Nos. 19-2070 and 19-2107

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS,

Plaintiff – Appellant Cross-Appellee,

v.

GRETCHEN WHITMER, GOVERNOR OF THE STATE OF MICHIGAN,

Defendant-Appellee,

CITY OF PETOSKEY, MI; CITY OF HARBOR SPRINGS, MI; EMMET COUNTY, MI; CHARLEVOIX COUNTY, MI,

Intervenors – Appellees Cross-Appellants,

TOWNSHIP OF BEAR CREEK; TOWNSHIP OF BLISS; TOWNSHIP OF CENTER; TOWNSHIP OF CROSS VILLAGE; TOWNSHIP OF FRIENDSHIP; TOWNSHIP OF LITTLE TRAVERSE; TOWNSHIP OF PLEASANTVIEW; TOWNSHIP OF READMOND; TOWNSHIP OF RESORT; TOWNSHIP OF WEST TRAVERSE; EMMET COUNTY LAKE SHORE ASSOCIATION; THE PROTECTION OF RIGHTS ALLIANCE; CITY OF CHARLEVOIX, MI; TOWNSHIP OF CHARLEVOIX,

Intervenors – Appellees.

On Appeal from the United States District Court
for the Western District of Michigan
The Honorable Paul L. Maloney

PROPOSED BRIEF OF AMICI CURIAE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, BAY MILLS INDIAN COMMUNITY, LITTLE RIVER BAND OF OTTAWA INDIANS, AND SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS IN SUPPORT OF LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS' PETITION FOR REHEARING EN BANC

AMICI CURIAE

The following amici appear in this matter and did not appear in the district court: Grand Traverse Band of Ottawa and Chippewa Indians; Bay Mills Indian Community; Little River Band of Ottawa Indians; Sault Ste. Marie Tribe of Chippewa Indians.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, all amici are federally recognized Indian tribes and have no corporate status, and therefore no subsidiaries or subordinate companies, and no affiliate companies that have issued shares to the public.

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INTEREST OF AMICI[1]

The undersigned tribes are federally recognized Indian tribes with government-to-government relationships with the United States.[2] Together with the Little Traverse Bay Bands of Odawa Indians ("LTBB"), they constitute the five tribes that are the modern legal successors to the various Ottawa and Chippewa bands that entered the 1836 Treaty of Washington, 7 Stat. 491 (RE558-02), and the 1855 Treaty of Detroit, 11 Stat. 621 (RE558-06). Those Treaties are the basis of our government-to-government relationships with the United States and are essential to our sovereignty and self-government. The Treaties and the sovereign status they recognize are also central to our relations with Michigan and have served, for example, as the basis for gaming compacts, tax and law enforcement agreements, and tribal-state court reciprocity agreements.[3]

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[1] No party or its counsel authored the brief in whole or part and no person or entity other than proposed amici contributed money for the production of this brief.
[2] *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 84 Fed. Reg. 1200 (Feb. 1, 2019).
[3] *See*, *e.g.*, Michael F. Cavanagh, *Michigan's Story: State and Tribal Courts Try to Do the Right Thing*, 76 U. DET. MERCY L. REV. 709 (1999); Matthew L.M. Fletcher, *The Power to Tax, the Power to Destroy, and the Michigan Tribal-State Tax Agreements*, 82 U. DET. MERCY L. REV. 1 (2004); Matthew L.M. Fletcher, Kathryn E. Fort, and Wenona T. Singel, *Indian Country Law and Enforcement and Cooperative Public Safety Agreements*, 89 MICH. B.J. 42 (Feb. 2010).

Each Tribe thus has critical legal and historical interests in having the Treaties interpreted fairly and accurately. Amici write to underscore how far the panel departed from the treaty text, its surrounding history, and settled principles governing treaty interpretation. Its decision, if allowed to stand, has serious potential consequences for our sovereignty, intergovernmental relationships, and self-governance, and we urge the full Court to review this matter en banc.

ARGUMENT

I. The 1836 Treaty

Under the 1836 Treaty, our predecessors ceded approximately one third of the Lower Peninsula and one half of the Upper Peninsula of Michigan to the United States, excepting small reservations from that cession. *See United States v. Michigan*, 471 F. Supp. 192, 226 (W.D. Mich. 1979). After the tribes signed the Treaty, "[t]he Senate ratified the treaty with an amendment limiting the terms of the reservations to five years or longer, as the United States might permit." *Id.* at 215–16. The treaty also allowed for removal of the tribes to the lands west of the Mississippi River. As a result of the amendments, the tribes had no secure permanent homes in Michigan and remained under threat of removal. *See*, *e.g.*, Schoolcraft Letter, RE600-28, PageID#10701; June Letter, RE600-31, Page ID#10716; 1851 Indian Affairs Report, RE558-42, PageID#7381. They entered the 1855 Treaty to secure those homes and avoid removal. *See* Matthew L.M.

Fletcher, *The Eagle Returns* 43 (2012) (purpose of the 1855 Treaty was "for [the Ottawas and Chippewa] to continue living in their own ceded lands." (quoting George Manypenny)).[4]

II. Historical Context of the 1855 Treaty

By the 1850s our ancestors were largely unsettled and impoverished. In 1855, the Michigan legislature declared that they must become "civiliz[ed]" and that therefore "it is necessary to obtain reservations for them[.]" 1855 House Report, RE600-49, PageID##10778, 10780. This view aligned with the new federal policy in the 1850s of using permanent reservations established in tribal homelands to "civilize" the Indians to facilitate their eventual assimilation. The policy was led by Commissioner of Indian Affairs George Manypenny, who negotiated the 1855 Treaty. As this Court has recognized,

> Manypenny believed that the civilization policy could be achieved through the reservation system…. [I]f the Indians were temporarily isolated on discrete parcels … they could gradually become assimilated or "civilized" and eventually could be incorporated completely into non-Indian society…. The reservation concept as a "way-station" was a necessary step, then, in the civilization process.
>
> … The new policy of the government was to provide "permanent homes" on the reservations that were set aside for the Indians[.]

[4] The panel committed potentially harmful error in stating that "[t]he [1836] Treaty was meant to expire in 1841…. The Treaty expired in 1841[.]" Panel Op. at 5-6. *See, e.g., United States v. Michigan*, 653 F.2d 277, 278 (6th Cir. 1981) ("The treaty-guaranteed fishing rights preserved to the Indians in the 1836 Treaty … continue to the present day as federally created and federally protected rights. The protection of those rights is the solemn obligation of the federal government[.]").

Keweenaw Bay Indian Cmty. v. Naftaly, 452 F.3d 514, 518 (6th Cir. 2006) (citations omitted).

III. The 1855 Treaty

The undersigned endorse LTBB's arguments regarding how the Treaty text as a whole meets the settled reservation-establishment test. We emphasize here the Indian understanding of the term "reservation" as used in the Treaty.

The 1855 Treaty identifies the lands set aside for the Tribes as "reserved herein for the band[s]" and as "the aforesaid reservations." 1855 Treaty, RE558-06, Page ID ##6894, 6895. The panel nowhere acknowledges this. But our ancestors understood "reservation" to mean a legally established Indian reservation and used the word that way at the negotiations. For example, Assagon, a principal tribal leader at the negotiations, referred to the 1836 reservations in recounting that "[i]t is now past 19 years [i.e., since 1836] since our fathers sold their land. When they sold them *they made reservations* & … left the price of *their reservations* in the hands of Government[.]" Council Proceedings, RE558-11, PageID#7130 (emphasis added).

Moreover, the Treaty, including its references to the lands as "reserved" and as "reservations," was read and explained to our ancestors at the negotiations. *See* Council Proceedings, RE558-11, PageID#7154 ("Agent Gilbert. reads & explains the treaty"). The State and its fellow appellees agree that the word "reservation" in

a legal sense was part of the parties' "common vocabulary" in 1855, and that the word (which appeared in both English and Ojibwe dictionaries in the 1850s to refer to legal Indian reservations) was accurately translated at the negotiations. *See* LTBB Reply, Doc. 77, at 30-31.

In fact, the State and its fellow appellees agree that the meaning of "reservation" was clear more broadly in the 1850s. *See* Joint Surreply, Doc. 91, at 2 ("During the 1850s, the modern meaning of Indian reservation emerged, referring to [1] land set aside [2] under federal protection [3] for the residence or use of tribal Indians[.]" (quotation marks omitted)). And Congress itself used "reservation" in the 1850s in a clearly legal sense. *See*, *e.g.*, Act of June 12, 1858, 11 Stat. 329, 332 (authorizing federal officials "to remove from any tribal reservation any person found therein without authority of the law").

Treaty text cannot be ignored. Our ancestors were promised legal "reservations" in the 1855 Treaty and understood those promises to mean just that. *See Herrera v. Wyoming*, 139 S. Ct. 1686, 1701 (2019) ("Treaty analysis begins with the text" and treaties "are construed as they would naturally be understood by the Indians." (quotation marks omitted)).

Similarly, the panel's disregard of Treaty text providing for schools and churches, blacksmith shops, and domestic and agricultural supplies, *see* 1855 Treaty, RE558-06, PageID#6895, as mere "general federal aid," Panel Op. at 22,

overlooks important historical context of the "civilization" goals of the reservation policy in the 1850s. *See* Francis Paul Prucha, *The Great Father* 317 (1984) (discussing federal reservation policy in 1850s and stating that "[a]griculture, domestic and mechanical arts, English education, Christianity, and individual property (land allotted in severalty) were the elements of the civilization program that was to be the future of the Indians").

IV. Negotiations of the 1855 Treaty

The Treaty negotiations reflect what the text says. In the 1850s, the "new policy of the government was to provide 'permanent homes' on the reservations … for the Indians[.]" *Naftaly*, 452 F.3d at 518 (citations omitted). That is what Commissioner Manypenny sought to accomplish in the 1855 Treaty, and he said so at the negotiations. *See* Council Proceedings, RE558-11, PageID#7135 ("The Government is desirous to aid you in settling upon permanent homes.").

In fact, this Court's description in *Naftaly* of Manypenny's "reservation system" as a "way-station" to civilize the Indians and prepare them to be assimilated "completely into non-Indian society" is how Henry Gilbert, the other principal federal negotiator, explained the Treaty's purpose to our ancestors at the negotiations:

> The sooner you break down the barriers between you & the whites, the sooner you will become one people.… [and] it [is the] object for government … to have you civilized citizens of the State – taking care of yourselves. And that is one object of calling you here…. *The government is willing to*

> *take care of your property; but if you improve for the next twenty years as fast as you have during the last five, I tell your great father that you can take care of it as well for yourselves*[.]

Council Proceedings, RE558-11, PageID##7150-7151 (emphasis added). The panel makes no mention of this statement, but it clearly reflects Manypenny's view of reservations as "way-stations" for eventual assimilation.

The panel's account of the negotiations is highly selective in other areas as well. For example, the panel asserts that "the Band wanted to become citizens and pay taxes," Panel Op. at 22, and cites one individual expressing willingness to "'pay our taxes as you do,'" *id.* (quoting Council Proceedings, RE558-09, PageID#7065). But the panel did not acknowledge that another tribal leader stated that "[i]t is the mind of the Indians, who sent me, that these lands may be *exempt from taxes*," Council Proceedings, RE558-11, PageID#7139 (emphasis added); that another said (regarding taxation), "[y]ou are wise…. We therefore present ourselves to you to take what you regard best," *id*. PageID#7141; or that Manypenny resolved the issue in favor of non-taxability of the land, *see id.* PageID#7145 (on "the question of taxes … I am disposed to manage it for your benefit."). It was not a fair assessment of the evidence to disregard these statements about taxation in favor of the one selected for emphasis by the panel. *See Tingle v. Arbors at Hilliard*, 692 F.3d 523, 529 (6th Cir. 2012) (at summary

judgment, courts must "construe all evidence in the light most favorable to the non-moving party").

The panel took a similar approach in concluding that "the Band made clear that they did not want land under federal superintendence" and instead sought "title to land that would be equal to that of their white counterparts." Panel Op. at 22. The panel nowhere acknowledges that the tribes were expressly told that they would *not* hold title like non-Indians did. *See*, *e.g.*, Council Proceedings, RE558-11, PageID#7136 ("Com Manypenny…. There will be some restriction on the right of selling. *Except that* your title will be like the White man's. This restriction will, *when it seems wise & proper* be withdrawn." (emphases added)). And the 1855 Treaty reflected this restriction. *See* 1855 Treaty, RE558-06, PageID#6895 ("President ... may direct … the restrictions provided by the certificate, continued *so long as he may deem necessary and proper*." (emphasis added)). This is not how non-Indians held title to their lands.

For their part, the tribes expressed a clear understanding that their lands would be under federal superintendence. Toward the end of the negotiations, one of the Tribal leaders stated that "[w]e are satisfied with what is done. We wish you to carry out the treaty as it is made. We believe it to be good. *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." RE558-11, Council Proceedings, PageID#7159 (emphasis added). The panel did not acknowledge this statement.

The United States understood that the intent and purpose of the 1855 treaty council was to "arrang[e] for [the Ottawas and Chippewa] to continue living in their own ceded lands." Fletcher, *The Eagle Returns*, *supra*, at 43 (quoting George Manypenny). Even the Senate of the State of Michigan, not a party to the treaty, issued a resolution calling for the "permanent settlement in the country where [the Ottawa and Chippewa tribes] now reside." *Id.*

The United States Senate Committee on Indian Affairs got it right in 1994 when it concluded that "[t]he historical record is clear that the Treaty Commissioners and the Indian tribal governmental representatives understood that the 1855 treaty reaffirmed the political autonomy of the bands and created what were intended to be permanent reservations for the tribes[.]" S. Rep. No. 103-260, at 2 (1994).

V. The Post-Treaty Period

In interpreting Indian treaties, courts may consult "the practical construction adopted by the parties." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (citation omitted). In the post-Treaty period, our ancestors referred to the lands set apart for them in the 1855 Treaty as "our reservation," Chiefs' Letter, RE600-62, PageID#10814, and they understood the

superintendence of those lands to be a federal responsibility, *see*, *e.g.*, Indian Letter, RE600-65, PageID#10829 (Indians writing to federal Indian agent in 1862 of a "person … among us" who "professes to claim a lot of land on this reservation" and requesting "that this man may not be permitted to remain among us").

Federal Indian agents responsible for implementing the Treaty also understood that "[t]hese reservations were set apart for the sole benefit of the Indians." 1867 Indian Affairs Report, RE558-67, PageID#7725. Therefore, "fulfilling the treaty stipulations … upon their reservations" required federal "diligence in guarding their rights[.]" 1858 Indian Affairs Report, RE558-55, PageID#7632. They understood that because the Michigan Indians were "under the guardianship of the United States," 1871 Indian Affairs Report, RE558-70, PageID#7745, the government had an obligation to "protect them upon the reserves set apart for their occupancy," *id.* PageID#7746. The panel dismissed all of this evidence.

While the government withdrew federal superintendence for some of the tribes, that outcome was not based on any accurate reading of the requirements or goals of the 1855 Treaty. In fact, "[i]n 1872, then-Secretary of the Interior, Columbus Delano, improperly severed the government-to-government relationship between the [Grand Traverse Band] Band and the United States …. This occurred

because the Secretary had *misread the 1855 Treaty* .... [as providing] that the federal government no longer had any trust obligations to the tribes[.]" *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of U.S. Att'y for W. Dist. of Mich.*, 369 F.3d 960, 961 & n.2 (6th Cir. 2004) (emphasis added).[5] Many of our ancestors were dispossessed as a result. *See* S. Rep. No. 103-260, at 2 (discussing the historical record of "criminal wrongdoing by federal agents profiting from the loss of individual Indian allotments" and fraud by "non-Indians and local governmental authorities acting in concert," until "all that remained of the reservations within the exterior boundaries described in the treaties, were scattered parcels … and isolated Odawa/Ottawa homesteads").

But that the United States' promise in the 1855 Treaty of federally-protected reservations was not well kept does not mean it was not made. The text and historical context of the Treaty, fairly interpreted, contradict that conclusion.

CONCLUSION

Our ancestors sacrificed greatly for the promises contained in the 1855 Treaty and are entitled to a fair and accurate interpretation of its terms and the history surrounding them by the courts of the United States. The panel's opinion

[5] *See also id.* at 962 (stating that the Little River Band and LTBB were subject to "the same" unlawful withdrawal of federal protection).

does not reflect such an interpretation. We respectfully request the full Court to grant en banc review.

Dated June 8, 2021.

Respectfully Submitted,

By /S/ John F. Petoskey

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(4) because, excluding the items permitted by Fed. R. App. P. 32(f) and Circuit Rule 32(b), this brief contains 2,596 words, including footnotes.

This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because it has been prepared in a proportionally spaced typeface in Microsoft Word using Times New Roman, 14-point font.

Dated: June 8, 2021

By: s/ John F. Petoskey
John F. Petoskey (MI Bar #P41499)

CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2021, I electronically filed the foregoing brief with the Clerk of the Court using the CM/ECF system. I certify that the participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ John F. Petoskey
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