ORAL ARGUMENT SCHEDULED FOR 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 STE. MARIE TRIBE OF CHIPPEWA INDIANS,

Plaintiff-Appellee,

- v. -

DAVID LONGLY BERNHARDT, in his official capacity as Secretary of the Interior, UNITED STATES DEPARTMENT OF THE INTERIOR, SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN, NOTTAWASEPPI HURON BAND OF POTAWATOMI INDIANS, MGM GRAND DETROIT, LLC, DETROIT ENTERTAINMENT, LLC, GREEKTOWN CASINO, LLC,

Defendants-Appellants.

On Appeal from the United States District Court for the District of Columbia
Case No. 1:18-cv-02035-TNM

REPLY BRIEF FOR DEFENDANTS-APPELLANTS NOTTAWASEPPI HURON BAND OF POTAWATOMI INDIANS AND SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN

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AMENDED CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Plaintiff-Appellee is Sault Ste. Marie Tribe of Chippewa Indians.

Defendants-Appellants are David Longly Bernhardt, in his official capacity as Secretary of the Interior, United States Department of the Interior, Nottawaseppi Huron Band of Potawatomi Indians, Saginaw Chippewa Indian Tribe of Michigan, MGM Grand Detroit, LLC, Detroit Entertainment, LLC, and Greektown Casino, LLC.

All Defendants-Appellants other than the federal government defendants intervened as defendants in the district court. No party has moved to intervene before this Court. On December 29, 2020, Professors Alexander T. Skibine, Richard B. Collins, and Robert J. Miller filed an *amicus* brief before this Court in support of Plaintiff-Appellee and affirmance.

B. Rulings Under Review

The rulings under review are the Memorandum Opinion (ECF No. 72) and Order (ECF No. 73) of the United States District Court for the District of Columbia (McFadden, J.) granting in part and denying in part Plaintiff's motion for summary judgment; granting in part and denying in part Defendants' cross-motion for summary judgment; granting in part and denying in part Defendants-Intervenors' cross-motions for summary judgment; vacating the Department of the Interior's

decision; and remanding the matter to the Department of the Interior. Both the Memorandum Opinion and the Order were entered on March 5, 2020. *Sault Ste. Marie Tribe of Chippewa Indians v. Bernhardt*, 442 F. Supp. 3d 53 (D.D.C. 2020).

C. Related Cases

Counsel is not aware of related cases other than those consolidated in this action.

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GLOSSARY

Interior:	Department of the Interior
Gaming Act:	Indian Gaming Regulatory Act
Michigan Act:	Michigan Indian Land Claims Settlement Act
Sault:	Sault Ste. Marie Tribe of Chippewa Indians

INTRODUCTION AND SUMMARY OF ARGUMENT

The Michigan Indian Land Claims Settlement Act ("Michigan Act") was enacted against the backdrop of an existing statutory scheme that strictly limits the lands where Indian tribes located in Michigan may conduct Indian gaming. These tribes include Defendants-Appellants Nottawaseppi Huron Band of the Potawatomi and Saginaw Chippewa Indian Tribe of Michigan (collectively, "Tribal Appellants"), as well as Plaintiff-Appellee Sault Ste. Marie Tribe of Chippewa Indians ("Sault"). Sault proposes to circumvent these restrictions for itself alone, based on an implausibly expansive reading of the Michigan Act that Sault insists is unambiguously correct. Sault then seeks to block run-of-the-mill operation of *Chevron* deference to the Department of the Interior ("Interior") by sidelining other tribes' stake in faithful interpretation of the Michigan Act. Ultimately, Sault falls back on a self-serving mischaracterization of the Michigan Act as a "settlement" intended to redress past wrongs and to compensate Sault only, when in reality the Act settles no claims, contains no waivers, and distributes to multiple tribes judgment funds derived from previous litigation.

Tribal Appellants highlight two infirmities of Sault's interpretation and the district court's ruling (beyond those addressed by other Defendants-Appellants): (i) failure to account for the statutory context restricting new off-reservation gaming sites, and (ii) distortion of the Indian canon. *First*, as Sault concedes, statutory

context must inform interpretation of the Michigan Act. The existing statutory regime against which Congress acts is a critical feature of that context. Here, that regime includes the Indian Gaming Regulatory Act ("Gaming Act"), as well as compacts that Sault (and Tribal Appellants) signed pursuant to that Act. Sault's reading of the Michigan Act, which would require Interior to take land into trust at Sault's behest for gaming purposes anywhere in the country and to the detriment of other tribes, would undermine the Gaming Act foundation on which the Michigan Act was erected. Sault attempts to support its acontextual and anomalous reading of the Michigan Act by characterizing the Act as specially compensating Sault for settling outstanding claims, but the Act does no such thing.

Second, Sault's attempt to escape ordinary application of *Chevron* deference warps the Indian canon of construction. The canon favors tribal interests generally; it does not serve to pick winners and losers among tribes when legislation shapes the interests of multiple Indian tribes. The Michigan Act was not enacted solely for Sault's benefit. Instead, the Act accounts for the competing interests of several Michigan tribes. And the Michigan Act is part of a broader statutory scheme that includes the Gaming Act—a statute that, as even *amici* supporting Sault acknowledge, "balance[s] competing tribal interests." The Indian canon is fundamentally rooted in the federal government's trust obligation to *all* Indian tribes. That rationale does not support a presumption that Congress intended to permit Sault

to gore the oxen of all other tribes in Michigan by unilaterally decreeing new trust lands wherever Sault thinks it can capture their gaming revenue.

ARGUMENT

I. SAULT IGNORES THE STATUTORY CONTEXT AGAINST WHICH THE MICHIGAN ACT WAS PASSED.

The Michigan Act must be read against the background of a preexisting statutory scheme that carefully regulates and limits Indian gaming for the benefit of multiple tribes. Sault concedes the relevance of statutory context but paints an incomplete and misleading portrait of the Michigan Act's history and its role.

A. The Gaming Act And Related Compact Restrictions On New Gaming Sites Constitute Key Features Of The Michigan Act's Statutory Context.

Statutory language "cannot be construed in a vacuum." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016) (quoting *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012)). Though Sault offers only thin discussions of "[s]tatutory structure and context," *see* Br. 57-58, 72-73, "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," *Sturgeon*, 136 S. Ct. at 1070 (quoting *Roberts*, 566 U.S. at 101).

In particular, existing statutes furnish vital context informing the interpretation of a later enacted law. "Courts presume that Congress legislates against the backdrop of existing statutes." *Orton Motor, Inc. v. United States Dep't*

of Health & Human Servs., 884 F.3d 1205, 1214 (D.C. Cir. 2018); *see also*, *e.g.*, *FCC v. AT & T Inc.*, 562 U.S. 397, 407 (2011) (drawing on preexisting statutory framework to interpret statutory language). More broadly, "Congress is presumed to preserve, not abrogate, the background understandings against which it legislates." *United States v. Wilson*, 290 F.3d 347, 356 (D.C. Cir. 2002).

Here, the Gaming Act, passed nine years before the Michigan Act, "expressly disfavors *** off-reservation Indian gaming." *Stand Up for California! v. U.S. Dep't of the Interior*, 919 F. Supp. 2d 51, 85 (D.D.C. 2013). The Gaming Act provides that Indian tribes in states that allow gaming activities may operate casinos only on a defined category of "Indian lands" that heavily favors existing reservations and makes trust status a crucial characteristic for any other potential gaming sites. Further, the Gaming Act allows such gaming only "in conformance with a Tribal-State compact entered into by the Indian tribe and the State." 25 U.S.C. § 2710(d)(1)(C). Pursuant to the Gaming Act, Sault and all other gaming tribes in Michigan (including Tribal Appellants) executed compacts with Michigan, providing that no tribe would submit an application to Interior to take land into trust for gaming purposes absent a prior revenue-sharing agreement with other tribes. AR3224. Each compact—and Sault's predates the Michigan Act—includes a Section 9, titled "Off-Reservation Gaming," stating that "[a]n application to take land in trust for gaming purposes pursuant to § 20 of IGRA (25 U.S.C. § 2719) shall

not be submitted to the Secretary of the Interior in the absence of a prior written agreement between the Tribe and the State's other federally recognized Indian Tribes" providing for revenue-sharing for "the off-reservation gaming facility that is the subject of the § 20 application." *Id.*; *see* Tribal Appellants Br. 4-5.

These features of the underlying regulatory regime are not mere "[p]olicy concerns," *cf.* Sault Br. 74, but essential aspects of the statutory context that Congress is presumed to be aware of and in light of which the Michigan Act must be interpreted. *See Orton Motor, Inc.*, 884 F.3d at 1214. Sault's interpretation requires accepting the implausible premise that nine years after passing the Gaming Act, Congress sought to allow just one tribe (Sault) to exploit a narrow exception by conferring unreviewable discretion to acquire new Indian trust lands for gaming. *See* Br. 74-80. Sault's assurance that it faces "many constraints" on its ability "to acquire and game on trust lands," *id.* 75, ignores the fact that Sault seeks a unique authority for it alone to circumvent the greatest practical protection the Gaming Act provides to tribes with on-reservation gaming against new competing off-reservation facilities.

Sault's invocation of the compact obligation as a meaningful "legal constraint[]," Br. 76, is especially ironic given that Sault is now flouting the compacts' requirement of a revenue-sharing agreement with other tribes. Sault responds only that Interior did not reject Sault's fee-to-trust application on the basis

that Sault's submission violated the compact. *See id.* 77 n.21. But that provides no reason for this Court, as a matter of statutory interpretation, to adopt the unconvincing view that the Michigan Act upended the regulatory regime into which the Act fits—a regime that includes the Gaming Act and the compacts.

B. Sault Mischaracterizes The Statutory Context Here.

Sault admits that statutory context is necessary to the interpretation of the Michigan Act. *E.g.*, Br. 57-58. The district court did the same. Mem. Op. 31-32, ECF No. 72. Yet Sault attempts to restrict consideration of the statutory context to the Act itself—and then mischaracterizes it. In particular, Sault contends that "[t]he Settlement Act is a compromise negotiated between sovereigns to remedy the federal government's past misdealing toward the Tribe." Br. 78-79. It is not. In reality, the Michigan Act governed distribution of several tribes' prior judgments from the Indian Claims Commission, which had resolved the claims of hundreds of tribes across the United States (including Sault's).

Its short title notwithstanding, the Michigan Act does not settle claims. It contains no waiver of claims; does not "resolve[] or extinguish[] with finality the tribe's land claim in whole or in part"; and is not a "settlement of a land claim." 25 C.F.R. § 292.5(a). The claims actually were settled decades earlier when the Indian Claims Commission remedied injustices against Sault (among other tribes) by awarding judgment funds that were subsequently held by the United States in

trust. As its full title indicates, the Michigan Act simply terminates the United States' trusteeship over those judgment funds: It sets parameters for the "division, use, and distribution of judgment funds" through the creation of tribally controlled funds, such as Sault's Self-Sufficiency Fund. Pub. L. No. 105-143, § 102, 111 Stat. 2652 (1997). Interest from the Self-Sufficiency Fund is not limited to interest from the judgment funds; it can be derived from principal added to the Fund from any source. *See id.* § 108(a)(1)(C).

The Michigan Act provides that one permissible use of Fund income is the acquisition of potential trust lands subject to certain criteria. The Act presupposes, rather than rescinding, Interior's trust-review duties with respect to those potential trust lands—including review for legality. *See* Interior Br. 33-36; Casinos' Br. 21-23. The Act's termination of the United States' trusteeship over judgment funds does not suggest that Congress intended to abrogate Interior's regular review role when taking land into trust.

The full statutory context—including the Gaming Act and the compacts—supports Interior's reading that the Michigan Act limits Sault's ability to dictate that far-flung lands be taken into trust for gaming purposes. At a minimum, the statutory context creates ambiguity on that issue, which entitles Interior to deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The "plainness or ambiguity of statutory language is determined [not only] by reference

to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole." *Yates v. United States*, 574 U.S. 528, 537 (2015) (plurality opinion) (alterations in original) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

II. THE INDIAN CANON DOES NOT NULLIFY THE ORDINARY OPERATION OF *CHEVRON* DEFERENCE IN THIS CONTEXT.

In attempting to sideline the interests of other tribes in correct interpretation of the Michigan Act, Sault not only gives short shrift to critical statutory context, but also distorts the Indian canon. Sault tries to thwart run-of-the-mill application of *Chevron* deference by invoking the principle that "[s]tatutes are to be construed liberally in favor of the Indians." *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1444-1445 (D.C. Cir. 1988); *see* Sault Br. 35-37. Before the district court, Sault did not even attempt such an argument with respect to Interior's authority to review compliance with § 108(c). Mem. Op. 29, ECF No. 72. Yet on appeal, Sault insists that the Indian canon must be applied even though doing so would grant one tribe a unilateral power to harm other tribes.

Sault is incorrect. The Indian canon favors Indian tribes based on the United States' trust duties to tribes. It does not create a presumption that Congress intended to confer a special benefit on Sault alone at the expense of other Michigan tribes.

A. The Michigan Act Forms Part Of A Statutory Regime That Accounts For The Competing Interests Of Multiple Tribes.

Sault barely grapples with a major impediment to its invocation of the Indian canon: the important tribal interests that Interior's decision protects. *See* Br. 51-52. The canon "does not apply for the benefit of one tribe if its application would adversely affect the interests of another tribe." *Connecticut v. United States Dep't of the Interior*, 344 F. Supp. 3d 279, 314 (D.D.C. 2018); *accord, e.g.*, *Rancheria v. Jewell*, 776 F.3d 706, 713 (9th Cir. 2015). Sault's only response is that the Michigan Act was enacted to benefit "specific tribes, including the Sault Tribe" and excluding Tribal Appellants. Br. 52.

This Court should reject Sault's self-serving view of the Michigan Act. As an initial matter, the Michigan Act was enacted for the benefit of multiple tribes. Section 108 (governing Sault) is sandwiched between the Michigan Act's provisions for use of judgment funds by the Bay Mills Indian Community and by Grand Traverse Band of Ottawa and Chippewa Indians of Michigan. *See* Pub. L. No. 105-143, §§ 107, 109. Dismissing those portions of the Michigan Act as not "at issue here," as *amici* do (Br. 9), misses the point that the Act serves interests beyond Sault's.

To be sure, Tribal Appellants are not among the "specific tribes" named in the Michigan Act. Br. 52.[1] But if interpretation of the Act depended on whether one of the tribes named in section 107 or 109 is an objecting party, then the statute would be an illicit "chameleon." *Amicus* Br. 8. The Michigan Act's express findings make clear that the statute addresses *competing interests* of several tribes. *See* Pub. L. No. 105-143, § 102 ("It is the purpose of this title to provide for the fair and equitable division of the judgment funds among the beneficiaries and to provide the opportunity for the tribes to develop plans for the use or distribution of their share of the funds."). The Michigan Act is not solely for Sault's benefit.

Moreover, the Michigan Act cannot be read in isolation; it is part of a broader statutory scheme that restricts gaming and protects the interests of multiple tribes, including Tribal Appellants. As noted, that scheme includes the Gaming Act and compacts concluded pursuant to that Act. *See* Part I, *supra*. Even if Sault would now prefer to dismiss the connection between the Michigan Act and the Gaming Act, Sault's complaint makes it crystal clear. *See* Compl. ¶ 35 (explaining Sault's intention of "creating 'Indian lands' for purposes of [the Gaming Act]"). As even the *amicus* brief acknowledges, the Gaming Act "balance[s] competing tribal

[1] As the district court recognized, Tribal Appellants "have an interest in the Court's determination about how, if at all, the compacts apply to the Sault Tribe's submissions to the Department, and to the Department's decision to deny these applications." *Sault Ste. Marie Tribe of Chippewa Indians v. Bernhardt*, 331 F.R.D. 5, 11 (D.D.C. 2019).

interests and [was] enacted for the benefit of all tribes." *Amicus* Br. 9; *see also Forest Cnty. Potawatomi Cmty. v. United States*, 330 F. Supp. 3d 269, 280 (D.D.C. 2018) (concluding, in the Gaming Act context, that "the Indian law canon does not apply" when doing so "would benefit Plaintiff at the expense of another tribe"). Hence, the Indian canon should not be distorted to help Sault to the detriment of other tribes protected by the broader statutory regime.[2]

B. The Indian Canon Does Not Favor One Tribe's Claim To A Power To Harm Other Tribes.

At bottom, the Indian canon does not come into play when one tribe claims a power to impose the sort of significant adverse impact on other tribes present here. As the Ninth Circuit has explained, the Indian canon applies "only when there is a

[2] Though Sault cites an Interior letter in a dispute regarding the Tohono O'odham Nation (Br. 52), that letter only highlights the reasons not to apply the Indian canon here. In touching on the Indian canon—which it acknowledged was "not necessary to [its] conclusion"—Interior reasoned that its interpretation of the Gila Bend Act was "consistent with" the canon where that Act was "enacted for the benefit of and to remedy the impaired rights of one tribe." Letter from Kevin K. Washburn, Ass't Sec'y for Indian Affairs, U.S. Dep't of the Interior to Hon. Ned Norris, Jr., Chairman, Tohono O'odham Nation 11–12 (July 3, 2014), https://www.bia.gov/sites/bia.gov/files/assets/public/oig/pdf/idc1-027180.pdf. Specifically, Interior noted that "[n]o other tribe was mentioned in the statute," and that Interior's interpretation of the statute might have merely an "incidental effect on other tribes." *Id.* at 15; *see also id.* at 17. That is not the case here, where the Michigan Act is not restricted to Sault and its interpretation will have significant effects on other Michigan tribes. In addition, unlike the Gila Bend Act, where the tribe at issue ceded lands to the United States in exchange for land acquisition rights that Interior was charged with protecting, the Michigan Act does not compensate Sault for any waivers of rights or lands. *See* Pub. L. No. 105-143, § 102(a)(1).

choice between interpretations that would favor Indians on the one hand and state or private actors on the other." *Rancheria*, 776 F.3d at 713. There is no valid reason for this Court to create a conflict with the Ninth Circuit's well-considered and established precedent by extending the Indian canon to this case.

Moreover, as several district courts in this Circuit have recognized, the Ninth Circuit's conclusion makes eminent sense. *See, e.g.*, *Connecticut*, 344 F. Supp. 3d at 314; *Forest Cnty.*, 330 F. Supp. 3d at 280. "The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." *Oneida Cnty. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 247 (1985). But "[t]he government owes the same trust duty to all tribes." *Rancheria*, 776 F.3d at 713 (alteration in original) (quoting *Confederated Tribes of Chehalis Indian Rsrv. v. Washington*, 96 F.3d 334, 390 (9th Cir. 1996)). This Court thus should not presume that Congress intended to authorize Sault to locate new trust lands for the purpose of gaming in the backyards of other Michigan tribes, especially when doing so is in conflict with compacts concluded pursuant to an existing federal statute (*i.e.*, the Gaming Act).

In sum, Sault's argument yanks the Indian canon from the soil in which it is rooted: the trust duties of the federal government vis-à-vis Indian tribes. Sault cannot overcome the traditional application of *Chevron* deference by pointing to its efforts to derive benefit at the expense of other tribes and in conflict with the

statutory scheme. The same trust relationship underlies the sensible conclusion that Interior has a role to play in reviewing fee-to-trust applications for legality. In carrying out that role here, Interior acted in accordance with a longstanding regulatory regime that accounts for the interests of multiple tribes instead of running roughshod over many for the benefit of one. This Court should uphold Interior's decision.

CONCLUSION

For the foregoing reasons and those stated by other Defendants-Appellants, the Court should reverse the district court's summary judgment.

Respectfully submitted,

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Dated: February 5, 2021

CERTIFICATE OF COMPLIANCE

On behalf of Defendants-Appellants Nottawaseppi Huron Band of Potawatomi Indians and Saginaw Chippewa Indian Tribe of Michigan, I hereby certify pursuant to D.C. Circuit Rule 32(e) and Federal Rule of Appellate Procedure 32(a)(7)(B) that the attached brief is proportionally spaced, has a typeface of 14 points or more, and contains 3,108 words.

Dated: February 5, 2021

/s/ Pratik A. Shah
Pratik A. Shah

CERTIFICATE OF SERVICE

I hereby certify that, on February 5, 2021, I served the foregoing brief upon counsel of record by filing a copy of the document with the Clerk through the Court's electronic docketing system.

/s/ Pratik A. Shah
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