to pull." D.Ct.Dkt.558-11 at 7144. The delegates emphasized that they had recently purchased lands in fee and that they wanted to hold fee title to newly acquired land, like the "white man." Pet.App.49a; *see* D.Ct.Dkt.558-11 at 7144 ("[I]t is the wish of many of us that you grant us papers, … we want to choose like the whites & have their titles.").

The federal delegates acceded to these requests. They saw "no difficulty" with granting "absolute title, save a temporary restriction upon your power of alienation." Pet.App.49a. They agreed to meet with the bands' delegates to designate areas from which members could select their individual fee lands. Pet.App.50a. And they explained that "it is the intention of the Government to allow each head of a family 80 acres of land & each single person over 21 years of age 40 acres." Pet.App.50a (alteration omitted).

After the parties reached a consensus about land, they transitioned to other topics, including the unpaid $200,000 principal payment referenced in the 1836 treaty. Pet.App.51a. Some of the bands' delegates requested that the government retain the principal and continue paying interest indefinitely. Pet.App.51a. The federal delegates disagreed, explaining their desire to "have you civilized citizens

of the State." Pet.App.51a. The federal delegates thus proposed that the United States would make payments for only ten years. *See* Pet.App.51a-53a. In response, the bands' delegates explained that "we are satisfied" and asked that the treaty "be honestly executed." Pet.App.53a.

4. The 1855 Treaty memorialized these negotiations. Article 1 addressed land issues and provided that, for a ten-year period, the United States would "withdraw from sale" "unsold public lands" in Michigan, which the Treaty described in eight clauses. The land withdrawn to allow for selection by individual members of the Band's predecessors consisted of 337 square miles and over 100 miles of Lake Michigan shoreline. Pet.App.114a-15a. Article I divided the ten-year selection period in half. During the first five-year period, certain members of the bands could "select[]" either "80 acres of land" or "40 acres of land" from "within the tract reserved" for those "selections." Pet.App.116a. Following these "selections," "the persons entitled to the land" would receive "certificates … guaranteeing and securing to the holders their possession and an ultimate title to the land." Pet.App.116a. Those certificates would "contain a clause expressly prohibiting the sale or transfer by the holder of the land" for ten years, but members would receive "a patent … in the usual form" afterward. Pet.App.118a.

During the second five-year period, the United States would allow members to "purchase[]" any unselected land within the 216,000-acre tract. Pet.App.119a. Article I stated that lands "so purchased … shall be sold [by the United States]

without restriction, and certificates and patents shall be issued for the same in the usual form as in ordinary cases." Pet.App.119a. Article I provided that, if any land remained unselected or unpurchased after the two five-year periods, it "may be sold or disposed of by the United States as in the case of all other public lands." Pet.App.119a. Finally, Article I stated that the Treaty did not "prevent the appropriation … by the United States, of any tract or tracts of land within the aforesaid reservations." Pet.App.120a.

The Treaty's remaining provisions addressed matters other than land. Article 2 explained that the United States would make payments to the bands for ten years; Article 3 released the United States from claims related to previous treaties with the bands; Article 4 addressed the provision of interpreters; Article 5 dissolved the fictional tribal entity created for purposes of Treaty negotiation; and Article 6 made the Treaty binding upon ratification. Pet.App.120a-123a. The Senate ratified the Treaty in 1856. Pet.App.13a.

5. Following ratification, the United States struggled to implement the 1855 Treaty. Rapid turnover among federal officials during and after the Civil War led to widespread confusion, causing errors and delays in the land-selection process. Pet.App.56a-57a. Congress ultimately intervened. In 1872, it enacted a law that assisted members in obtaining patents for parcels that they had selected and "restored" "undisposed" lands "to market," thereby effectuating the Treaty's language. Pet.App.58a. In 1875 and 1876, Congress enacted two more laws to facilitate the provision of patents for selected lands

while again restoring undisposed lands for public sale. Pet.App.58a-59a. Ultimately, Band members acquired fee title to only a small fraction of the 337-square-mile area. *See* D.Ct.Dkt.582-7 at 9763 (map identifying land selections).

In the last quarter of the nineteenth century, the United States maintained detailed records of Indian reservations, but, consistent with the terms of the Treaty and the individual fee interests obtained, those records did not identify any reservation for the bands. Pet.App.28a. In 1887, Andrew Blackbird—a college-educated Band delegate to the Treaty negotiations and a Treaty signatory—published a history of the bands, which identified no permanent reservation. D.Ct.Dkt.600-125. In 1936, a federal official wrote to the Commissioner of Indian Affairs and explained that the Band had not lived on a reservation "for nearly a century"; that Band members "are not wards of the federal government"; and that "[t]hese people have been citizens of the State of Michigan and come under the laws of the state." D.Ct.Dkt.560-55 at 9162. In 2014, in response to a FOIA request, the Interior Department did not identify the lands referenced in the Treaty as a reservation. D.Ct.Dkt.75-3. And today, non-Indians account for over 90% of the area's population.

C. Proceedings Below

1. In August 2015, 160 years after the 1855 Treaty, the Band filed suit against Michigan's governor, asserting that the 1855 Treaty created "a permanent nearly-216,000 acre reservation" for the Band. D.Ct.Dkt.1 at 7. The Band sought "an order declaring that the lands within the boundaries of the

Reservation are Indian country under federal law and enjoining the State from its improper exercises of authority." D.Ct.Dkt.1 at 2. None of the other tribes that signed the 1855 Treaty intervened as plaintiffs (or ever advanced similar claims), and the United States declined the district court's invitation to intervene. Numerous parties intervened as defendants, including the Emmet County Lake Shore Association and The Protection of Rights Alliance (together, the "Associations"), two nonprofit organizations whose members own land in the large region that the Band claims as a reservation. D.Ct.Dkt.50. As they explained, accepting the Band's arguments would cause jurisdictional chaos and defy settled expectations. *See, e.g.*, D.Ct.Dkt.27, 47.

The defendants moved for summary judgment, asserting that the 1855 Treaty did not create a reservation and that any reservation would have long since been disestablished. Pet.App.36a. After two full days of oral argument, the district court granted their motions, holding that "the 1855 treaty cannot plausibly be read to create an Indian reservation, even when giving effect to the terms as the Indian signatories would have understood them and even when resolving any ambiguities in the Treaty text in favor of the Indians." Pet.App.37a.

The court began by rejecting the Band's argument that it had to demonstrate only "some federal action creating a 'set aside' of land." Pet.App.69a. The court instead recognized that, under this Court's precedent, the court must assess whether the 1855 Treaty "'[1] validly set apart' the disputed lands 'for the use of the Tribe as such, [2] under the superintendence of the

Government.'"[2] Pet.App.69a-70a (quoting *Okla. Tax Comm'n*, 498 U.S. at 511, in turn quoting *United States v. John*, 437 U.S. 634, 649 (1978)). The court concluded that neither requirement was satisfied.

Examining pre-Treaty history and context, the court found that the United States had "two primary objectives" in negotiating the Treaty: "(1) the provisioning of permanent homes for Indians who had signed the 1836 Treaty, with said homes being broken into 'separate tracts' with the title in fee belonging to the individual, rather than being held in common by the Band; and (2) the settlement and consolidation of monies and services owed to the Indians under previous treaties." Pet.App.72a. The court determined that "the unmistakable intention of the Bands going into the treaty negotiations was securing additional monetary compensation so that they could continue to successfully buy up lands as they had been since at least the 1840s." Pet.App.72a. And the court found that "[t]he Treaty Journal capture[d] the sentiment of the pre-negotiation history." Pet.App.73a.

Turning to text, the court explained that, when "placed in the proper historical context and interpreted with that context in mind, the only reasonable conclusion is that the plain and unambiguous terms do not create a federal set aside of

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[2] Notably, earlier in the litigation, the Band itself identified the test applied by the district court as the correct one. *See* D.Ct.Dkt.80 at 1305-06 (acknowledging that this Court "ask[s] whether the area has been validly set part for the use of the Indians as such, under the superintendence of the Government" (quoting *Okla. Tax Comm'n*, 498 U.S. at 511)).

land for use as a reservation." Pet.App.82a. Rather, the parties "clearly and methodically" sought to accomplish the following:

> (1) Band representatives at the Treaty Council identified a particular area of Michigan where their members would be able to select a 40 to 80 acre parcel of land depending on their familial status;
>
> (2) The United States withdrew the designated lands from public sale so they would not otherwise be sold and would remain available for selection by individual Band members;
>
> (3) The United States (through the Indian Agent) would compile a list of eligible members within a year;
>
> (4) The individual Band members were then allowed five years to make their land selection from the parcel designated by their representative at the Treaty Council;
>
> (5) Once a selection of land was made, the United States issued a certificate, which authorized the selector to possess the land, but which would contain a restraint on alienation for ten years;
>
> (6) Then, once the five-year term for land selection expired, all the lands not selected 'remain[ed] the property of the United States,' and the government continued to withhold them from public sale, to allow Band members [to] purchase the unselected land at

> the same prices and using the same methods as other public land was sold;
>
> (7) Finally, ten years after the Band members were first able to make their selections, any land that had gone unselected and unpurchased could be 'sold or disposed of by the United States as in the case of all other public lands.'

Pet.App.82a-83a (capitalization altered). The court found these terms "perfectly consistent with Manypenny's stated desire" to provide "individual tracts of land, with the title to the land being held in fee by each head of household"—and perfectly inconsistent with the creation of a permanent reservation for the Band as a collective. Pet.App.83a. The court buttressed this conclusion with the commonsense observation that the Senate did not reject a 50,000-acre permanent reservation in 1836, just to create a permanent reservation over four times as large just two decades later. Pet.App.99a n.4.

The court then offered an "additional reason" for rejecting the Band's claim: The Treaty did not provide for "ongoing federal superintendence" of the land. Pet.App.83a. For land selected within the first five-year period, "the parties agreed that after the temporary restraint on alienation, the land would be owned by the individuals, who would hold patents, and the lands would be freely alienable." Pet.App.84a. For land purchased within the second five-year period, "there were not even temporary restraints on alienation or other indicia of ongoing federal superintendence." Pet.App.84a. In addition, the court found that the Band "clearly understood" from the

federal delegates' resistance to the bands' financial proposals "that the 1855 Treaty did not provide for ongoing federal superintendence." Pet.App.85a-86a.

The court next explained why the Band's "arguments in favor of a reservation having been created are not persuasive." Pet.App.86a. Beyond "fragmentary quotations, divorced of their context and quoted in isolation," Pet.App.86a, "there [wa]s no record of the [Band's] treaty construction in the briefing," forcing the court to try to piece together the Band's argument from a "demonstrative exhibit" used at oral argument, Pet.App.102a & n.6. The Band then "changed course at oral argument, offering its own theory of treaty interpretation for the first time"—*viz.*, that the Treaty "simultaneously created Indian reservations for the Bands while also allowing for allotments." Pet.App.101a-02a. The court criticized the Band for "isolat[ing] particular phrases from the Treaty." Pet.App.93a. The court continued: "When placed in the proper context," the phrases "tract reserved" and "tracts of land within the aforesaid reservations" in fact "clearly and unambiguously" foreclosed any claim that the Treaty created a permanent reservation. Pet.App.94a.

Because the court concluded that the 1855 Treaty did not establish a reservation, it did not address the parties' disestablishment arguments. Pet.App.104a.

2. The Band appealed to the Sixth Circuit, which unanimously affirmed the district court's "well-reasoned opinion," concluding that the 1855 Treaty did not "set apart land for" the "purpose" of an Indian "reservation," but rather established a process "akin" to the "allotment" of public domain lands.

Pet.App.19a, 25a, 35a. The Sixth Circuit agreed with the district court that "the Treaty negotiations illustrate[d] that the Band and the federal government wished to provide tribal members with individual titles to land." Pet.App.26a. It found that the "practical construction" of the Treaty supported that conclusion, as Band leaders recognized after the Treaty that the bands had "renounced their chiefdoms" and were "now 'under the laws of the State of Michigan and the United States.'" Pet.App.27a. The court noted that post-Treaty federal records did not identify the 337-square-mile area as a reservation, and although certain letters authored by Band members or federal officials sometimes referenced a "reservation," the court found it "unclear … whether the tribal members and federal officials used the word … as a legal term of art." Pet.App.27a-28a. The court thus concluded that, "[w]hen reviewed in full, the history of the treaty, its precedent negotiations, and the practical construction adopted by the parties demonstrate that the Treaty did not provide land for Indian reservation purposes." Pet.App.29a (quotation marks omitted).

Although that conclusion sufficed to affirm the district court, the Sixth Circuit also agreed with the district court that the 1855 Treaty did not provide for federal superintendence "for purposes of … reservation." Pet.App.31a. As the Sixth Circuit explained, the treaty negotiations "made clear" that "the leaders of the Band … did not want land under federal superintendence or federal control," and the government "made clear its desire for Band members to be independent from governmental support." Pet.App.33a.

Because the Sixth Circuit concluded that the 1855 Treaty did not establish a reservation, it did not reach other arguments pressed on appeal, including arguments regarding disestablishment, judicial estoppel, and issue preclusion. Pet.App.34a n.10.

3. The Band sought rehearing en banc. No judge requested a vote, and the Sixth Circuit denied the petition without dissent. Pet.App.111a-112a

REASONS FOR DENYING THE PETITION

After carefully studying this Court's precedents and the extensive historical record, every judge to consider this case has thoroughly rejected the Band's much-belated claim that the 1855 Treaty established a permanent reservation. The Band identifies no reason to disturb that consensus or risk upending long-settled expectations.

The 1855 Treaty established a process by which individual Band members could select small parcels of land from within 337 square miles of public lands and obtain individual fee title. Neither the Band nor even individual Band members were given the entire land mass, members selected individual tracts covering only a small portion of the larger area, and members no longer own most of that land. State and local governments have long exercised jurisdiction over the area, which has been overwhelmingly populated by non-Indians for many decades. As the decisions below explain in exhaustive and factbound detail, the notion that the Treaty and its land-selection process actually established a 337-square-mile permanent reservation on which the exercise of state and local jurisdiction is broadly prohibited is irreconcilable with text, context, and history.

The Band claims that the decision below splits from decisions of this Court and various other courts in various ways, but all those decisions dealt with different treaties, most addressed different issues, and none endorses the kind of reading of isolated words stripped from context on which the Band's position depends. Accordingly, the Band's petition reduces to a plea for factbound error correction in the absence of any error to correct. The Band's arguments about this case's importance are equally unpersuasive, as the only thing that would cause chaos and vitiate settled expectations would be to grant plenary review and embrace the Band's late-breaking effort to oust Michigan of jurisdiction over a significant portion of the State. The Court should deny the petition.

I. The Sixth Circuit's Decision Does Not Conflict With Decisions Construing Different Treaties And Involving Different Tribes And Different Issues.

The Band asks this Court to decide "[w]hether the 1855 Treaty of Detroit established a federal reservation for the Little Traverse Bay Bands of Odawa Indians." Pet.i. According to the Band, the Sixth Circuit's resolution of that question conflicts with "multiple" decisions of this Court and others. Pet.2. But the Band does not and cannot claim that this Court, any other federal court of appeals, or any state court of last resort has ever addressed that question. *Compare, e.g.*, S.Ct. Rule 10; *McGirt*, 140 S.Ct. at 2460 ("While Oklahoma state courts have rejected any suggestion that the lands in question remain a reservation, the Tenth Circuit has reached the opposite conclusion."). Instead, the Band contends

that, in three respects, the decision below conflicts with decisions involving *other* treaties, *other* tribes, and *other* issues. Even setting aside the bedrock rule that "[e]ach tribe's treaties must be considered on their own terms," *McGirt*, 140 S.Ct. at 2479, those conflicts are illusory.

1. The Band first contends that this Court and three circuits have adopted a magic-words test under which *any* use of the word "reservation" in a treaty is "*always* … sufficient" to establish a reservation, regardless of context. Pet.17 (emphasis altered). In the Band's view, though the Treaty contains nearly 3,000 words, only two matter: "reserved" and "reservations." Pet.19-20. In reality, however, this Court is no more tolerant of divorcing terms in Indian treaties from the company that they keep than it is of "constru[ing] statutory phrases in isolation." *United States v. Morton*, 467 U.S. 822, 828 (1984). To the contrary, this Court's cases teach that both a treaty's "written words"—*all of them*—and the "larger context that frames the [t]reaty" are critical to treaty construction. *Mille Lacs*, 526 U.S. at 196.

That statutory and historical context is especially essential when it comes to the word "reservation," which not only can have different meanings in different contexts, but lacked a term-of-art meaning in the Indian-law context for much of the nineteenth century. *See, e.g.*, *McGirt*, 140 S.Ct. at 2461; 1 *Cohen's Handbook of Federal Indian Law* §3.04[2][c][ii] (2019); Pet.21 (citing 1852 dictionary listing multiple definitions for "reservation"). Just as a statute dealing with Native American issues can use the word "recognized" in a non-term-of-art sense—*i.e.*, without

"connot[ing] political recognition," *Yellen v. Confederated Tribes of Chehalis Rsrv.*, 141 S.Ct. 2434, 2444-45 (2021)—a treaty can use the terms "reserve" or "reservation" in a non-term-of-art sense that does not connote a permanent Indian reservation for the tribe as a collective.

Far from refuting that conclusion, the cases that the Band invokes reinforce it. *Minnesota v. Hitchcock*, 185 U.S. 373 (1902), did not hold that no further analysis is necessary whenever the word "reservation" makes an appearance. To the contrary, the Court explained how both the words of the treaty *and the history surrounding it* demonstrated that certain aboriginal lands never ceded to the United States "became, in effect, an Indian reservation." *Id.* at 389-90. And in *United States v. Celestine*, 215 U.S. 278 (1909), the Court expressly admonished that "a reservation is *not* necessarily 'Indian country'" because the word "reservation" can refer to "*any* body of land, large or small, which Congress has reserved from sale *for any purpose*." *Id.* at 285 (emphases added).

This Court's more recent cases, such as *Parker* and *McGirt*, address the distinct question whether a reservation established by an earlier treaty was disestablished or diminished by later legislative acts. In that context, later references to a "reservation" may underscore the continued existence of a reservation that the parties agree once existed. But even in that context, there is no magic-words test. In *McGirt*, for example, this Court admonished that "[e]ach tribe's treaties must be considered on their own terms," and it was not the bare use of the word "reservation," but

rather repeated language about land being "forever set apart" as a "permanent home" for "the Creek nation" that the Court found made the establishment of a reservation an easy question there. 140 S.Ct. at 2479, 2460-61. Moreover, this Court's insistence that a reservation once established cannot be lightly disestablished or diminished underscores that reservation status, with all of the jurisdictional consequences that flow from it, cannot be lightly established.

Unsurprisingly given this Court's teachings, the lower-court cases that the Band cites neither adopt a magic-words test nor conflict with the decisions below. The Band emphasizes *Chemehuevi Indian Tribe v. McMahon*, 934 F.3d 1076 (9th Cir. 2019), a case addressing whether certain land in California lay within the boundaries of the Chemehuevi Reservation. But in concluding that the federal government validly established that reservation, the Ninth Circuit did not simply locate the word "reservation" in the relevant document (an executive order, rather than a treaty) and call it a day. Instead, the court found it "clear that a Chemehuevi Reservation was validly established" for numerous reasons, including that *this* Court "expressly so recognized" decades earlier. *Id.* at 1080-81 (citing *Arizona v. California*, 373 U.S. 546 (1963)). The earlier Ninth Circuit case that the Band cites, *United States v. McIntire*, 101 F.2d 650 (9th Cir. 1939), merely noted that the Flathead Nation's treaty established a "general Indian reservation," without suggesting that the bare use of the term "reservation" is always and everywhere sufficient for the purpose. *Id.* at 651.

The Eighth Circuit's decision in *Devils Lake Sioux Tribe v. North Dakota*, 917 F.2d 1049 (8th Cir. 1990), is equally inapposite. There, the court observed that an 1867 treaty between the United States and the Sisseton and Wahpeton Sioux Bands of the Great Sioux Nation established "two permanent reservations" in North Dakota. *Id.* at 1051. But the parties did not dispute that point; the appeal concerned only whether the tribe had "settled its claim" to a "lakebed" 110 years later, "in 1977." *Id.* at 1054-55.

The Tenth Circuit's decision in *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387 (10th Cir. 1990), is even further afield. There, the court addressed whether two executive orders—one from President Roosevelt in 1908, the other from President Taft in 1911—"terminated" an addition to the Navajo Reservation, the establishment of which no one disputed. *Id.* at 1388. The Band notes (at 17) that, in the course of surveying various other executive orders terminating reservations and restoring lands to the public domain, the court mentioned an 1872 executive order in which President Grant "disestablished a portion of" a reservation and, "'in lieu' of that portion, … set aside other lands as a reservation." *Id.* at 1405. The decision says nothing about the bare use of the term "reservation" being sufficient. The Band's felt need to invoke *Yazzie* only demonstrates the complete lack of authority for a test that would substitute the mere use of the words "reserve" or "reservation" for consideration of the full text and context. Here, the full text and context belie any claim that Congress sought to create 337 square miles of Indian country (after rejecting a much smaller

reservation two decades earlier), rather than to simply identify a tract of public land from which individual fee parcels could be acquired.

2. The Band next contends that the decision below splits from decisions of this Court and four other circuits that have treated "allotments" as compatible with reservation status. Pet.24, 26-27. It is hard to see how that could form the basis of a split when, contrary to the Band's mischaracterization of the court's opinion, the Sixth Circuit expressly "recognize[d] … that allotments are not 'inherently incompatible with reservation status.'" Pet.App.29a n.8. It simply (and correctly) concluded that "a lack of inherent incompatibility with reservation status does not mean that an Indian reservation is established wherever allotments are provided for." Pet.App.29a n.8.

Moreover, most of the Band's cases involve the analytically distinct question whether the allotment of parcels within an already-established reservation supports or accomplishes the diminishment or disestablishment of the reservation. *See, e.g.*, *McGirt*, 140 S.Ct. at 2463-64 (discussing allotment statutes enacted in the 1900s that related to reservation established in the 1830s); *Parker*, 577 U.S. at 490 (similar); *Hagen*, 510 U.S. at 403-04 (similar); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 356-58 (1962) (similar); *Murphy v. Royal*, 875 F.3d 896, 919 (10th Cir. 2017); *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1209, 1221 (9th Cir. 2001) (en banc). But it is one thing to reject the claim that an allotment process is sufficient to contradict a prior decision to set aside the land for

the tribe's common use, and quite another to accept that an ab-initio process for individual fee ownership is consistent with a reservation for tribal purposes. The Band's cases thus have little, if any, bearing on the question here, which is whether the 1855 Treaty established a reservation in the first place.

Recognizing this problem, the Band suggests that both this Court and others have "found that treaties created reservations even when the treaty instrument itself provided for allotment and eventually patents." Pet.24. But none of the cited decisions focused on the "allotment" issue, let alone suggested that the allotment process affirmatively supported reservation status (as opposed to not being sufficient to defeat reservation status). *See, e.g.*, *Mille Lacs*, 526 U.S. at 176 (resolving question about "usufructuary rights"). Nor did any involve a treaty containing the same kind of land-selection process enshrined in the 1855 Treaty, in which any non-selected land remained with the United States to dispose of however it saw fit (let alone a prior rejection of a smaller permanent reservation or a pattern of individual members buying land in fee). *See, e.g.*, *Parker*, 577 U.S. at 484 (treaty gave President discretion to create allotments out of reservation in the future and sell any unallotted land for "benefit" of tribe).

3. The Band lastly suggests that the Sixth Circuit's alternative federal superintendence holding conflicts with decisions from this Court and two other circuits purportedly holding that "active" federal superintendence is unnecessary under 18 U.S.C.

§1151(a).[3] Pet.28, 31-32. At the outset, whether federal superintendence is required is beside the point since both courts below held that the 1855 Treaty did not satisfy the threshold requirement of setting aside land for the purpose of establishing a reservation. *See* pp.27-30, *infra*. At any rate, the Band's argument fails on its own terms.

The Band insists that the federal superintendence requirement "applies only to dependent Indian communities" under 18 U.S.C. §1151(b), not to "Indian reservations" under 18 U.S.C. §1151(a). Pet.32. But this Court has squarely held that "18 U.S.C. §1151"—which covers *three* categories of Indian country, *including* Indian reservations—"codified" "two" separate "requirements," one being "federal superintendence," which requires "indicia of active federal control over the … land." *Venetie*, 522 U.S. at 527, 534; *see also id.* at 529 (explaining that, "*like Indian reservations*," other Indian country must have "been validly set apart for the use of the Indians … under the superintendence of the Government" (emphases altered); *John*, 437 U.S. at 649 (similar).

The Band suggests that "no court prior to this litigation" has ever required a showing that a treaty provided for active federal superintendence when a reservation is concerned. Pet.30. But even setting aside *Venetie*, that claim is belied by the very case on which the Band relies, as *McGirt* concluded that the Creek treaties established a reservation only after

[3] As noted, the Band recognized earlier in the litigation that federal superintendence *is* a requirement. *See* n.2, *supra*.

recounting extensive evidence of federal superintendence, including the federal government's promise that "'no portion'" of the Creeks' land "'shall ever be embraced or included within, or annexed to, any Territory or State'" and the federal government's "caveat" that the Creeks' land would "revert to the United States" in certain circumstances. *McGirt*, 140 S.Ct. at 2460-61. Indeed, the Creek Tribe itself argued that, under the relevant treaties and statutes, "the United States retained both a reversionary interest in and supervisory power over" the lands at issue. Br. for Muscogee (Creek) Nation as *Amicus Curiae* at 7, No. 18-9526, *McGirt* (U.S. Feb. 11, 2020).

Turning to the lower courts, the Band primarily emphasizes the Tenth Circuit's decision in *Hydro Resources, Inc. v. EPA*, 608 F.3d 1131 (10th Cir. 2010) (en banc). But that decision addressed only "dependent Indian communities" under 18 U.S.C. §1151(b), as "[i]t was … undisputed that the[] lands" at issue "d[id] not qualify as part of any Indian reservation within the meaning of §1151(a)." *Id.* at 1139. And even on that question, its reasoning is entirely consistent with the Sixth Circuit's, as the court explained that, under *Venetie*, "*much like reservations*," there are two "necessary requirements" for dependent communities, and neither involves a "community of reference": "'first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; *second, they must be under federal superintendence*.'" *Hydro Res.*, 608 F.3d at 1148 (emphasis added).

The Second Circuit's decision in *Oneida Indian Nation of New York v. City of Sherrill*, 337 F.3d 139

(2d Cir. 2003), *rev'd on other grounds sub nom., City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005), does not conflict with the decision below either. There, the City of Sherrill "*accept[ed] the proposition that the [disputed] properties are located within the Oneida reservation's historic boundaries*," but nevertheless argued that "the properties are not in Indian country because they were neither set aside by the federal government for Indian use nor placed under federal superintendence." *Id.* at 155 (emphasis added). The court rejected that argument because it contradicted the proposition that the city accepted: "[B]y its nature," a reservation exists under 18 U.S.C. §1151(a) only if it satisfies "two requirements"—the land is "set aside by the Federal Government for the use of the Indians as Indian land" and is "*under federal superintendence*." *Id.* at 156 (emphasis added). That conclusion is in lockstep with the decision below.[4]

II. Both Courts Below Correctly Concluded That The 1855 Treaty Did Not Establish An Indian Reservation.

The Band's petition boils down to a plea for error correction, but there is no error to correct. Four federal judges carefully considered the question, and all four reached the same, unsurprising conclusion that the 1855 Treaty provided a path to individual land ownership rather than effectuating a transfer of sovereignty by creating a massive reservation that went undetected for a century-and-a-half.

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[4] The Band also cites two post-*Sherrill* Second Circuit decisions, *see* Pet.32, but neither addresses 18 U.S.C. §1151.

A. The 1855 Treaty Did Not Set Aside Land for Use as an Indian Reservation.

Both courts below correctly concluded that the 1855 Treaty did not set aside land for the purpose of establishing an Indian reservation. That much is evident from the Treaty's text, which reveals that the parties instead sought to establish a process by which individual Band members would select small parcels of land to own in fee. As Article 1 explains, the United States agreed to temporarily "withdraw from sale" areas of "public land" for a ten-year period, divided into two five-year periods. Pet.App.114a. During the first period, certain Band members could select 40- or 80-acre tracts of land; they would receive "certificates … guaranteeing and securing … their possession and an ultimate title to the land"; and in the end, they would obtain "a patent … in the usual form." Pet.App.116a-118a. During the second period, Band members could "purchase" any land not already selected, and any land "so purchased" would "be sold without restriction, and certificates and patents shall be issued for the same in the usual form." Pet.App.119a. As for land that remained unselected, the United States could "s[ell] or dispose[] of [it] as in the case of all other public lands." Pet.App.119a. The "plain and unambiguous terms" thus leave no doubt that the United States did not set aside 337 square miles of land for the Band for permanent "use as a reservation," but merely "reserved" it for individual sales during a discrete period. Pet.App.82a; *see* Pet.App.25a.

That conclusion is reinforced by the pre-Treaty context. Pet.App.26a-27a. The Band had recently

emerged from an experience in the 1830s in which it thought that it had successfully negotiated for a smaller permanent reservation of 50,000 acres, only to settle for a temporary reservation that expired in 1841 after the Senate balked at a permanent reservation for the Band. Pet.App.39a-40a. With the United States having just rejected a permanent reservation, the Band members settled in the 1840s and early 1850s on a strategy of purchasing land in fee. Pet.App.72a. Indeed, just before the 1855 Treaty negotiations, the bands explained to federal officials that their members simply wanted to "buy more lands." Pet.App.44a. Federal officials embraced that concept, agreeing that granting "titles in fee to individuals for separate tracts" offered the best solution. Pet.App.46a. That federal acceptance of a temporary designation of 216,000 acres for individual purchases of land in fee is far more consistent with the federal government's earlier rejection of a 50,000-acre permanent reservation than the Band's implicit suggestion that the same government that rejected a 50,000-acre permanent reservation in 1836 turned around and accepted a permanent reservation over four times as large in 1855.

The post-Treaty history underscores that the Treaty did not establish a permanent reservation. Late-nineteenth-century federal records of then-extant reservations conspicuously omitted the lands listed in the Treaty. Pet.App.28a. Prominent and learned Band members in the late-nineteenth century did not understand the Treaty to have created a reservation. Pet.App.27a; D.Ct.Dkt.600-125. The federal government in the twentieth and twenty-first centuries agreed. D.Ct.Dkt.560-55 at 9162;

D.Ct.Dkt.75-3. While two statutes from the 1870s used the term "reservation" to refer to the lands subject to individual purchases, other post-Treaty statutes (including another from the 1870s) did *not* do so. Pet.App.28a-29a. Given that the lands were "reserved" for individual sales—but not reserved as a permanent homeland for the Band—those stray references are neither surprising nor illuminating. And the absence of comparable language in other statutes buttresses the wisdom of this Court's admonition that "[t]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Hagen*, 510 U.S. at 420.

In short, it is little surprise that the Band is forced to press an untenable magic-words rule. When the terms "reserved" and "reservations" are "placed in the proper context," its argument collapses. Pet.App.94a. Those terms simply refer to the fact that "eligible Indians were entitled to make their selection[s] of land"—which they would then hold individually and in fee simple—"from within the larger tract designated" for such selections. Pet.App.94a. They are not some term-of-art code for the establishment of a permanent reservation that would contradict all of the Treaty's other text and everything that the parties "methodically" sought to accomplish. Pet.App.82a-83a.

B. The 1855 Treaty Did Not Provide for Ongoing Federal Superintendence of the Land.

Because the lower courts' conclusion about the set-aside requirement is correct, the superintendence requirement is immaterial. In all events, both courts

correctly concluded that the 1855 Treaty did not place the lands at issue under federal superintendence.

Federal superintendence exists when the federal government "actively control[s] the lands in question, effectively acting as a guardian for the Indians." *Venetie*, 522 U.S. at 527, 533. Critically, "it is *the land in question,* and not merely the Indian tribe inhabiting it, that must be under the superintendence of the Federal Government." *Id.* at 530 n.5. Accordingly, the superintendence requirement is met when, for example, the government "retain[s] title to the land," places the land "under the jurisdiction and control of Congress for all governmental purposes," or exercises "absolute jurisdiction and control" over the land. *Id.* at 533-34.

The 1855 Treaty clearly does not satisfy that requirement. Far from imposing federal control over the land, the Treaty sought to *free* the land from federal control by giving Band members fee ownership over their selected parcels. Pet.App.118a-19a. That same objective is reflected in pre-Treaty history: Band members repeatedly emphasized their desire to own land "like the whites and have their titles," and federal officials agreed to "cease" the bands' dependency on the federal government. Pet.App.33a-34a. The post-Treaty history "further supports the notion that the federal government did not intend, nor did it seek, to guard over any of the land the tribal members owned as it would a reservation." Pet.App.34a.

III. This Case Does Not Warrant This Court's Review.

At bottom, the Band seeks factbound error correction of decisions that committed no error. That

is reason enough to deny review. But there are plenty more reasons to do so. First, the question that the Band asks this Court to resolve is not outcome-determinative. Even assuming (contrary to law and fact) that the 1855 Treaty established a permanent reservation, the lower courts would still have to adjudicate unresolved questions of disestablishment, judicial estoppel, and issue preclusion. Pet.App.34a n.10, 104a.

Nor would leaving the decisions below undisturbed create jurisdictional confusion or unsettle any expectations. The opposite is true. The decisions below validate decades and decades of established practice and settled expectations. The only thing that would create confusion or threaten long-settled norms would be granting plenary review and validating the Band's belated effort to transform a significant swath of Michigan into Indian country. The land at issue here has long been predominantly populated by non-Indians, and state and local governments have long exercised jurisdiction over it. As this Court has explained, "[w]hen an area is predominately populated by non-Indians … finding that the land remains Indian country seriously burdens the administration of state and local governments." *Hagen*, 510 U.S. at 420-21. Indeed, the Court has declined to oust states and localities of such longstanding jurisdiction for precisely that reason. *See City of Sherrill*, 544 U.S. at 213-21.

Those same concerns are at their zenith here. Take, for instance, the members of the Associations, who live, own property, and do business in the area that the Band would reclassify as Indian country.

Rather than living under a uniform set of universally applicable rules, if the Band prevails, the Band and its members could enjoy absolute immunity from state and local zoning restrictions, building codes, business regulations, nuisance laws, taxes, criminal codes, and more—all of which will invariably impact the Associations' members. *See Bryan v. Itasca Cnty.*, 426 U.S. 373, 376-77 (1976). The Band could authorize gaming and control the development and administration of environmental laws in the area. *See, e.g.*, *Hydro Res.*, 608 F.3d at 1138. And the Associations' members could now find themselves unwittingly subject to tribal regulatory and adjudicatory jurisdiction. *See* D.Ct.Dkt.27 at 3-6.

Finally, the Band's last-ditch effort (at 35) to have this Court invite the Solicitor General's views should be rejected out of hand. This case has been proceeding with full knowledge of the United States for years. The district court invited the United States to intervene, but it declined the invitation. In the Sixth Circuit, the United States expressly asked for time to consider participation and then declined to file a brief. The United States recognizes the Band as a federally recognized tribe. If it believed that the Band had been denied its permanent homeland (and that state and local authorities had improperly assumed federal jurisdiction) for over a century, it would have made that view clear already. Under these circumstances, the federal government's decision to stay on the sidelines is presumably a conscious (and diplomatic) effort to give the Band a chance to make its case. The Band has been given that chance and has failed to persuade a single federal judge. Soliciting the views of the Solicitor General at this point will not make this

case any more certworthy, but will simply place federal authorities in an awkward position. The proper outcome at this juncture is to deny the petition and leave the status quo in Michigan undisturbed.

CONCLUSION

For the foregoing reasons, this Court should deny the petition.

Respectfully submitted,

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January 24, 2022