Case No. 19-2070

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS,

Plaintiff – Appellant, Cross-Appellee,

v.

GOVERNOR 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, Southern Division
The Honorable Paul L. Maloney

APPELLEES' JOINT SUR-REPLY ADDRESSING MCGIRT V. OKLAHOMA

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SUMMARY OF ARGUMENT

The Little Traverse Bay Bands of Odawa Indians' (Tribe) reply brief heavily cites *McGirt v. Oklahoma*, ___ U.S. ___; 140 S. Ct. 2452 (2020), a decision handed down after Appellees filed their briefs on appeal. But *McGirt* provides no support for the Tribe. Rather, that decision confirms what Appellees have urged from the outset: 18 U.S.C. §1151 and the three-part Indian country test apply here, not the lower standard proposed by the Tribe. Further, *McGirt* leaves in place the well-established principles for interpreting Indian treaties. This Court should affirm.

ARGUMENT

I. *McGirt* supports using the three-part Indian country test, not the Tribe's proposed reservation test.

Throughout its briefing, the Tribe has championed its own test for the establishment of an Indian reservation because the Treaty of Detroit, 11 Stat. 621 (July 31, 1855) ("1855 Treaty"), does not satisfy the criteria for Indian country under 18 U.S.C. § 1151. Nothing in *McGirt* changes the Indian country test or supports the Tribe's newest test. As the Seventh Circuit recently explained in considering *McGirt*, 18 U.S.C. § 1151 determines "reservation status" for lands, even under nineteenth century treaties. *See Oneida Nation v. Village of Hobart*, __ F. App'x. __; 2020 U.S. App. LEXIS 24022, at *18 (7th Cir. July 30, 2020) (citing *McGirt*, 140 S. Ct. at 2464). This Court should conclude the same.

A. *McGirt* requires applying the three-part Indian country test.

The Tribe expressly claims a reservation that is Indian country under 18 U.S.C. § 1151. (Compl., R.1, PageID#17, ¶ 57.) Yet it argues that *McGirt* allows the courts to apply its novel test rather than the test for Indian country under that very section. Tribe's Reply Br. 2-12. The Tribe is wrong.

As *McGirt* recognized, 18 U.S.C. § 1151 plays a central role in defining Indian country. 140 S. Ct. at 2477, 2408. That statutory definition of Indian country, and the three-part test outlined in *United States v. John*, 437 U.S. 634, 648-49 (1978), accurately capture the meaning of an "Indian reservation" as that term was used in the nineteenth century. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.04[2][c][ii] at 190-91 (Nell Jessup Newton ed., 2012) ("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, regardless of origin."). Courts use the Indian country test to identify all Indian lands in 18 U.S.C. § 1151, according them the same status under federal law unless Congress prescribes otherwise. *See McGirt*, 140 S. Ct. at 2474 (rejecting argument that dependent Indian community and reservation are treated differently under 18 U.S.C. § 1151); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991) (rejecting argument that trust lands and reservations are treated

differently under 18 U.S.C. § 1151, referring to three-part test). *McGirt* in no way disturbs this established test for Indian country.

B. *McGirt* does not make reservation status depend on the word "reservation."

The Tribe argues that *McGirt* endorses its reservation test because it cites *Minnesota v. Hitchcock*, 185 U.S. 373, 390 (1902). Tribe's Reply Br. 3. The Tribe's test would require "a defined tract, an explicit act setting it apart, and its dedication to a specific public purpose, including Indian settlement[.]" Tribe's Reply Br. 2. But *McGirt* did not articulate the Tribe's test, let alone endorse it.

McGirt supports Appellees' argument that this appeal does not depend on the word "reservation" in the 1855 Treaty or other documents. Governor's Br. 4-5. In the nineteenth century, the word reservation "had not yet acquired such distinctive significance in federal Indian law." *McGirt*, 140 S. Ct. at 2461. As a result, courts have looked at "language in [other] treaties from the same era sufficient to create a reservation" for comparison. *Id*. *McGirt's* point is that courts must read treaties fully and in their historical context to understand them – exactly what Appellees have argued, and the Tribe has sought to avoid on appeal.

C. *McGirt* does not change federal law, a prerequisite for adopting the Tribe's reservation test.

For *McGirt* to support the Tribe's reservation test, the Court would have had to make three significant changes to federal law. First, it would have had to omit

federal superintendence as an element of the test, contrary to 18 U.S.C. § 1151(a), which refers to an "Indian reservation under the jurisdiction of the United States Government[.]" Associations' Br. 20; Governor's Br. 41-43. Second, it would have had to abandon the three-part test for Indian country under 18 U.S.C. § 1151 articulated in *John*, 437 U.S. at 648-49. Associations' Br. 19-23; Governor's Br. 32-33. Finally, it would have had to overturn the legal distinction between withdrawing land from sale and setting it apart from the public domain, a distinction elaborated on in cases like *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915). Emmet Twps. Br. 7-9. Plainly, *McGirt* did not make any of these changes.

There was no reason in *McGirt* to lower the threshold for establishing a reservation because the majority saw familiar reservation-creation language in the Creek treaties. 140 S. Ct. at 2460-61. Both dissents assumed the treaties created a reservation. *See id*. at 2483 fn. 1 (Roberts, C.J., dissenting); *see id*. at 2502 (Thomas, J., dissenting). Oklahoma asserted that the Creek treaties had created a dependent Indian community, which is Indian country under 18 U.S.C. § 1151(b). *Id*. at 2474. The majority quickly disposed of Oklahoma's unpreserved argument that the Creek treaties did not create a reservation without altering the Indian country test. *Id*. at 2474-76.

D. The Indian country test explains why *McGirt* concluded that the Creek treaties created a reservation.

McGirt's conclusion that the Creek treaties created a reservation is not surprising because their language satisfies the three-part Indian country test.

First, as the Court recognized, the Creek treaties unambiguously "set apart" land. *McGirt*, 140 S. Ct. at 2460-62; *see also John*, 437 U.S. at 649. The 1832 Treaty said that lands west of the Mississippi "shall be solemnly guarantied to the Creek Indians" and that the United States would "cause a patent or grant to be executed to the *Creek tribe*" once those lands were located. Treaty with the Creeks, 7 Stat. 366, art. XIV (Mar. 24, 1832) (emphasis added). And the 1833 Treaty "establish[ed] boundary lines" to "secure a country and permanent home *to the whole Creek nation* of Indians." Treaty with the Creeks, 7 Stat. 417, preamble (Feb. 14, 1833) (emphasis added). Further, the 1833 Treaty set boundaries of the "country of the Muskogee Indians" and referred to the lands "set apart as the country of *the Creek nation*[.]" 1833 Treaty, arts. II and IV (emphasis added).

Second, the 1833 Treaty granted land to the whole Creek Nation. 1833 Treaty, art. III; *McGirt*, 140 S. Ct. at 2475. That grant satisfied the requirement that the lands set apart be for the "use of the Indians as such[.]" *John*, 437 U.S. at 649; *see McGirt*, 140 S. Ct. at 2475. The 1833 Treaty also incorporated a significant use restriction by making the reservation contingent on actual and continuing Indian occupation, saying that the Creek had a right to the land "so long as they shall exist

as a nation, and continue to occupy the country hereby assigned them." 1833 Treaty, art. III; *see McGirt*, 140 S. Ct. at 2461.

Finally, and perhaps most importantly, the Creek treaties granted the United States superintendence directly over the Creek lands. *John*, 437 U.S. at 649. In the 1833 Treaty, the United States retained the right to settle the Seminoles on Creek lands, and authorized the president to allow other "friendly Indian tribes" to collect salt if it were found on Creek lands. 1833 Treaty, arts. II, III, and VII.

The United States exercised its jurisdiction over the Creek lands in 1856 when it adjusted the "boundaries of the Creek country." Treaty with the Creeks, etc., 11 Stat. 699, arts. 1 and 2 (Aug. 16, 1856) (1856 Treaty). It also clearly demonstrated superintendence, barring state and territorial jurisdiction over any portion of the Creek's land, and prohibiting annexation without tribal consent. And the United States promised that Indian agents, aided by the military, would exercise jurisdiction over Creek lands by authorizing non-members to live there and by removing any non-members who were "intruders." 1856 Treaty, art. 15. The 1856 Treaty also, with some exceptions, "secured" the Creek's "unrestricted right of self-government, and full jurisdiction over persons and property." 1856 Treaty, arts. 4 and 15; *see McGirt*, 140 S. Ct. at 2461.

In 1866, the United States guaranteed the Creeks "quiet possession of their country, and protection against hostilities on the part of other tribes." Treaty with

the Creeks, 14 Stat. 785, art. 1 (July 19, 1866) (1866 Treaty). To make that possible, the Creeks "agree[d] to a military occupation of their country, at any time, by the United States, and the United States agree[d] to station and continue in said country from time to time, at its own expense, such force as may be necessary for that purpose." *Id*. Thus, the Creek treaties prescribed active, and potentially harsh, federal jurisdiction over the lands.

The contrasts between the Creek treaties and the 1855 Treaty in this case are readily apparent. The 1855 Treaty did not: grant communal title to the bands; exclude unauthorized non-members; subject the lands to federal jurisdiction or military occupation; prohibit state jurisdiction; or tie the right to land under Article I to continuing Indian occupancy. Additionally, the 1855 Treaty had no land cession; it secured the Michigan bands' right to *avoid* removal; and it granted title only to *individual* band members through the circumscribed process in Article I. Finally, the 1855 Treaty ensured the United States' right to sell or dispose of any remaining lands, meaning it was not engaging in "'an act of confiscation'" of tribal lands when it sold or disposed of the lands band members did not select or purchase. *McGirt*, 140 S. Ct. at 2475 (*quoting United States v. Creek Nation*, 295 U.S. 103, 110 (1935), and explaining that federal inability to sell land without it being an "act of confiscation" was reflective of that land being a reservation).

E. *McGirt's* focus on diminishment and disestablishment principles does not allow the Tribe to avoid meeting the Indian country test.

The Tribe repeatedly cites the diminishment and disestablishment precedent discussed in *McGirt* while acknowledging there is no diminishment or disestablishment issue in this appeal. Tribe's Reply Br. 8-9, 11-12, 18, 44, 46-48, 51-52, 56-57, 59, 70-71. Diminishment and disestablishment can occur only if a reservation exists. The Tribe cites those principles because it wants this Court to assume that, like the Creek Nation, it has a treaty reservation. But federal law does not assume all treaties provide a reservation. *McGirt*, 140 S. Ct. at 2479 ("[e]ach tribe's treaties must be considered on their own terms").

Further, diminishment and disestablishment could only become an issue in this case if this Court were to reverse and remand to the District Court for a trial at which the Tribe carried its burden of proving that the 1855 Treaty created the reservation it claims.[1] But remand for trial should not be the outcome in this appeal because the Tribe has failed to show a genuine issue of material fact concerning how the 1855 Treaty satisfies each element of the Indian country test.

[1]In the district court, the Tribe never claimed that the 1855 Treaty so clearly provided a reservation that it was entitled to judgment as a matter of law. (Tribe's Historical Mot. Br., R.586, PageID##10112.)

II. *McGirt* does not alter the way courts interpret treaties.

The way the Tribe interprets the 1855 Treaty departs substantially from the principles in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999), by reading snippets of treaty text in the abstract while ignoring historical context and Indian understanding. The Tribe would have the Court believe that *McGirt* supports its interpretation method. But *McGirt* applies the principles in *Mille Lacs*.

The Tribe insists the Court should decide the appeal based on the plain text of the 1855 Treaty because *McGirt* found a reservation created by an 1866 Creek treaty that used the word "reservation." Tribe's Reply Br. 29-30. The Tribe is effectively arguing that the Court should read the phrases "tract reserved herein" and "aforesaid reservation" in the 1855 Treaty out of context, an approach *McGirt* did not take when reviewing four Creek treaties in their entirety. 140 S. Ct. at 2460-62. Even the portion of the 1866 Treaty that *McGirt* quoted contained far more indicia of recognizing a reservation than just using the word "reservation." *Id*. at 2461. As *McGirt* noted, the 1866 Treaty "explicitly restated its [the United States'] commitment that the remaining land would 'be forever set apart as a home for said Creek Nation,' which it now referred to as 'the reduced Creek reservation.'" *Id*.

(quoting 1866 Treaty, arts. III and IX). The Court must also read the language of the 1855 Treaty as a whole and in context.[2]

The Tribe did not advance its plain text argument below, maintaining that courts interpreting Indian treaties cannot rely on plain language to "skip historical review." (Tribe's Br. Opp. Governor's Historical Mot., R.611, PageID#11820.) Now, the Tribe wants the Court to disregard the historical context for the 1855 Treaty because it used the word "reservation" and the signatories knew what the word meant. Tribe's Reply Br. 31. But *McGirt* considered the historical context for the Creek treaties, which is why the first sentence of the opinion starts with the Trail of Tears. 140 S. Ct. at 2459. *McGirt* also viewed the Creek treaties as the Indian signatories understood them, focusing on the many "promises" the United States made to the Creek people. *Id*. at 2459, 2460-62.

The Tribe has not offered a *cohesive* discussion of the historical documents surrounding the 1855 Treaty to provide its historical context or the band leaders' understanding of the treaty at the time they signed it. Appellees have provided the Court with the analysis that *Mille Lacs* and *McGirt* require for treaty interpretation.

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[2]In *McGirt*, the Supreme Court explained that it does not require a treaty to use any specific words to create a reservation. 140 S. Ct. at 2475. But that statement is not license for the Tribe to read the treaty as if it stated words that are plainly missing, like "set apart." Nor is it grounds for the Tribe to demand that the treaty use certain words, like "temporary," to express concepts that are clearly stated in other terms.

If this Court had any questions about the text of the 1855 Treaty, that historical context and evidence of Indian understanding demonstrate that the parties to the 1855 Treaty intended to make individual band members landowners, not create reservations.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above and in their other briefs, Appellees respectfully ask the Court to affirm.

Dated: October 30, 2020

Respectfully submitted by:

DYKEMA GOSSETT

By: s/*Jill M. Wheaton*
JILL M. WHEATON
ERIN A. SEDMAK
R. LANCE BOLDREY
Attorneys for Appellees
Emmet County Lake Shore Assoc.
The Protection of Rights Alliance
2723 S. State Street, Suite 400
Ann Arbor, MI 48104
(734) 214-7629
jwheaton@dykema.com
esedmak@dykema.com
lboldrey@dykema.com

PLUNKETT COONEY

By: *s/Jeffrey C. Gerish* (w/consent)
JEFFREY C. GERISH
Attorney for Appellees
Charlevoix County, MI
Emmet County, MI
City of Harbor Springs
City of Petoskey
38505 Woodward Ave., Suite 100
Bloomfield Hills, MI 48304
(248) 901-4031
jgerish@plunkettcooney.com

DANA NESSEL
MICHIGAN ATTORNEY GENERAL

FADWA A. HARAMOUD
SOLICITOR GENERAL

By: *s/Jaclyn Shoshana Levine* (w/consent)
JACLYN SHOSHANA LEVINE
KELLY M. DRAKE
LAURA R. LAMORE
Assistant Attorneys General
Co-Counsel of Record
Attorneys for Defendant-Appellee
Governor Whitmer Environment. Natural Resources. and Agriculture Division
P.O. Box 30755
Lansing. MI 48909
(517) 335-7664
levinej2@michigan.gov

OLSON, BZDOK & HOWARD

By: *s/Scott W. Howard* (w/consent)
SCOTT W. HOWARD
Attorney for Appellees City of Charlevoix and Charlevoix Township
420 East Front Street
Traverse City, MI 49686
(231) 946-0044
scott@envlaw.com

FRASER TREBILCOCK DAVIS & DUNLAP, P.C.

By: s/*Thaddeus E. Morgan* (w/consent)
THADDEUS E. MORGAN
Attorney for Appellees
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
124 W. Allegan Street, Suite 1000
Lansing, MI 48933
(517) 377-0877
tmorgan@fraserlawfirm.com

Dated: October 30, 2020

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I hereby certify that on October 30, 2020, I caused the foregoing paper to be filed with the Clerk of the Court using the Court's electronic filing system which will forward a copy via e-mail to all counsel of record.

By: */s/Jill M. Wheaton*

JILL M. WHEATON
ERIC SEDMAK
R. LANCE BOLDREY
Attorneys for Appellees
Emmet County Lake Shore Assoc.
The Protection of Rights Alliance
2723 S. State Street, Suite 400
Ann Arbor, MI 48104
(734) 214-7629
jwheaton@dykema.com
esedmak@dykema.com
lboldrey@dykema.com