

STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF
MICHIGAN,

Plaintiff-Appellant,

v

WALTER JOSEPH CASWELL,

Defendant-Appellee.

Supreme Court No.

Court of Appeals No. 368232

Mackinac Circuit Court No. 23-4360-
AR

92nd District Court No.
18D657689A/B-SM

**PEOPLE OF THE STATE OF MICHIGAN'S
APPLICATION FOR LEAVE TO APPEAL**

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STATEMENT OF JURISDICTION

On November 24, 2025, the Court of Appeals issued its Opinion (Ex A), affirming the Mackinac Circuit Court's September 27, 2023 Opinion and Order on appeal (Ex B), which in turn affirmed the 92nd District Court's April 18, 2023 Opinion and Order that ruled in favor of Defendant-Appellee Walter Joseph Caswell and dismissed the charges against him. (Ex C.) Appellant People of the State of Michigan timely files this application for leave to appeal seeking reversal and remand for trial on the charges. This Court has jurisdiction pursuant to MCL 600.215(3) and MCR 7.303(B)(1).

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STATEMENT OF QUESTION PRESENTED

1. Did the district court abuse its discretion in dismissing the charges against Caswell on the basis that he was exercising treaty rights where the district court altered and misapplied the federal test for determining whether the Mackinac Tribe group has treaty-tribe status?

Appellant's answer: Yes.

Appellee's answer: No.

District court's answer: No.

Circuit court's answer: No.

Court of Appeals' answer: No.

INTRODUCTION

In this case of first impression, this Court is asked to decide whether to protect the treaty rights it recognized in *People v LeBlanc*, 399 Mich 31 (1976), the seminal decision recognizing tribal fishing rights under the 1836 Treaty of Washington. Defendant-Appellee Walter Joseph Caswell claims that he is immune from the state fishing regulations that he violated because he is a member of a group that calls itself the Mackinac Tribe. He asserts that his group has the same fishing rights under the same 1836 Treaty confirmed in *LeBlanc*. But whereas A.B. LeBlanc was a member of the federally recognized Bay Mills Indian Community, Caswell's group is not federally recognized as an Indian tribe. Nor is the group a party to the federal consent decrees that have governed treaty fishing by the members of five federally recognized Indian tribes since the 1980s. Thus, Caswell's claim that he was exercising the Mackinac Tribe's treaty rights at the time he violated state law is not, on its own, enough to prove his affirmative defense.

This case marks the first time Michigan state courts have considered whether a group *not* recognized by the federal government as an Indian tribe has treaty rights, i.e., whether it has "treaty-tribe" status. The Court of Appeals in an earlier appeal correctly adopted the federal standard to determine treaty-tribe status because treaty rights are federal rights. That test required Caswell to prove that he is a member of (1) a group of citizens of Indian ancestry, (2) who are descended from a treaty signatory, and (3) that has maintained an organized tribal structure. *People v Caswell*, 336 Mich App 59, 75 (2021). In short, Caswell had to establish with supporting evidence that *this group* calling itself the Mackinac Tribe is a

modern-day political successor to the historical group that signed the 1836 Treaty with the United States government in order to claim fishing rights under that treaty.

Despite being given two opportunities to prove his affirmative defense, Caswell has failed to prove *any* of the three elements of the federal test that demonstrate treaty-tribe status, much less all of them. Yet, the district court concluded based solely on six potentially relevant documents and inadequate testimony that Caswell had met his burden of proof for his affirmative defense. Both the circuit court and the Court of Appeals erroneously affirmed the district court, with each successive court changing the legal test to narrow the evidence Caswell needed to support his affirmative defense.

By altering and misapplying the treaty-tribe test, the lower courts have undercut the historic and enduring nature of the treaty rights that this Court recognized in *LeBlanc* as tribal rights. Under the lower courts' reasoning, individuals can give treaty rights to other individuals, eliminating the tribal nature of those rights.

If this Court allows the Court of Appeals' ruling to stand, it will do so at the expense of the five federally recognized tribes that have treaty rights in the same 14-million-acre area in the eastern Upper Peninsula and northwestern Lower Peninsula that Caswell claims. Those five tribes have fought to preserve the rights their ancestors reserved in the 1836 Treaty, and now the Mackinac Tribe and other groups will claim the same rights in the same places without adequate proof that

they have the same treaty rights. Allowing the Court of Appeals' decision to stand also tramples on the State of Michigan's sovereign right to protect and conserve natural resources that belong to the People of the State by enforcing state law. Notably, granting leave to appeal and reversing the lower courts will not bar the Mackinac Tribe group from seeking to prove its treaty-tribe status in a different case with adequate evidence.

This Court should grant leave to appeal in this case of first impression for the following reasons:

- Which groups are entitled to exercise treaty rights has significant public interest, and this case is brought on behalf of the People of the State of Michigan. MCR 7.305(B)(2).
- This case involves a legal principle of major significance to the state's jurisprudence. MCR 7.305(B)(3). This Court recognized rights under the treaty at issue in this case more than 50 years ago—before the federal courts did. But that ruling was the last time this Court issued a significant ruling regarding that treaty.
- The Court of Appeals' decision to affirm is clearly erroneous and will cause material injustice to the tribes that rightfully exercise treaty rights and to the State's sovereign right to protect its natural resources on behalf of all its citizens. MCR 7.305(B)(5)(1).

The People respectfully request that this Court grant its application for leave, reverse the Court of Appeals, reinstate the charges against Caswell, and remand to the district court for trial on those charges.

STATEMENT OF FACTS AND PROCEEDINGS

The State of Michigan regulates fishing within its borders, but state law can be preempted by federal law, including tribal treaties.

Fish in Michigan waters, including the Michigan areas of the Great Lakes, are the property of the State. *Aikens v Dep't of Conservation*, 387 Mich 495, 503 (1972); MCL 324.47301. The State indisputably has the authority to enact laws regulating taking fish within its boundaries. *Aikens*, 387 Mich at 502–503; MCL 324.47301; see also *United States v Washington (Washington I)*, 520 F2d 676, 684 (CA 9, 1975), citing *Geer v Connecticut*, 161 US 519 (1896) (“By virtue of its police power, the state has initial authority to regulate the taking of fish and game.”). Further, because Michigan’s fishing laws are generally applicable and non-discriminatory, they apply to everyone, including Indians. See *Washington I*, 520 F2d at 684, quoting *Mescalero Apache Tribe v Jones*, 411 US 145, 148–149 (1973). However, the Supremacy Clause dictates that federal law, including federal treaties with Indian tribes, preempts state law in certain circumstances, even when the activities in question occur outside of Indian country. US Const, art VI, cl 2.

Modern-day tribes exercise fishing rights under the 1836 Treaty of Washington.

In 1836, several bands of Anishinaabe (Ojibwe/Chippewa and Odawa/Ottawa) Indians ceded to the United States nearly 14 million acres of land in the area that would become Michigan a year later. See Treaty of Washington, 7 Stat 491, art I (Mar 28, 1836) (1836 Treaty). The ceded area is shaded yellow and labeled “205” on the map below:



Royce Area 205, Michigan 1,

<<https://www.loc.gov/resource/g3701em.gct00002?sp=29>> (accessed January 20,

2026). The bands that signed the 1836 Treaty included the Michilimackinac band

that resided on and around Mackinac Island. In ceding the land, the bands

reserved to themselves the usual rights of occupancy, including the right to fish

there. 1836 Treaty, art XIII. The continuing existence of those treaty rights was acknowledged by this Court more than fifty years ago in *LeBlanc*. It was subsequently confirmed by the federal courts. See generally *United States v Michigan*, 471 F Supp 192 (WD Mich 1979) (confirming treaty right to fish in ceded areas of the Great Lakes); *United States v Michigan*, unpublished order of the United States District Court for the Western District of Michigan, issued November 2, 2007 (Docket No. 2:73-cv-26) (confirming inland treaty rights). The continued existence of these treaty rights is not in question in this case. Nor does this case challenge the fact that a historical group known as the Mackinac bands signed the 1836 Treaty.

Five of the twelve federally recognized tribes in Michigan are known political successors in interest to signatories of the 1836 Treaty and therefore are entitled to exercise rights under that treaty: Bay Mills Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, Little River Band of Ottawa Indians, Little Traverse Bay Bands of Odawa Indians, and Sault Ste. Marie Tribe of Chippewa Indians (Sault Tribe). These five modern-day tribes, along with the United States and Michigan, are parties to two federal court decrees that address the exercise of the rights reserved under the 1836 Treaty: a 2023 Decree governing Great Lakes fishing and a 2007 Consent Decree governing inland hunting, fishing, and gathering. *United States v Michigan*, United States District Court for the Western District of Michigan, Docket No. 2:73-cv-26, ECF Nos. 2132, 1799. As a result,

members of these five tribes exercise fishing rights under the 1836 Treaty as governed by those decrees.

Caswell belongs to a group that calls itself the Mackinac Tribe, which is not recognized by the federal government as an Indian tribe.¹ See generally *Mackinac Tribe v Jewell*, 829 F3d 754, 755 (DC Cir 2016). Further, the Mackinac Tribe is not a party to the federal decrees that implement the treaty rights in the 1836 Treaty ceded area. Until the rulings in this case, no court had determined that this Mackinac Tribe group is a successor in interest to any signatory of the 1836 Treaty, including the historical Mackinac bands. Nor had any court determined that the group's members are entitled to exercise fishing rights under that treaty.

Caswell was charged with violating Michigan fishing laws and asserted a treaty right as his defense.

In October 2018, Caswell was spearfishing in an inland stream in Mackinac County within the 1836 Treaty ceded area when he was contacted by a Michigan Department of Natural Resources (DNR) conservation officer. *People v Caswell*, 336 Mich App 59, 64 (2021) (*Caswell I*). Caswell presented both a State of Michigan fishing license and a subsistence harvesting license issued by the Mackinac Tribe. *Id.* The conservation officer issued two citations to Caswell, for using illegal gear, MCL 324.48711, and for fishing in a closed stream, MCL 324.48715.²

¹ The State of Michigan relies on federal acknowledgment to determine which groups constitute Indian tribes and does not take a position here concerning whether the Mackinac Tribe is an Indian tribe.

² This statute has since been repealed. 2018 PA 529.

The Court of Appeals adopts the federal test for treaty-tribe status.

Caswell moved to dismiss the charges on the grounds that he was exercising a treaty right. (Def's Mot to Dismiss, 2/4/19.) The district court held a brief evidentiary hearing on the motion, at which Caswell submitted into evidence only three documents: (1) his tribal membership card and (2) tribal subsistence harvesting license, both issued by the Mackinac Tribe group, and (3) a certificate of degree of Indian blood prepared by the U.S. Department of Interior, Bureau of Indian Affairs, showing that he is 1/64th Mackinac Tribe Chippewa Indian. (2/12/19 Hr'g Tr, p 14:11–20 (Ex D); 2/12/19 Hr'g Defendant Ex A and C (Ex E and F); 2/12/19 Hr'g Tr, pp 14:21–15:6; 2/12/19 Hr'g Defendant Ex B (Ex G).) He also called Mackinac Tribe Chairman Barry Adams to testify, who stated without evidentiary support that the Mackinac Tribe group was “treaty signatories to the 1836 treaty, the 1855 treaty”; descended from Ainsse,³ a band leader who signed the 1836 Treaty on behalf of the Michilimackinac band; and was made up of individuals who were denied membership in the Sault Tribe after it closed its enrollment. (2/12/19 Hr'g Tr, pp 5:14–16, 22–23, 8:9–10, 10:15–20.) Caswell did not submit any historical documents to the district court.

The district court dismissed the charges, concluding that Caswell was a member of the Mackinac Tribe, that he possessed a valid tribal fishing license at the time of the citation, and that it was “clear from the record that the Mackinac Tribe

³ In the 1836 Treaty, the leader's name is spelled Ainse. It appears as Ainsse in the district court record.

of Odawa and Ojibwa Indians were signatories to the 1836 and 1855 treaties with the United States.” (6/14/19 Dist Ct Op & Order (Ex H).)

On appeal, the circuit court reversed on the basis that the Mackinac Tribe group is not federally recognized as an Indian tribe and remanded for further prosecution. (11/21/19 Circ Ct Mem & Decision & Order (Ex I).)

Caswell then appealed to the Court of Appeals, which identified the dispositive issue as “whether the Mackinac Tribe is a political successor in interest to a signatory tribe, entitling defendant to an affirmative defense based on his tribal status.” *Caswell I*, 336 Mich App at 77. Adopting the reasoning of the United States Court of Appeals for the Ninth Circuit, the Court of Appeals held that “treaty-tribe status is established when a group of citizens of Indian ancestry is descended from a treaty signatory and has maintained an organized tribal structure.” *Id.* at 75, quoting *United States v Washington (Washington II)*, 641 F2d 1368, 1371 (CA 9, 1981). The Court of Appeals vacated and remanded the case to the district court for an evidentiary hearing under the proper legal framework. *Caswell I*, 336 Mich App at 63.

On remand, the district court held another evidentiary hearing.

On remand, the district court held a second evidentiary hearing, at which it received five exhibits and heard from only three witnesses. The first witness was James M. McClurken, Ph.D., an expert in the field of ethnohistory and treaty rights who had not been retained by Caswell and had done little to prepare for the hearing. (1/25/22 Hr’g Tr, p 15:12–14 (Ex J).) McClurken could not support any of

the treaty-tribe factors because he admitted that he did not “know anything about the modern group” that Caswell claims has treaty rights. (*Id.*, p 103:19–25.) He acknowledged that determining whether a historical tie existed between the modern-day Mackinac Tribe and a treaty signatory would take “thousands of records” and “a good year to put those records together[.]” (*Id.*, p 14:9–23.)

Caswell’s other witness was Barry Adams, who no longer was the chairperson of the Mackinac Tribe group and admitted that he was suffering from memory loss. (1/25/22 Hr’g Tr, p 126:1–8; 165:16–17.) Adams testified that he and Darryl Brown “started” the modern-day Mackinac Tribe group, explaining that they decided to “go find the Mackinac people” when the Sault Tribe—a federally recognized tribe of which Adams is a member—closed its enrollment. (*Id.*, p 128:5–6, 15–18; 127:13–14; 153:1–7.) Adams spoke only generally about looking for information that potential group members descended from a person on a historical tribal census, but he never explained what the process entailed, what records he gathered or how those records were used, or how information was confirmed or refuted. (*Id.*, pp 141:3–142:9, 179:16–20.) Also, he did not offer any genealogical or other records to establish that any Mackinac Tribe member other than Caswell descended from a signatory to the 1836 Treaty. Adams testified that the Mackinac Tribe hosts powwows, fall gatherings, and other types of events (*Id.*, p 149:1–4), but he offered no details, such as how often events are held or how many members attend, or documentary evidence.

Conservation Officer Jon Busken testified for the People. He stated that the federally recognized 1836 Treaty tribes have structures in place to protect their treaty rights, such as conservation departments, regulations and officers, but he had not encountered similar structures for the Mackinac Tribe group. (1/25/22 Hr'g Tr, pp 189:18–190:3–6, 191:9–21, 192:20–193:2.)

At the conclusion of the hearing, the record contained only eight documents that Caswell claimed proved his affirmative defense (only six of which were potentially relevant): (1) Caswell's blood quantum card; (2) Caswell's Mackinac Tribe membership card; (3) Caswell's Mackinac Tribe fishing license; (4) the undated Mackinac Tribe declaration of independence and constitution; (5) Adams' affidavit; (6) the 1890 U.S. Census Report on Indians Taxed and Untaxed; (7) the Federal Register entry acknowledging the Grand Traverse Band; and (8) the U.S. Senate bill reaffirming the Little Traverse Bay Bands and Little River Band. It also had testimony from three individuals, none of whom provided evidence of a continuous connection between the historical Mackinac band that signed the 1836 Treaty and the modern Mackinac Tribe group in which Caswell is a member.

The district court dismissed the charges a second time.

After the evidentiary hearing, the district court again dismissed the charges against Caswell. The district court changed the treaty-tribe test, stating, "To do so, the Defendant must demonstrate that, (A) the Defendant is a part of a group of people of Indian ancestry, (B) that the *Defendant* descended from a treaty signatory tribe, and (C) that that tribe has maintained an organized tribal structure."

(4/18/23 Dist Ct Op & Order, 5 (emphasis added) (Ex C).⁴) The second element requires that the entire *group* claiming treaty-tribe status be descended from a treaty signatory tribe, not just Caswell.

The district court also concluded that Caswell established each of the three elements. (4/18/23 Dist Ct Opinion, 5–8.) *First*, the district court pointed to evidence of Caswell’s and Adams’ Indian ancestry to conclude that the Mackinac Tribe *as a whole* was “a group of people of Indian ancestry.” (*Id.*, 5.) *Second*, the district court concluded that Caswell, Adams, and group members who are related to Adams—who were neither identified nor quantified—were descended from a treaty signatory. (*Id.*, 6.) From this, the district court engaged in head-scratching speculation, and improperly shifted the burden of proof to the prosecution, stating that “[w]hile there’s *no evidence of any other members having directly descended from those identified in the Durant Roll other than the Defendant*, that does not lead to the logical conclusion that all members of the Mackinac Tribe are not somehow descendants of the Defendant’s members identified on the Durant Roll.”⁵ (*Id.* (emphasis added).) *Third*, the district court concluded that the Mackinac Tribe had maintained an organized tribal structure since 1836, relying solely on McClurken’s testimony regarding the historical Mackinac bands, which did not address the group that Caswell belongs to or anything from the past 40-plus years. (*Id.*, 7–8.)

⁴ The pages of the district court opinion are not numbered. Citations are based on page order.

⁵ Presumably, “Defendant’s members” in the quoted statement means Mackinac Tribe members, with Defendant incorrectly referring to the Tribe and not Caswell.

The circuit court affirmed the district court.

The People appealed, arguing that the district court had not faithfully applied the test that the Court of Appeals adopted in the prior appeal and that the very limited evidence in the record did not support the district court's decision. Nonetheless, the circuit court affirmed, agreeing with the district court's conclusion that Caswell satisfied his burden of proof on all three prongs of the test. In its seven-page opinion, the circuit court simply deferred not only to the district court's factual findings, but also to its interpretation of the treaty-tribe test. (9/27/23 Circ Ct Op & Order (Ex B).)

The Court of Appeals affirmed.

The People appealed by leave granted,⁶ raising similar arguments to those in the circuit court appeal. Although the Court of Appeals reviewed the district court's opinion more critically than the circuit court did, it still largely deferred to the district court's interpretation of the treaty-tribe test and affirmed.

As to the first prong, the Court of Appeals held that Caswell did not need to "produce individualized evidence" about Mackinac Tribe members because Adams had testified "about the generalized process" of enrolling members. *People v Caswell*, ___ Mich App ___ (2025) (Docket No. 368232) (*Caswell II*); slip op at 11. The Court of Appeals also noted that Adams had agreed that "the people who are now the Mackinac Tribe" had "always felt themselves to be distinct," explaining

⁶ *People v Caswell*, unpublished order of the Court of Appeals, entered March 22, 2024 (Docket No. 368232).

that “[t]hey’re Indians.” *Id.* The panel stated that from this, “the district court could extrapolate to every member of the tribe.” *Id.* Based on this, the Court of Appeals concluded that “there was evidence showing that the Mackinac Tribe was a *group* of citizens of Indian ancestry.” *Id.*

Addressing the second prong, the Court of Appeals held that the district court erred in concluding that the group was descended from a treaty signatory, but it relied again on Adams’ general testimony about the process of finding members to hold that the second prong was met: “Adams verified that each member was a descendant of the Mackinac Bands, who had been represented by Ainse, an 1836 treaty-signatory. Accordingly, there was evidence that the Mackinac Tribe—the 468 individuals Adams registered as tribe members—was a group descended from a treaty signatory.” *Id.*, ___ Mich App at ___; slip op at 12.

Finally, as to the third prong, the Court of Appeals concluded that Adams’ testimony “filled in the ‘gaps’” of McClurken’s testimony to establish the third prong. *Id.* The Court of Appeals stated that Adams and Brown used genealogy records to verify that members descended from the treaty signatory Mackinac bands, despite the lack of documentary evidence in the record. *Id.* The Court of Appeals further noted that the group had a constitution and declaration of independence, issued fishing and hunting licenses, had a “chairman of the conservation,” had rules and regulations that carried the threat of fines, and had powwows and gatherings “that were culturally distinct.” *Caswell II*, ___ Mich App at ___; slip op at 12. From this, the Court of Appeals concluded, “While the nature

of the Mackinac Bands may have evolved over time, there were nonetheless defining characteristics—the kinship-based structure, connection to the Mackinac region, fishing, powwows—as well as less modern political structures that survived from 1836 until the present day.” *Id.* The Court of Appeals also rejected the characterization of Adams’ testimony as stating that he “created” the Mackinac Tribe, instead portraying it as “reestablishment.” *Caswell II*, ___ Mich App at ___; slip op at 13.

The People now appeal.

STANDARD OF REVIEW

A trial court’s decision on a motion to dismiss charges against a defendant is reviewed for an abuse of discretion. *People v Bylsma*, 493 Mich 17, 26 (2012), citing *People v Thomas*, 438 Mich 448, 452 (1991). “A trial court necessarily abuses its discretion when it makes an error of law.” *People v Butka*, 514 Mich 366, 376 (2024), quoting *Duncan*, 494 Mich at 723. Additionally, “An abuse of discretion occurs when a trial court’s decision ‘falls outside the range of reasonable and principled outcomes.’” *People v Franklin*, 500 Mich 92, 100 (2017) (cleaned up).

The trial court’s findings of fact are reviewed for clear error. *Bylsma*, 439 Mich at 26. Clear error occurs when the reviewing court is “left with a definite and firm conviction that the trial court made a mistake.” *Id.* (cleaned up).

ARGUMENT

I. The district court erred in dismissing the charges against Caswell on the basis that he was exercising treaty rights because the district court altered and misapplied the federal test for determining whether the Mackinac Tribe group has treaty-tribe status.

A. Burden of Proving the Affirmative Defense

A defendant bears the burden of proving an affirmative defense to the charges against him. *People v Likine*, 492 Mich 367, 405 nn 80 and 81 (2012) (noting that a defendant bears the burden of proving an affirmative defense to the charges against him); see also *Patterson v New York*, 432 US 197, 210 (1977) (holding that due process requires the prosecution to prove beyond a reasonable doubt all the elements of the charged offense, but proof of nonexistence of all affirmative defenses is not constitutionally required). Accordingly, Caswell bore the burden of proof to establish that the Mackinac Tribe group has treaty-tribe status. See *Caswell I*, 336 Mich App at 78; (4/18/23 Dist Ct Op, 1, 4–5).

B. Analysis

In *LeBlanc*, 399 Mich at 35, this Court was tasked with determining whether the fishing rights reserved to the Indians under the 1836 Treaty continued to the present day. There was no question that if the treaty rights still existed, members of the federally recognized Indian tribe that A.B. LeBlanc belonged to, the Bay Mills Indian Community, were entitled to exercise them. That is because Bay Mills had already been established to be a political successor in interest to an 1836 Treaty signatory. Here, the question of whether the Mackinac Tribe group that Caswell

belongs to is a political successor to a treaty signatory—that is, whether the *group* has treaty-tribe status—had not been resolved when Caswell asserted his affirmative defense.

On the record before the district court, Caswell failed to prove that the group has treaty-tribe status. To overcome this, the lower courts changed the federal test for treaty-tribe status and misapplied it to reduce the evidentiary burden the federal courts have imposed so that Caswell’s meager evidence could satisfy it. This was legal error.

The consequences of that error are grave: Allowing the Court of Appeals’ decision to stand could allow other individuals with equally paltry supporting evidence to claim the same treaty rights that this Court acknowledged in *LeBlanc* and which the Bay Mills Indian Community and the other federally recognized Indian tribes have fought to protect. At the same time, the courts will have made it difficult for the State to know who has those rights in order to respect them as required by federal law.

- 1. The lower courts committed a legal error when they changed the treaty-tribe test from the federal test that the Court of Appeals had properly adopted.**

“[T]reaty-tribe status is established when a group of citizens of Indian ancestry is descended from a treaty signatory and has maintained an organized tribal structure.’” *Caswell I*, 336 Mich App at 75, citing *Washington II*, 641 F2d at 1371. Thus, this test comprises three elements: (1) a group of citizens of Indian

ancestry, (2) that is descended from a treaty signatory, and (3) has maintained an organized tribal structure.

The lower courts each appeared to follow the test adopted in the first *Caswell* decision, but they made a small, yet consequential, change to the second prong of the test. That second prong requires proof that the group *as a whole* is descended from a treaty signatory. The lower courts, instead, focused on proof of only Caswell's and Adams' ancestry. Even the Court of Appeals, which ostensibly concluded that the lower courts erred in accepting evidence concerning only Caswell and Adams, nonetheless found this second prong was met despite the lack of evidence regarding the group as a whole.

Each court in succession took the high bar that the treaty-tribe test sets and lowered it because Caswell's evidence did not pass over the bar. Changing the treaty-tribe test is, on its own, error that requires reversal and grounds to grant this application because it deviates from the federal test and fails to hold groups without federal recognition as an Indian tribe to the same high standard that protects treaty rights for the descendants of those who reserved it.

2. The lower courts committed a legal error by failing to apply the robust evidentiary requirement for a group to establish treaty-tribe status.

Establishing treaty-tribe status, even under a preponderance of the evidence standard,⁷ see *Caswell I*, 336 Mich App at 78, requires a voluminous documentary record and a broad range of evidence to demonstrate each of the three factors—a robust evidentiary requirement that *Caswell* utterly failed to meet. The lower courts each concluded based on a total of eight documents and generalized testimony that *Caswell* had demonstrated that the Mackinac Tribe group has treaty-tribe status. The lower courts’ failure to hold *Caswell* to the appropriate evidentiary requirement resulted in a misapplication of the treaty-tribe test, which was an error of law requiring reversal. See *Butka*, 514 Mich at 376 (an error of law constitutes abuse of discretion).

The Court of Appeals adopted the Ninth Circuit’s treaty-tribe test because that court “has handled far more of these cases than apparently any other federal circuit court in the country.” *Caswell I*, 336 Mich App at 74. The Ninth Circuit has also offered guidance on the evidentiary burden necessary to satisfy that test, noting that although the treaty-tribe test is not identical to the standard for federal recognition of an Indian tribe, “the two inquiries are similar.” *Greene v United States*, 996 F2d 973, 976 (CA 9, 1993); see also American Indian Law Deskbook, § 9:11 (“Though the two inquiries address legally distinct issues, *the facts a group*

⁷ “‘Preponderance of the evidence’ means such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth.” *People v Cross*, 281 Mich App 737, 740 (2008).

must establish to gain federal acknowledgement as an Indian tribe are similar to those it must establish to show that it is entitled to exercise treaty rights.”) (emphasis added). The factors that a group seeking federal recognition must document largely mirror the three prongs of the treaty-tribe test: “whether it has been identified as an American Indian entity on a ‘substantially continuous basis’ since 1900; whether it comprises a ‘distinct community;’ whether it has historically maintained ‘political influence or authority over its members;’ and whether its membership ‘consists of individuals who descend from a historical Indian tribe.’” *Jewell*, 829 F3d at 756, citing 25 CFR 83.11(a)–(c), (e). Thus, both the federal recognition standard and the treaty-tribe test look at the ancestry of the group’s members, whether the members descend from a historical tribe, and whether the group has continuously functioned as a government by exerting influence or authority over its members.

To meet the federal recognition standard, petitioners must present voluminous documentary evidence demonstrating the group’s genealogy, ethnohistory, and political life, which requires multiple experts including anthropologists, genealogists, and lawyers. *Jewell*, 829 F3d at 759–760 (BROWN, J., concurring). Indeed, “[t]he creation of the documents alone has been estimated to take between two-and-a-half and five years.” *Id.*, quoting Comment, *Old Promises: The Judiciary and the Future of Native American Federal Acknowledgment Litigation*, 151 U Pa L Rev 1827, 1840 (2003). “‘At present day, a federal acknowledgment petition can be over 100,000 pages long and cost over \$5 million to

assemble[.]’ ” *Jewell*, 829 F3d at 758 (BROWN J., concurring), quoting Jackson, *Note, The Incomplete Loom: Exploring the Checkered Past and Present of American Indian Sovereignty*, 64 Rutgers L Rev 471, 497 (2012). In other words, the documentary evidence needed to support federal recognition is substantial, wide-ranging, and exacting.⁸

And there is good reason to impose a similarly high evidentiary standard to the treaty-tribe test, as the Ninth Circuit directed in *Greene*. Treaties between the United States and Indian tribes are contracts between sovereigns. *Washington v Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 US 658, 675, modified sub nom *Washington v United States*, 444 US 816 (1979); see also Royster & Blumm, *Native American Natural Resources Law* (Durham, NC: Carolina Academic Press, 2002), ch VIII, p 473 (“Indian hunting, gathering, and fishing rights are peculiar kinds of profits a prendre, however. They were affirmed or

⁸ Although not a final decision, the Bureau of Indian Affairs’ recent proposed finding against federal acknowledgment of the Grand River Bands of Ottawa Indians illuminates the difficulty in providing documents with the level of detail needed to meet this evidentiary requirement. Proposed Finding Against Acknowledgment of the Grand River Bands of Ottawa Indians, 2/22/23 <https://www.bia.gov/sites/default/files/dup/inline-files/146_pf.pdf> (accessed January 20, 2026) (finding that the group’s evidence failed to show that “its members comprise a distinct community that has existed as a community through time”). By contrast, the Nottawaseppi Huron Band of Potawatomi Indians provided detailed evidence of the historical continuity between the historical band that signed the treaty and the modern petitioner, which was sufficient to meet the federal acknowledgment criteria. Proposed Finding for Huron Potawatomi, Inc., 5/10/95 <https://www.bia.gov/sites/default/files/dup/assets/as-ia/ofa/petition/009_hurpot_MI/009_pf.pdf> (accessed January 20, 2026). The final determination for federal acknowledgment of the Huron Potawatomi can be found at 245 Fed Reg 66315 (December 21, 1995).

recognized *by one sovereign for another sovereign.*”) (emphasis added). Thus, determining that a modern-day group has treaty-tribe status is akin to declaring that a group has key attributes of the historical sovereign that signed the treaty regardless of whether the federal government recognizes it as a sovereign today. It is a declaration that the modern-day group has “a continuing special political relationship with the United States” based on a treaty entered into by the members’ ancestors. *United States v Washington (Washington II)*, 476 F Supp 1101, 1110 (WD Wash, 1979), *aff’d* 641 F2d 1368 (CA 9, 1981). That is no small thing, especially in a case like this where the federal government has rejected the Mackinac Tribe group’s attempt to gain federal recognition through means other than the federal administrative process. See generally *Jewell*, 829 F3d 754.

Moreover, recognizing treaty-tribe status for a group necessarily impacts the tribes already exercising those treaty rights, such as under the precedent this Court set in *LeBlanc*, particularly where those tribes are already sharing scarce natural resources. And of course, a group with treaty-tribe status has authority to regulate its members’ use of natural resources outside the parameters of state law, thereby depriving the State of regulatory jurisdiction it otherwise would possess. These considerations are why the evidentiary requirement to demonstrate treaty-tribe status is so substantial, even under a preponderance of the evidence standard.

Caswell’s own expert witness understood that the type and volume of documentary evidence that was required to demonstrate treaty-tribe status was similar to that for federal recognition. McClurken testified that it would take

“thousands of records” to establish a historical tie between the modern-day Mackinac Tribe group and a treaty signatory and that “it would take me a good year to put those records together[.]” (1/25/22 Hr’g Tr, p 14:9–23.) And he conceded he had not done that work, explaining:

If somebody wanted to pay me \$200,000, I would write a detailed report. I would track down the internal documents. I would produce it and answer all of your questions.

But so far I’ve testified from memory except for one document that I knew that I could look up quickly because I was just using it. And all of this is a general recitation of what I’ve found over 35 years.

So when you come to ask me specifics, I just can’t do that for you right now. [*Id.*, p 80:9–19.]

Considering the type of evidence that Caswell needed to admit into the record to prevail on his defense, the evidence that the district court accepted as establishing treaty-tribe status was alarmingly deficient.⁹ Between the two evidentiary hearings, Caswell entered only eight documents into the record, far

⁹ Despite the clear allocation of the burden of proof to Caswell, the circuit court at multiple points faulted the People for failing to rebut Caswell’s evidence. (9/27/23 Circ Ct Op, 3) (“However, Appellant failed to contradict any of the evidence presented by Appellee.”); see also *id.*, 4 (“The Appellant wants more, but again provided no contradictory evidence.”), *id.*, 6 (“Further, as stated previously, the Appellant failed to rebut or contradict the evidence submitted by the Appellee.”). The Court of Appeals, while acknowledging Caswell’s burden of proof, similarly criticized the prosecution for failing to put forth evidence. *Caswell II*, ___ Mich App at ___; slip op at 10 (“As the circuit court recognized, the prosecution largely failed to offer any evidence in rebuttal, which meant defendant was at an advantage. . . . Therefore, despite the prosecution largely failing to rebut defendant’s evidence, defendant still had to satisfy the three-prong test this Court handed down in the prior *Caswell* appeal.”); see also *id.* at ___; slip op at 11 (“From such testimony, the district court could extrapolate to every member of the tribe, especially without rebuttal evidence from the prosecution.”). This was improper burden shifting, as the People had no obligation to counter Caswell’s evidence or to prove that the Mackinac Tribe does *not* have treaty-tribe status.

short of thousands. Only six of those directly addressed the treaty-tribe test factors: Caswell's certificate of degree of Indian blood, tribal membership card and harvesting license; an 1890 federal census of Indians; the Mackinac Tribe declaration of independence and constitution; and Adams' affidavit. And those documents failed to make any sort of cogent historical connection between the modern-day Mackinac Tribe group and the bands that signed the 1836 Treaty, as the treaty-tribe test requires.

Moreover, the type of anecdotal testimony that McClurken and Adams offered was not a substitute for documentary evidence and has been rejected as insufficient to establish treaty-tribe status. See *Timpanogos Tribe v Conway*, unpublished opinion of the United States District Court for the District of Utah, issued Jan 24, 2005 (Case No. 2:00-CV-734 TC), p 3, 2005 WL 8176199 (rejecting personal statements presenting anecdotal information in considering whether tribe was descended from a treaty signatory or had merged with another tribe) (attached as Exhibit K).

Nonetheless, and as explained more below, the district court concluded that the limited and inadequate evidence that Caswell presented was sufficient to establish treaty-tribe status. The circuit court and the Court of Appeals failed to correct that error—and instead, narrowed further the evidence required to prove treaty-tribe status. The Court of Appeals went so far as to expressly reject the Ninth Circuit's instruction in *Greene* regarding the evidentiary burden necessary to satisfy that test. *Caswell II*, ___ Mich App at ___; slip op at 9 (“As an initial matter,

the prosecution argues that the documentary evidence necessary to establish treaty-tribe status is similar to the documentary evidence necessary to support federal tribal recognition. We disagree.”).

Ultimately, none of the lower courts gave appropriate consideration to the level of documentary evidence that the treaty-tribe test requires or the test’s proper application. Instead of applying the robust evidentiary standard that the treaty-tribe test demands, the district court accepted “trust me” testimony from Caswell’s witnesses in place of documentary evidence. This was a misapplication of the treaty-tribe test and was legal error that constituted an abuse of discretion. See generally *People v Wilhite*, 240 Mich App 587, 595 (2000) (holding the trial court abused its discretion by trusting defense counsel rather than “mak[ing] its decision [to allow plea withdrawal] according to the evidence on the record, none of which supported its decision in this case”).

The treaty-tribe test is intentionally burdensome and creates a high evidentiary bar to protect the treaty rights that *LeBlanc* and other decisions identified. The lower courts’ relaxing of the evidentiary requirement could allow groups without valid treaty rights to be deemed to have treaty-tribe status and thereby diminish the treaty rights of tribes validly claiming them and intrude on the State’s sovereign right to enforce its laws. It is crucial that this Court correct this error.

3. The lower courts abused their discretion when analyzing the evidence and concluding it supported all prongs of the treaty-tribe test.

The record shows that Caswell fell far short of the evidentiary showing the treaty-tribe test requires, providing only a handful of documents and anecdotal testimony. The district court—as it did the first time—failed in its role of historical gatekeeper, ruling that the Mackinac Tribe group had treaty-tribe status even though Caswell had not provided an unbroken chain of historical evidence tying his modern-day group to the historical Mackinac bands.

The question here is not whether the Mackinac bands existed historically; that is undisputed. The question is whether the Mackinac Tribe as a *group* is the modern-day *continuation* of those historical bands. Nothing in federal law guarantees that a historical tribe will have a modern-day political successor, and Caswell failed to bring forward evidence that the Mackinac Tribe group is such a political successor with treaty-tribe status.¹⁰

The evidence Caswell presented was inadequate to establish any of the three elements of the treaty-tribe test, much less all of them. Caswell at best offered ancestry evidence regarding only *two* of the more than 400 members of the Mackinac Tribe group, and yet the district court concluded from that evidence that the Mackinac Tribe *as a group* consists of people of Indian ancestry and is descended from a treaty signatory. And Adams, who is also a member of the

¹⁰ Although correctly applying the federal test forecloses Caswell's affirmative defense in this case, the Mackinac Tribe group could still seek to prove its treaty-tribe status in a different case with adequate evidence.

federally recognized Sault Tribe, testified that he *created* the group about 25 years ago in response to political events at the Sault Tribe—a far cry from demonstrating a continuous organized tribal structure since treaty times. Caswell presented no documents about the historical Mackinac bands, and the few documents he offered about the modern Mackinac Tribe group failed to show a functioning governmental structure or continuity since treaty times.

In finding that this evidence established that the Mackinac Tribe group had treaty-tribe status, the district court misapplied the treaty-tribe test to the very limited evidence in the record, which constituted an error of law, and abused its discretion in dismissing the charges. The circuit court and the Court of Appeals failed to correct the error. Indeed, the lower courts committed the same error the district court did the first time around: changing the treaty-tribe test and lowering the evidentiary bar because Caswell plainly failed to prove his affirmative defense. This Court should grant leave and reverse.

- a. **Caswell failed to prove that the modern-day Mackinac Tribe consists of citizens of Indian ancestry when he provided evidence concerning at best only two out of 400-plus members.**

The first element of the treaty-tribe test requires the group asserting that status to demonstrate that its members are of Indian ancestry. *Caswell I*, 336 Mich App at 75. Proving this element requires substantial genealogical and other documentary evidence about the group as a whole. Here, Caswell presented documentary evidence demonstrating only his own ancestry, plus anecdotal

testimony about Adams' ancestry. Despite the lack of evidence, the district court concluded that *the entire group* had Indian ancestry. This was error.

The only evidence in the record regarding the ancestry of any Mackinac Tribe group member is documentation of Caswell's ancestry (the certificate of degree of Indian blood) and Adams' unsubstantiated testimony. Although Adams testified that he is directly descended from Ainsse (1/25/22 Hr'g Tr, p 129:2–3), his testimony was not supported by genealogical records and clearly was not based on his personal knowledge of someone who lived in 1836.¹¹ Adams also claimed that some Mackinac Tribe members are his relatives, so those individuals *might* also be of Indian ancestry. (*Id.*, p 145:22–23.) However, Adams never identified those relatives or even stated how many of the group's 468 members are related to him. No evidence was provided about the ancestry of any other group members. For all the record shows, Caswell and Adams could be the *only* members of the Mackinac Tribe who can rightfully claim to have Indian ancestry.

Nonetheless, the district court concluded that the Mackinac Tribe was *a group* of people of Indian ancestry. The district court cited only Caswell's certificate

¹¹ In a similar case in Delta County, where a member of a group calling itself the Mackinac Band of Chippewa and Ottawa Indians asserted treaty rights in defense of a hunting violation, the district court judge noted, “[I]f I was in a court proceeding and I was a Defendant and it was important for me to establish that I was related to Abraham Lincoln, I would expect that nobody would just rely on my saying that.” (*People v Ansell*, 94th District Court, File No. 22-SM-000578, 2/16/24 Hr'g Tr, p 8 (cleaned up) (attached as Exhibit L).) He continued, “There'd have to be some -- some documentation of that and not just me coming into court and saying I'm related to Abraham Lincoln.” (*Id.*) In that case, the district court held the defendant had not proven that the Mackinac Band of Chippewa and Ottawa Indians had treaty-tribe status because “there just wasn't sufficient proof.” (*Id.*, p 13.)

of degree of Indian blood showing that *he* is a descendant of an individual who appeared on the 1836 Census Register to conclude that “[t]he constituents of the current day Mackinac Tribe are clearly descendants of Ainsse as their signatory to the 1836 Treaty of Washington.” (4/18/23 Dist Ct Op, 5.) Similarly, the district court concluded from Adams’ testimony identifying himself as a direct descendant of Ainsse that “[h]e and his relatives, *as well as others who descended from that tribe*, constitute the Mackinac Tribe.” (*Id.* (emphasis added).)

In other words, the district court concluded that the Mackinac Tribe, which consists of 468 members, is a group of Indian ancestry based on evidence regarding at best two members and possibly some unknown number of Adams’ unidentified relatives. Proving a characteristic of *a group* requires evidence about what the 400-plus members have in common, not just one or two of them. This focus on Caswell’s ancestry, even if supplemented by Adams’ testimony about his own ancestry, was the specific error that the district court committed in 2019 that led the Court of Appeals to reverse that first decision to dismiss the charges. *Caswell I*, 336 Mich App at 77 (holding that the district court erred “by assuming that the Mackinac Tribe possessed treaty rights merely because some of its members were descended from signatory tribes of the relevant treaty”). The district court’s findings in this regard were clear error yet again and likewise must be reversed.

Further, Adams’ general testimony about researching Mackinac Tribe members’ lineages did not suffice to prove that the group is of Indian ancestry. Adams testified that he researched the genealogy of people who sought membership

in the group, but he did not describe how the genealogical research was conducted, what process was followed, or how information was confirmed or refuted. Adams at no point explained how he determined a specific person's Indian ancestry or revealed whether he had used any particular criteria to determine Indian ancestry. He gave no examples of instances where Indian ancestry was proved or disproved. Also, no genealogical documents were entered into the record or identified in Adams' testimony, even about his own ancestry. Notably, the 1890 federal census of Indians that was placed into evidence simply identified the number of Indians residing in each county; it did not identify individual Indians. When considering an issue as monumental as treaty-tribe status, it is not enough simply to take Adams' word for it. See *Wilhite*, 240 Mich App at 595. Nonetheless, the district court stated that the Mackinac Tribe is a group of Indian ancestry because "[t]he efforts that Mr. Adams and others made to identify those relatives and descendants cannot be ignored." (4/18/23 Dist Ct Op, 5.) Given the lack of documentary evidence and the scant details in Adams' testimony, this finding was clear error.

Finally, the district court stated that McClurken's testimony supported its finding on this element, even though McClurken offered no testimony regarding the Indian ancestry of Mackinac Tribe members. (*Id.*) Indeed, McClurken stated that he had no information about the modern-day Mackinac Tribe and had not done any genealogical research into the Mackinac bands. (1/25/22 Hr'g Tr, pp 78:8–13, 95:24–96:10.) The district court's reliance on McClurken's non-existent testimony to support its conclusion was also clearly erroneous.

For its part, the circuit court only compounded the error, disregarding even the slim documentary evidence that Caswell offered and finding Adams' vague testimony about enrolling members and researching their ancestry to be sufficient to establish this element. (9/27/23 Circ Ct Op, 3.) The circuit court's discussion of the first factor does not even mention Caswell's certificate of degree of Indian blood or Adams' testimony asserting his Indian ancestry. Under the circuit court's reasoning, the treaty-tribe test can be met with *no* documentary evidence and *no* information about the ancestry of specific group members.

Rather than require evidence, the Court of Appeals held that the district court could "extrapolate" Adams' statement that the group's members are Indians "to every member of the tribe." *Id.* It excused the "lack of detail or documentation" in Adams' testimony, stating that any claims of deficiency "relate[d] back to the federal recognition standard, which does not apply," and "to issues of weight and credibility, which are matters that we defer to the trial court." *Caswell II*, ___ Mich App at ___; slip op at 11. As explained, the Court of Appeals improperly rejected the Ninth Circuit's comparison in *Greene* of the evidentiary burden for the treaty-tribe test to that for federal recognition. And matters of weight and credibility are irrelevant where no evidence exists.

The Court of Appeals accepted Adams' description of his process without evidentiary support as sufficient, characterizing his general statements as "describ[ing] the extensive methods used to determine membership in the Mackinac Tribe, including the use of census rolls and genealogy." *Caswell II*, ___ Mich App at

___; slip op at 10. As to that last point, the Court of Appeals pointed to a list of “genealogy and ancestral records” attached to Adams’ affidavit that neither lower court had mentioned, much less relied on. *Caswell II*, ___ Mich App at ___; slip op at 10 n 8. Adams did not name any of those documents in his testimony or explain their use. And of course none were admitted into evidence. A mere list of documents (without the documents themselves) does not prove the Indian ancestry of more than 400 people.

In sum, the record shows that Caswell is of Indian ancestry. Taken at face value, Adams’ testimony shows that he is of Indian ancestry and that some unknown number of Mackinac Tribe members who are related to him *might* be of Indian ancestry. But rather than hold that the evidence was inadequate, the district court modified the treaty-tribe test to allow evidence about two members to establish that the Mackinac Tribe *as a group* is of Indian ancestry. This was error. Indeed, concluding that this group has treaty-tribe status based on the ancestry of only two members is in direct conflict with the principle that treaty rights belong to a tribe and are not vested in the tribe’s members. *United States v Michigan*, 471 F Supp at 271–272 (the right reserved by the tribes or bands that signed the 1836 Treaty “is the communal property of the tribes which signed the treaty and their modern political successors; it does not belong to individual tribal members”) (citations omitted). Recognizing a group as having treaty-tribe status based on evidence of only two members implies that an individual Indian like Adams or Caswell can possess a communal right and then share it with anyone he chooses to

make a member of the group he forms regardless of their Indian ancestry or connection to a treaty signatory. That is plainly incorrect.

The district court committed clear error in finding that the Mackinac Tribe is a group of Indian ancestry without any evidence in the record concerning the ancestry of members other than Caswell and Adams. This error alone requires this Court to reverse and remand for trial on the charges.

b. Caswell failed to prove that the modern-day Mackinac Tribe descends from a treaty signatory when he failed to provide any evidence of the group's ties to the historical Mackinac band.

The second element of the treaty-tribe test requires the group asserting treaty-tribe status to demonstrate that it is descended from a treaty signatory. *Caswell I*, 336 Mich App at 75. This element is related to the first: To establish the first element, the group must demonstrate Indian ancestry, and to meet the second element, that ancestry must link to a treaty signatory. Here, because the Mackinac Tribe group claims rights under the 1836 Treaty, Caswell had to show that the Mackinac Tribe group was descended from a signatory of the 1836 Treaty. As with the first element, the only evidence Caswell offered regarding the Mackinac Tribe group's descendancy from a treaty signatory is documentation of Caswell's ancestry and Adams' testimony. And similarly, the lower court erred in concluding that this insufficient evidence established that the Mackinac Tribe *as a group* is descended from a treaty signatory.

The only documentary evidence that links the modern-day Mackinac Tribe group to an 1836 Treaty signatory is Caswell's certificate of degree of Indian blood, and that document links only *him* to a treaty signatory. Taken at face value, Adams' testimony shows that he descends from Ainsse, an 1836 Treaty signatory, as do potentially some unknown number of Mackinac Tribe members who are related to Adams. (1/25/22 Hr'g Tr, pp 129:2–3, 145:22–23.) This information about these two individual members is simply insufficient to establish that *the group* as a whole descended from a treaty signatory, and the test for treaty-tribe status turns on evidence as to *the group*.

Although Adams offered vague testimony about proving that Mackinac Tribe members descended from persons identified as Mackinac on the Durant Roll, as explained, Adams did not describe how any genealogical research was conducted, what criteria were used, what process was followed, or how information was confirmed. Further, no documents supporting Adams' testimony about his genealogical research, or the results of that research, were entered into the record. Adams even called into question the reliability of his own research. He testified that he found people who did not know they were Mackinac, and when asked how these individuals could “forget such a thing,” he replied, “Well, they got so many of the same names out there, you don't know if you're getting the right person or not.” (*Id.*, p 179:12–17.)

Citing only Adams' unsubstantiated testimony about his own ancestry and that of his relatives, the district court acknowledged that “there's *no evidence of any*

other members having directly descended from those identified in the Durant Roll other than the Defendant,” but then used a double-negative to try to overcome the lack of evidence as to the Mackinac Tribe as a group: “. . . that does not lead to the logical conclusion that all members of the Mackinac Tribe are not somehow descendants of the Defendant’s members identified on the Durant Roll.”¹² (4/18/23 Dist Ct Opinion, 6 (emphasis added).) The Court of Appeals correctly held that the district court erred in relying on this slim evidence and what it characterized as a problematic assumption to conclude that Caswell had shown that the Mackinac Tribe—the whole group—descended from a treaty signatory and that the circuit court erred in affirming the ruling. *Caswell II*, ___ Mich App at ___; slip op at 11.

However, the Court of Appeals found the district court had provided a “separate rationale for its conclusion regarding this second prong,” pointing to statements in the district court’s opinion about the group as a whole that had nothing to do with the group members’ ancestry. *Caswell II*, ___ Mich App at ___; slip op at 12. Coupled with Adams’ generalized testimony that he had verified that each member was a descendant of the Mackinac bands, the Court concluded that “there *was* evidence that the Mackinac Tribe—the 468 individuals Adams registered as tribe members—was a group descended from a treaty signatory.” *Id.* But the existence of evidence does not mean there was adequate evidence—and the Court of Appeals too failed to hold Caswell to the necessary evidentiary burden.

¹² Presumably, “Defendant’s members” in the quoted statement means Mackinac Tribe members, with “Defendant” meant to refer to the group and not Caswell.

In sum, the record at best shows that Caswell and Adams are descended from signatories of the 1836 Treaty, and some unknown number of other members of the Mackinac Tribe related to Adams *might be* related to treaty signers. But without documentary evidence and detailed, thorough information about the efforts made to verify identities and the link to the historical Michilimackinac band of 1836, the record did not support the district court’s conclusion that the modern-day Mackinac Tribe *as a group* descends from a signatory of the 1836 Treaty. The district court should have held that Caswell failed to meet his burden, but instead it erroneously changed the test to allow evidence of two members and anecdotal testimony about the rest of the group to satisfy this second element. This Court should reverse and remand for trial on the charges.

c. Caswell failed to prove that the Mackinac Tribe maintained an organized tribal structure from treaty times through today.

The third element requires the group asserting treaty-tribe status to demonstrate that it has continuously maintained an organized tribal structure since treaty times. *Caswell I*, 336 Mich App at 75. Even if Caswell had established the first two prongs of the treaty-tribe test (which he did not), establishing treaty-tribe status requires more than merely tracing the modern group’s ancestry to the original tribe. See *Caswell I*, 336 Mich App at 75; see also *United States v Suquamish Indian Tribe*, 901 F2d 772, 776 (CA 9, 1990) (“That a tribe includes descendants of treaty-signatory tribes does not alone allow it the fishing rights of a treaty tribe.”). In addition, a tribe must have “functioned since treaty times as [a]

‘continuous separate, distinct and cohesive Indian cultural or political communit[y].’” See *Caswell I*, 336 Mich App at 76, quoting *Washington II*, 641 F2d at 1373. This third element of the treaty-tribe test is paramount: “*Continually* maintaining an organized tribal structure is the ‘single necessary and sufficient condition for the exercise of treaty rights by a group of Indians.’” *Caswell I*, 336 Mich App at 75, quoting *Washington II*, 641 F2d at 1372 (emphasis added). Here, Caswell did not make that showing.

There is no dispute that Mackinac bands existed historically and signed the 1836 Treaty. Indeed, despite the many shortcomings of McClurken’s testimony and the lack of documents to support it, there is no real dispute that Mackinac bands existed from treaty times into the twentieth century. The question in this case is whether the modern-day Mackinac Tribe group connects to those historical groups to create an *unbroken* chain of continuous tribal government existence. Put another way, “the sole purpose of requiring proof of tribal status is to identify the group asserting treaty rights as the group named in the treaty.” *Caswell I*, 336 Mich App at 75, quoting *Washington II*, 641 F2d at 1372–1373.

The inquiry considers such things as whether tribal governments have “controlled the lives of the members” or established “continuous informal cultural influence.” *Caswell I*, 336 Mich App at 76, quoting *Washington II*, 641 F2d at 1373.

In determining whether a group of persons have maintained Indian tribal relations and a tribal structure sufficient to constitute them an Indian tribe having a continuing special political relationship with the United States, the extent to which the group’s members are persons of Indian ancestry who live and were brought up in an Indian society or community, the extent of *Indian governmental control over their lives*

and activities, the extent and nature of the members' participation in tribal affairs, the extent to which *the group exercises political control over a specific territory*, the *historical continuity* of the foregoing factors, and the extent of express acknowledgement of such political status by those federal authorities clothed with the power and duty to prescribe or administer the special political relationships between the United States and Indians are all relevant factors to be considered. [*Washington II*, 476 F Supp at 1110 (emphasis added).]

The evidence in this case simply fails to address most of these critical factors. Just being descendants of a treaty signatory tribe is not enough where the members have “no common bond of residence or association *other than such association as is attributable to the fact of their voluntary affiliation with*” the modern-day group. *Id.* at 1109 (emphasis added). In other words, there must be a relationship between the members that demonstrates that they are a tribal community regardless of federal recognition, which Caswell has not shown. As discussed, he has not even explained who these group members may be.

The district court's finding on the third factor was based solely on McClurken's testimony about the Mackinac bands from treaty times through about 1981, from which the court astonishingly concluded that “the record shows a lineal continuation of tribal governance from the inception of the Treaty of 1836.” (4/18/23 Dist Ct Op, 8.) Evidence regarding only the historical groups, with no mention of what happened in the past 40 years and nothing linking the modern group to the historical groups, did not support a finding in Caswell's favor on this factor. The district court's ruling on this factor was clearly erroneous. The circuit court and Court of Appeals seemed to acknowledge the need to demonstrate a continuation of

tribal structure through the present day, but the evidence did not support their holdings.

In fact, the record establishes the opposite of what Caswell needed to prove, showing instead that Adams created this group a couple decades ago because he was personally displeased with how the Sault Tribe was operating. If an organized tribal structure had been continuously maintained, there would have been no need to create the Mackinac Tribe. The timeline Caswell presented also contained a twenty-year gap where there was no evidence of any Mackinac group maintaining a tribal structure, and the record did not demonstrate that this group exerts governmental authority over its members. In effect, the lower courts modified this element of the test to allow substantial historical gaps rather than require the *continuous* maintenance of a tribal structure. This Court should reverse and remand for trial on the charges.

i. Caswell did not demonstrate continuity of tribal government from treaty times through the present.

The group that Caswell belongs to is a recent creation, not an entity that has “functioned since treaty times as [a] ‘continuous separate, distinct and cohesive Indian cultural or political communit[y].” *Caswell I*, 336 Mich App at 76, quoting *Washington II*, 641 F2d at 1373. Adams’ testimony shows that his Mackinac Tribe was created about 25 years ago when the Sault Tribe closed its enrollment rolls and there were millions of dollars in federal land claim settlement funds at play. (1/25/22 Hr’g Tr, pp 128:5–6, 10–18, 153:8–20.) If the group that Caswell belongs to

had existed since treaty times, there would have been no need for Adams to spend “decades” going “all over the place” and using “extensive methods” to find members. *Caswell II*, ___ Mich App at ___; slip op at 5, 10; (see also 1/25/22 Hr’g Tr, pp 128:15–18, 130:1–10, 157:10–17).

The Court of Appeals credited Adams’ “hard work over the course of many years to accurately ensure that only those who were descended from the Mackinac Bands, i.e., Indian ancestry, were enrolled.” *Caswell II*, ___ Mich App at ___; slip op at 10. But the fact that it took hard work and many years to identify the group’s members confirms that there was no existing tribal governmental structure. And reframing Adams’ efforts as re-establishing the group rather than creating it makes a distinction without a difference. *Caswell II*, ___ Mich App at ___; slip op at 13. The reality is that this group would not have existed if Sault Tribe had not closed its enrollment rolls. The fact that the group was created—or re-established—in response to modern-day political events in another tribe disproves any argument that the Mackinac Tribe has maintained an organized tribal structure since treaty times: It could not have existed since treaty times *and* have been created recently. This alone is sufficient to defeat this factor.

Separately, this Mackinac Tribe group cannot show continuity because the timeline established by the evidence that Caswell presented has a twenty-year gap. McClurken’s testimony covered treaty times through about 1981, when the Northern Michigan Ottawa Association (NMOA) disbanded, and Adams picked up with the Mackinac Tribe’s creation in the late 1990s. That leaves nearly twenty

years unaccounted for—a two-decade hole that precluded a finding that the Mackinac Tribe had maintained a continuous government since treaty times.

The Court of Appeals correctly found fault with the district court’s extensive reliance on McClurken’s testimony to conclude that the Mackinac Tribe had maintained an organized tribal structure from 1836 to the present day, given that his testimony did not extend past the early 1980s. *Id.*, ___ Mich App at ___; slip op at 12. But the Court of Appeals erred in finding that “Adams’s testimony filled in the ‘gaps.’” *Id.* That faulty conclusion rested on several erroneous factual findings.

First, the Court of Appeals stated that the Mackinac Tribe was part of the NMOA “through the 1980s.” *Id.* In fact, the NMOA disbanded about 1981. (1/25/22 Hr’g Tr, p 47:17–19.)

Second, the Court of Appeals stated that the Mackinac Tribe “was involved with the Michigan Commission on Indian Affairs until 2007,” *Caswell II*, ___ Mich App at ___; slip op at 12, based on McClurken’s testimony. (1/25/22 Hr’g Tr, p 80:5–8.) But the governor disbanded the Commission in 1999. Executive Reorganization Order No. 1999-6, codified at MCL 16.721. Even if the Commission had continued longer, the Court of Appeals failed to address the fact that members of the Commission were appointed by the governor, not by tribes, and eligibility for membership was based largely on blood quantum and geography rather than tribal membership. See, e.g., MCL 16.711(1). And even if Mackinac groups played some role on the Commission, there is no evidence that *this* Mackinac Tribe group did so.

Third, the Court of Appeals acknowledged that Adams’ testimony was unclear about when he started to form his Mackinac Tribe group, noting that the “testimony suggests it began between 1978 and the 1990s.” *Caswell II*, ___ Mich App at ___; slip op at 12. Because the Court of Appeals thought the NMOA continued through the 1980s and the Michigan Commission on Indian Affairs operated until 2007, perhaps the difference between 1978 and the 1990s did not matter in its analysis. But the best evidence in the record supports that the effort began in the late 1990s, when the federal government paid millions of dollars in land-claim settlement funds to Sault Tribe. (1/25/22 Hr’g Tr, pp 128:10–18, 152:5, 153:8–20, 154:1–6, 158:4–16; Adams Aff, 1/25/22 Hr’g Def Ex D, ¶ 4 (Ex M)); see Michigan Indian Land Claims Settlement Act, PL 105–143, 111 Stat 2652. That creates a gap in the timeline that defeats Caswell’s attempt to establish the third prong of the treaty-tribe test.

Ultimately, to establish this third element, Caswell had to provide evidence that the historical groups that McClurken described eventually became *this group* known as the Mackinac Tribe and founded by Adams. This factor is particularly important given that there are multiple groups of individuals in Michigan who claim exactly what Caswell and Adams claim, i.e., that their group stands in the place of the historical Mackinac band and has rights under the 1836 Treaty. (See, e.g., 1/25/22 Hr’g Tr, pp 78:3–7, 145:2–7.) But again, McClurken’s testimony did not tie the historical Mackinac bands he talked about to the Mackinac Tribe group at issue in this case because he had no knowledge of the many modern-day Mackinac

groups. Similarly, Adams did not offer testimony showing an uninterrupted tie between his modern-day group and those historical groups. Instead, even the reading of the record most favorable to Caswell shows only that there were historical bands at Mackinac that signed the 1836 Treaty and that there is now a modern-day group that calls itself the Mackinac Tribe. Caswell failed to prove an unbroken connection between the historical treaty signatories and this group.

This is not a matter of the Mackinac Tribe group not having “a formalized governmental structure akin to modern-day structures[.]” *Caswell II*, ___ Mich App at ___; slip op at 13. The treaty-tribe test acknowledges that “tribal status is preserved if some defining characteristic of the original tribe persists in an evolving tribal community.” *Caswell I*, 336 Mich App at 76, quoting *Washington*, 641 F2d at 1372–1373 (quotation marks omitted). Moreover, “changes in tribal policy and organization attributable to adaptation do not destroy tribal status,” and so long as tribes survived as a “distinct communities,” some “assimilation inevitable in response to shifts in federal policy between favoring tribal autonomy and seeking to destroy it” was permitted and did not automatically result in “the abandonment of distinct Indian communities.” *Caswell I*, 336 Mich App at 76, quoting *Washington*, 641 F2d at 1373 (quotation marks omitted). But regardless of the form, the tribal government must have existed *continuously* since treaty times. That is the shortcoming in Caswell’s case, not a failure to demonstrate a modern-day governmental form.

Overall, the record does not show that this Mackinac Tribe group has maintained continuity of tribal government from treaty times through today. Instead the record shows the opposite, that Adams recently created the Mackinac Tribe group because of the Sault Tribe's actions. The district court erred in reading "continuous" out of this element.

ii. Caswell did not demonstrate that the Mackinac Tribe exercises governmental authority over its members.

The lack of continuity between the historical Mackinac bands and the modern-day Mackinac Tribe group means that Caswell failed to establish the third factor. But even if Caswell had established a continuous timeline from treaty times through today (which he did not), the record does not show that this modern-day Mackinac Tribe group exercises governmental authority over its members. In particular, the evidence fails to demonstrate that the Mackinac Tribe has "controlled the lives of the members" or established "continuous informal cultural influence." *Caswell I*, 336 Mich App at 76, quoting *Washington II*, 641 F2d at 1373.

The record contains very limited evidence about the Mackinac Tribe's governance of its members. Notably, the fact that the group has a constitution and a chairperson does not alone show continuous governmental control over members' lives or continuous cultural influence. See *Caswell I*, 336 Mich App at 76, quoting *Washington II*, 641 F2d at 1373 ("Although the appellants now have constitutions and formal governments, the governments have not controlled the lives of the members."). In *Washington II*, the federal court denied treaty-tribe status to the

Snohomish tribe even though the group had a constitution, bylaws, a tribal council, and tribal chairperson and claimed 720 members. 476 F Supp at 1107. These hallmarks of government were not enough where the tribe's members had not maintained "a continuous separate, distinct and cohesive Indian cultural or political community." *Id.*

The Mackinac Tribe group's lack of control over its members' lives is demonstrated by Adams' testimony about the group's enforcement (or rather, nonenforcement) of its natural resources regulations. Adams had no knowledge of how the natural resources regulations were currently enforced, but he said that when he was tribal chair, he assigned people to enforce them. (1/25/22 Hr'g Tr, p 171:15–18.) These individuals were not formal conservation officers or game wardens (although the Court of Appeals referred to them as such, *Caswell II*, ___ Mich App at ___; slip op at 5), and their only power was to issue fines. (1/25/22 Hr'g Tr, p 171:17–25.) And if a member did not pay, recourse was limited. The Mackinac Tribe has no jail and no tribal court. (*Id.*, pp 170:2–3, 172:16.) In fact, the only means Adams identified for compelling payment was to beat the person up. (*Id.*, p 172:14–20.) Adams' later retraction of the statement (*id.*, 186:11–12) does not change the fact that the Mackinac Tribe lacks a mechanism to enforce its regulations. This limited evidence does not support a conclusion that the group controls its members' lives.

The evidence also does not show that the Mackinac Tribe has informal cultural influence over its members. Notably, the record does not even support a

finding that the *historical* Mackinac bands maintained informal cultural influence over its members because McClurken's testimony did not address that issue. As for the modern group, Adams testified that the Mackinac Tribe holds powwows, fall gatherings, and other events. (*Id.*, p 149:1–4.) However, nothing in the record indicates how often these events are held, how many members participate in them, or how long the Mackinac Tribe group has been holding them, much less whether it has done so continuously. The district court should have ruled that this scant evidence did not support a conclusion that the group had informal cultural influence over its members. Its decision to excuse Caswell from meeting the evidentiary standard was error.

* * *

In summary, the record does not demonstrate that the Mackinac Tribe has maintained an organized tribal structure from 1836 until the present. At best, the evidence showed a tribal structure existed until around 1980 and then a new group was created in the late 1990s when millions of dollars in land claims settlement funds became available. The mere fact that Adams had to track down people to form the Mackinac Tribe shows that the group had not maintained an organized tribal structure. Further, Adams' testimony about the modern-day group fails to show that the Mackinac Tribe controls the lives of its members or has informal cultural influence over them.

Even allowing for evolution of the tribal government over time and considering the history of policy failures of the federal government with respect to

tribes, the evidence that Caswell offered simply failed to show an organized tribal structure from treaty times through today. The issue is not that the group did not have a formalized government structure like those of modern-day governments, but rather that the group did not maintain a *continuous* tribal structure in any form.

Showing a continuously maintained organized tribal structure is the key requirement of the treaty-tribe test and is necessary to a finding that a group is entitled to exercise treaty rights. See *Caswell I*, 336 Mich App at 75. The district court's finding on this third and paramount element was clear error.

4. The district court abused its discretion in dismissing the charges against Caswell based on its clearly erroneous finding that the Mackinac Tribe has treaty-tribe status.

The district court's decision to dismiss the charges against Caswell stemmed from its determination that he had established each of the three elements of the treaty-tribe test. However, the district court's decision was based on altering the treaty-tribe test adopted in *Caswell I* and misapplying it to the very limited evidence in the record. The district court's alteration of the test and its factual findings on each of the three factors were clearly erroneous and unsupported by the record. "A trial court necessarily abuses its discretion when it makes an error of law." *Butka*, 514 Mich at 376, quoting *Duncan*, 494 Mich at 723. And a decision based on clearly erroneous factual findings necessarily "falls outside the range of reasonable and principled outcomes." *Franklin*, 500 Mich at 100. By basing its decision on a legal error and improper factual findings, the district court abused its discretion in dismissing the charges against Caswell.

Under the district court's reasoning, just two people with Indian ancestry and a link to a treaty signatory tribe could form a group, call it a treaty tribe, and then share treaty rights with anyone to whom the group gives a membership card and a fishing license. Recognizing these groups as having treaty-tribe status would diminish the rights of the tribes like the Bay Mills Indian Community in *LeBlanc* that validly claim the treaty rights and preempt the State's sovereign duty to protect the natural resources by enforcing state law. This Court should reverse the district court's alteration and misapplication of the treaty-tribe standard to preclude such an outcome here.

CONCLUSION AND RELIEF REQUESTED

The district court abused its discretion in dismissing the charges against Caswell because he failed to prove that the modern-day group known as the Mackinac Tribe is a political successor in interest to a treaty signatory. As it did the first time it dismissed these charges, the district court accepted little more than Caswell's barebones claim in place of the significant evidence needed to prove this special status, and the circuit court and the Court of Appeals simply allowed this error to persist uncorrected. Allowing this ruling to stand will allow any number of groups to claim treaty-tribe status without making the showing that *Caswell I* requires, thereby diminishing the treaty rights of the federally recognized tribes that exercise those rights, including those acknowledged by this Court in *LeBlanc*, and infringing the State's sovereign duty to protect its natural resources for all its

citizens and muddying its ability to respect treaty rights. It is imperative that this Court correct the district court's error.

For these reasons, this Court should reverse the Court of Appeals, reinstate the charges against Caswell, and remand to the district court for trial on the charges.

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