INITIAL FORM

ORAL ARGUMENT SCHEDULED March 26, 2021
Nos. 20-5123, 20-5125, 20-5127, 20-5128

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SAULT ST. MARIE TRIBE OF CHIPPEWA INDIANS,
Plaintiff-Appellee,

v.

DAVID LONGLY BERNHARDT, in his official capacity as Secretary of the Interior, and UNITED STATES DEPARTMENT OF THE INTERIOR,
Defendants-Appellants,

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN and NOTTAWASEPPI HURON BAND OF THE POTAWATOMI,
Appellants,

MGM GRAND DETROIT, L.L.C., DETROIT ENTERTAINMENT, L.L.C., and GREEKTOWN CASINO, L.L.C.,
Appellants.

On Appeal from the U.S. District Court for the District of Columbia

REPLY BRIEF OF APPELLANTS MGM GRAND DETROIT, L.L.C., DETROIT ENTERTAINMENT, L.L.C., & GREEKTOWN CASINO, L.L.C.

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Michigan Act..... Michigan Indian Land Claims Settlement Act

Sault..... Sault St. Marie Tribe of Chippewa Indians

SUMMARY OF ARGUMENT

The Sault concedes that, on its reading, the Michigan Act is doubly unprecedented. No other statute empowers a tribe to force Interior to take into trust an unlimited amount of land nationwide. And no other statute compels Interior to accept lands into trust even if Interior concludes that doing so would violate federal law. True, if Congress passed such a statute, Interior would be bound. The Michigan Act's text, structure, and context, however, confirm that Congress did not do so here.

As to the phrase "consolidation or enhancement of tribal lands" in Section 108(c), the Sault purports to offer a "plain text" interpretation. But its reading flouts ordinary usage; converts the term "enhancement" into "acquisition"; rewrites the term "tribal lands" to defy that term's settled meaning both in dictionary definitions and in Indian law; and drains the term "consolidation" of any real meaning. There is nothing "plain text" about the Sault's reading.

Nor does the Michigan Act compel Interior to take land into trust even if doing so would be illegal. The Sault insists its reading is required to avoid federal interference with "tribal sovereignty" over "how to use the Tribe's own settlement funds." Sault Br. 3. The tribe, however, can purchase any land it wants. What the Sault seeks is the right to force the federal government—a separate and superior sovereign—to act unlawfully. That is no part of tribal sovereignty. What controls here, then, is not the tribe's sovereignty, but settled background principles requiring

the federal government to act lawfully and Interior's broad authority to manage "all Indian affairs" and "all matters arising out of Indian relations." 25 U.S.C. § 2. Nothing in the Michigan Act deprives Interior of the power to assess the legality of actions it is asked to take.

ARGUMENT

I. The Sault Fails To Show That Congress Empowered It, Uniquely, To Force Interior To Take Unlimited Lands Into Trust.

After 75 pages, the Sault finally concedes that, on its reading, the Michigan Act would empower the Sault to acquire (and offer gaming on) unlimited trust lands nationwide. But not to worry, says the Sault, because it will not actually do so. Sault Br. 75. The question, however, is Congress's intent: Did Congress intend to leave to the Sault's good graces whether to use Fund income—which can be unlimited, given the Sault's unlimited ability to add to Fund principal, Casinos Br. 11—to obtain trust land nationwide and divest affected States of some of their sovereign power?[1] As to this question, the Sault's assurances of "voluntary self-denial ha[ve] no bearing upon the answer." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001).

[1] Although the Sault concedes that the Indian Gaming Regulatory Act presumptively bars "gaming on land acquired after 1988," Sault Br. 76, it claims that *all* lands taken into trust under the Michigan Act satisfy the exception for the "settlement of a land claim." 25 U.S.C. § 2719(b)(1)(B)(i); *see* AR452-53. The Sault also notes that Class III "casino gaming" can occur only under "a tribal-state gaming compact." Sault Br. 76. Class II gaming, however, requires no compact.

The Sault also says that "[a]t least one [other] settlement act imposes no geographic limit" on mandatory acquisitions. Sault Br. 72. But that act imposes a strict $100,000 limit. Casinos Br. 12 (Wyandotte). Nor can the Sault (at 75) dismiss this point as a "policy concern." At stake is whether the Michigan Act is like *all other* settlement acts or is unprecedented. A "'lack of historical precedent' to support" a power is "'[p]erhaps the most telling indication'" of its absence. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2201 (2020).

The Sault's efforts fail to show that the Michigan Act compels this unprecedented result. The Sault offers a two-step argument in favor of its position that the Act authorizes any acquisition that increases the Sault's aggregate landholdings. Sault Br. 67. Both steps are necessary to the Sault's position, and each is wrong.

First, the Sault argues that "enhancement" means "acquisition," so that an "enhancement" of tribal lands covers "an[y] increase." *Id.* at 21. The Sault's unbounded definition of "enhancement," however, ignores that usage matters. When dictionaries define "enhance" as to "increase … (*as in* value or desirability)," *The Merriam-Webster Dictionary* 165 (2019) (emphasis added), they do not offer mere "*examples* of attributes that may be made greater." Sault Br. 62. Instead, they identify *what types* of increases constitute "enhancements." The Sault does not answer the solid wall of dictionaries embracing that usage. Casinos Br. 9-10. Nor

does the Sault cite any statute or regulation embracing its strained interpretation, or answer the Casinos' many examples of statutes and regulations giving "enhance" the same meaning Interior did: improving existing lands' value or quality. *Id.* at 10-11. Meanwhile, each colloquial example the Sault proffers—benefits, sentences, attorney's fees, market power—uses the word in this same sense. An "enhancement" means an increase in *existing* benefits, sentences, fees, or power, not a new sentence, a new set of benefits, or power in a new market. By contrast, when Congress intends to capture all land purchases irrespective of impact on existing lands, Congress uses the ordinary word: "acquisition." Casinos Br. 7-8. The Sault has no adequate answer to Congress's different choice here.[2]

Second, the Sault equates "tribal lands" with a "collective" or "mass noun" meaning "territorial possessions" or "tribal landholdings." Sault Br. 67. The Sault's brief relentlessly—27 times!—uses "tribal landholdings" to describe what Section 108(c)(5) covers. What that section *actually* encompasses, however, is "tribal lands." And that phrase picks out the existing lands the Sault held at the Michigan Act's enactment and allows the Sault to "consolidat[e] or enhance[]" those specific lands. As myriad dictionaries show, the common meaning of "lands" is *actual* lands,

[2] The Sault asserts that "enhancement" captures both acquisitions and improvements. Sault Br. 56-57. That is true to a point. Under Interior's reading, "enhancement" captures improvements and *some* acquisitions. Casinos Br. 8-9. "Acquisition," however, is the term Congress uses to capture *all* purchases.

not an abstract "collective" or "mass noun." The Sault's preferred dictionary, *Webster's Third New International Dictionary* 1268 (1993), defines "land" as "ground owned privately or publicly," as in "to divide *lands* among heirs." Per the *Cambridge American Dictionary*, "lands" means "the land owned by a person or organization," as in "[i]t was understood that federal lands would be given to the oil and gas industry." And the *Merriam-Webster Dictionary* (2019) defines "land" as "a portion of the earth's solid surface distinguishable by boundaries or ownership," as in "bought *land* in the country."

Indeed, the most natural reading of "tribal lands" is narrower still. In Indian law, "tribal lands" generally refers to tribal trust lands or other land subject to tribal jurisdiction.[3] When the Sault acquires lands in fee using Fund income outside its reservation, those lands are not "tribal lands" under the Indian-law definition. Meanwhile, "statutes are construed by the courts with reference to the circumstances existing at the time of the passage." *United States v. Wise*, 370 U.S. 405, 411 (1962).

[3] *E.g.*, 25 U.S.C. § 231 (directing Secretary to "permit the agents and employees of any State to enter upon Indian tribal lands, reservations, or allotments" to carry out certain health-and-safety duties); *id.* § 3001(15) (defining "tribal land" under Native American Graves Protection and Repatriation Act to include "all lands within the exterior boundaries of any Indian reservation"); 25 C.F.R. § 169.2 (defining "Tribal land" under Federal Power Act as tracts owned "in trust or restricted status"); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 653 & n.5 (2001) (an "Indian tribe's sovereign power to tax … reaches no further than tribal land"); *Somday v. Rhay*, 406 P.2d 931, 934 (Wash. 1965) ("Generally speaking, tribal lands are lands within the boundaries of an Indian reservation held in trust by the federal government for the Indian tribe….").

At the Michigan Act's enactment, the Sault owned specific trust lands "scattered across the Upper Peninsula." Sault Br. 67-68. The term "tribal lands," when given its usual meaning, is sensibly directed to those parcels.

The rest of the Michigan Act further refutes the Sault's conflation of "tribal lands" with "tribal landholdings"—by carefully distinguishing the two terms. First, in Section 107(a)(3), Congress authorized the Bay Mills Indian Community to spend funds for the "consolidation and enhancement of tribal landholdings." Michigan Act, Pub. L. No. 105–143, § 107(a)(3), 111 Stat. 2652 (1997). But Congress did not pair this authority with a mandatory trust duty (and it separately authorized expenditures "for improvements on *tribal land*"). *Id.* Then, in Section 108(b)(1), Congress let the Sault use Fund *principal* (but not income) to "consolidate or enhance tribal landholdings." *Id.* § 108(b)(1). But again, it did not compel Interior to take those lands into trust. By contrast, when Congress addressed Section 108(c)(5) and the mandatory trust duty it triggers, Congress used "tribal lands." *Id.* § 108(c)(5). Basic interpretive principles require respecting that choice. *See Russello v. United States*, 464 U.S. 16, 23 (1983).

Nor does the Sault persuasively rebut the argument that its interpretation of the phrase "consolidation or enhancement of tribal lands" excises the word "consolidation" from the statute. If "enhancement of tribal lands" encompasses all acquisitions, then "consolidation" is superfluous. The Sault posits (Br. 65) that

exchanging a larger, faraway piece of land for a smaller, closer one could consolidate the Sault's lands without enhancing them. But any real-world swap of a larger piece of land the tribe values less for a smaller piece of land it values more—a swap that "'combine[s]' lands 'into a single more effective or coherent whole'"—would surely enhance the existing lands' value or attractiveness. Sault Br. 64. Statutory interpretation must give real meaning to both terms, rather than rationalize an overreading of one term by conjuring fanciful hypotheticals the other might cover.

By contrast, Interior's reading of "enhancement" leaves "consolidation" independent work to do. As explained, Interior reads Section 108(c)(5) to allow for acquisitions if they enhance the Sault's existing tribal lands. And contra the Sault (Br. 66), on Interior's definition, many purchases enhance existing lands without consolidating them. Buying a nearby (but non-contiguous) parcel to build a mill could increase the value of farms on existing land. Likewise, buying land to build a better road linking a tribal casino to the closest interstate could enhance tribal lands without consolidating them. Interior, however, properly recognizes that merely *generating funds* for the Sault's treasury is not enough. Moreover, "enhancement" includes *any* action—acquiring new land or improving existing land—that increases existing lands' attractiveness, quality, or value. This is a significant power that, without the word "enhancement," the Sault would lack. Interior's reading, but not the Sault's, gives the two nouns in "consolidation or enhancement" the "'separate

meanings'" the disjunctive phrase requires. *Loughrin v. United States,* 573 U.S. 351, 357 (2014).

In rejecting the Sault's interpretation, Interior thus did not engage in "interpretive gerrymandering," Sault Br. 64, 67, violate the "'general-terms' canon," or impose an "arbitrar[y] limit[]" on an unambiguously broad phrase. Sault. Br. 63-64, 67. Instead, Interior followed the most natural meaning of the entire phrase "consolidation or enhancement of tribal lands." For instance, had the Fortieth Congress appropriated funds "for the consolidation or enhancement of national lands," Congress would have expected the money to go to consolidating or improving the country's existing lands—and Congress would have been quite surprised had William Seward redirected those funds to purchase Alaska. *Contra* Sault Br. 56.

Moreover, even if the Sault's reading of "consolidation or enhancement of tribal lands" were linguistically *possible*, the relevant interpretive principle is that under "the ordinary-meaning rule," "contextual and idiomatic clues" generally identify "which of several possible senses a word or phrase bears." Antonin Scalia & Bryan A. Garner, *Reading Law* 101 (2012). Here, Interior's reading accords with the meaning of "enhancement" in other land-focused statutes and regulations and the meaning of "tribal lands" in Indian law. Casinos Br. 10-11. It also makes the Michigan Act consistent with all *other* land-settlement statutes, with their reasonable

limits on mandatory trust authority—while the Sault's renders the Act unprecedented. While the Sault emphasizes that several thousand members live in the Lower Peninsula, Sault Br. 5, 7-8, 59, 73, more relevant is that the Act arose out of "negotiations with the Chippewa [*i.e.*, the Sault's predecessors] concerning the cession of *the upper peninsula*." Michigan Act § 102(a)(3). Congress reasonably focused on purchases that would consolidate or enhance the Upper Peninsula lands that were the subject of those negotiations.

At a minimum, Interior's interpretation was reasonable. The parties have sparred over whether and when the Indian Canon overcomes *Chevron*. This Court, however, need not resolve that question in all cases and for all time. Neither the Supreme Court nor this Court has applied the canon to compel an agency to accept a tribe's claim of unchecked power to divest States of jurisdiction over state lands—overcoming the "presumption" against limiting "'the historic police powers of the States.'" *California v. FERC*, 495 U.S. 490, 497 (1990). The Sault correctly acknowledges that the canon instead applies to "diminishment[s] of tribal rights," Sault Br. 36, and its cases apply the canon to protect tribes against derogations of their inherent sovereignty (via treaty or statute)[4] or against losses of trust resources.[5]

[4] *Oneida Cnty. v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 247 (1985); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

[5] *Cobell v. Norton*, 240 F.3d 1081, 1101-02 (D.C. Cir. 2001); *Cobell v. Kempthorne*, 455 F.3d 301, 304 (D.C. Cir. 2006).

By contrast, the Supreme Court has declined to read statutes passed for Indians' benefit "as conferring supersovereign authority to interfere with another jurisdiction's sovereign right[s]." *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 465-66 (1995). And when the Supreme Court confronted a conflict between the Indian Canon and another canon protecting a different sovereign—"the canon that warns … against interpreting federal statutes as providing tax exemptions unless … clearly expressed"—it declined to "say that the pro-Indian canon is inevitably stronger." *Chickasaw Nation v. United States*, 534 U.S. 84, 95 (2001).

II. The Sault Fails To Show That Congress Forced Interior To Bless Illegal Trust Acquisitions.

On reviewability, there is a dead giveaway that the Sault's interpretation is wrong. The Sault argues (at 41) that even if it *admits* to having acquired lands through fraud, Interior must accept the lands in trust so long as the Sault used Fund income to effect the fraud. The Sault must take this position, for if it concedes that Interior can *sometimes* review trust acquisitions for illegality, its argument that Interior cannot review whether lands were lawfully "acquired using [Fund] interest" would collapse. Michigan Act § 108(f).[6]

[6] There is nothing to the Sault's suggestion that Interior generally does not review mandatory trust acquisitions for fraud. Sault Br. 41. In all cases, Interior demands evidence of "how [the property] was acquired." AR2951.

The Sault's conclusion is wrong because, like the district court, it starts in the wrong place. It relentlessly invokes "tribal sovereignty." Sault Br. 20, 25-26, 34-35, 41. Tribal sovereignty, however, is not the issue. The Sault retains unfettered sovereign authority to use its own money to purchase any land it desires. Its sovereignty does not extend to forcing *the United States* to take lands in trust.

The Sault compounds its error by demanding from Section 108(f) an affirmative authorization for Interior to assess whether a trust acquisition complies with the law—and finding none, declaring that the answer here "is that simple." Sault Br. 24. Congress, however, has broadly empowered Interior to conduct "the management of *all* Indian affairs and of *all* matters arising out of Indian relations," 25 U.S.C. § 2, and enacted the Michigan Act against the backdrop of all the trust and rule-of-law principles detailed in the Casinos' brief, which confirm the government retains the power (indeed, duty) to refrain from illegality. Casinos Br. 21-24. The "extensive grant of authority" Congress conferred on Interior "to carry out the federal government's unique responsibilities with respect to Indians," *Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1267 (D.C. Cir. 2008), comfortably authorizes Interior to weigh the legality of trust acquisitions it is asked to undertake.

Shorn of its two erroneous framing devices, the Sault's remaining arguments fail.

First, the Sault tells this Court to ignore "existing statutory grants of authority to Interior" because the Michigan Act is a "freestanding enactment" not "codified in Titles 25 or 43 of the U.S. Code." Sault Br. 45. But that absence reflects only the codifiers' judgment that Public Laws the codifiers deem to "relat[e] to the settlement of the land claims of certain Indian tribes" should be "omitted from the Code as being of special and not general application." 25 U.S.C. ch. 19 Codification Note. This editorial judgment does not repeal Interior's general authority under 25 U.S.C. § 2. Indeed, it would be extraordinary had Congress employed a fund-distribution statute like the Michigan Act to divest Interior of its authority to protect *other tribes* from a boundless assertion of authority like the Sault's here.

Second, the Sault observes that Interior's general authorities and the governing background principles do not "empower the agency to 'rewrite' a statutory scheme." Sault Br. 46. These general authorities and background principles do, however, show *what question* to ask. In particular, they show why the Sault errs by inviting the Court to search Section 108(f) for express authorization for Interior to act lawfully, as if the Michigan Act stands in isolation both from every other congressional statute and from the principles that in every other case inform the interpretation of Congress's handiwork. Just as an art gallery that agrees to hold in trust paintings a collector acquires would not need specific authorization to inquire whether a painting was stolen, Interior has the power to conform its conduct to the

law absent an express contrary statement. Casinos' Br. 21-22. The Sault does not cite any statute anywhere forcing the government into complicity with illegality.

Third, the Sault contends that Interior's review of the legality of the Sault's trust application conflicts with Section 108(e)(2), which states that Interior's "approval" of expenditures of Fund income "shall not be required." Interior's review here, however, does not implicate what Section 108(e)(2) addresses. Section 108(e)(2) allows the Sault to spend Fund income as it wishes by lifting Interior's normal trust responsibility over judgment funds. *See* 25 U.S.C. § 1403(b). It does not address Interior's review of compliance with Section 108(c) when Interior *itself* acts to take land into trust. Sault Br. 32.

The Sault persists, declaring this a "distinction without a difference" because Interior's "claimed authority to determine whether a land purchase is 'lawful' under Section 108(c) necessarily entails the power to 'approv[e]' expenditures." *Id.* But that is just not true. Interior does not approve the Sault's expenditures, and the Sault may spend money without Interior's oversight. Nothing in the Michigan Act, however, requires Interior to abandon its trust duties and *join in illegality* by taking into trust land whose acquisition violated the Act. *See* Casinos Br. at 26-27 (noting that the textual distinction between Sections 108(b) and 108(c) reinforces this point).

Fourth, the Sault says permitting Interior to weigh compliance with Section 108(c) would turn the Michigan Act into a "discretionary" trust statute.

Sault Br. 47. This, again, is just not true. If the Sault uses appropriate funds to purchase land that enhances or consolidates its tribal lands, Interior must take the land into trust. Interior may, however, weigh whether the conditions for that mandatory duty are met.

At a minimum, again, Interior read the Michigan Act reasonably. The answer to the Sault's invocation of the Indian Canon is the same one provided above: Whatever the general scope of *Chevron* and the Indian Canon, the latter does not sweep so far as to compel Interior to blind itself to tribal illegality. Although the Sault may not like the outcome here, Indian tribes benefit when federal agencies can and do conform their conduct to the law.

CONCLUSION

The judgment below should be reversed.

Dated: February 5, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,347 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14 point Times New Roman font for the main text and 14 point Times New Roman font for footnotes.

/s/ *Ian Heath Gershengorn*
Ian Heath Gershengorn

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of February, 2021, I caused to be electronically filed the foregoing **Reply Brief of Appellants MGM Grand Detroit, L.L.C., Detroit Entertainment, L.L.C., & Greektown Casino, L.L.C.** with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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