IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

The Sault Ste. Marie Tribe of Chippewa Indians,

Plaintiff,

v.

David L. Bernhardt, in his official capacity as Secretary of the Interior, and **United States Department of Interior,**

Defendants,

Saginaw Chippewa Indian Tribe of Michigan, Nottawaseppi Huron Band of the Potawatomi, MGM Grand Detroit, LLC, Detroit Entertainment, LLC, and **Greektown Casino, LLC**

Intervenor-Defendants.

No. 18-cv-2035-TNM

INTERVENOR-DEFENDANTS DETROIT CASINOS' OPPOSITION TO THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT

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Consistent with this Court's Order establishing the briefing schedule on these motions (Order Dated Sept. 28, 2022), as well as this Court's Order granting the Motions to Intervene (ECF No. 36), counsel for the Casino Intervenors met and conferred, first by email and then telephonically on November 21, 2022, with counsel for the Tribal Intervenors to discuss whether it would be possible to set forth the parties' positions in a single consolidated brief. Through an extensive discussion of the issues raised in this case, it became clear that the Tribal Intervenors intended to address particular issues that the Casino Intervenors did not intend to address, and/or to address some similar issues in different levels of detail and with different points of emphasis, all consistent with the Intervenors' distinct interests in the subject of this litigation. Accordingly, counsel for the Intervenors determined that it would not be feasible or efficient to file a single brief. The Tribal Intervenors did, however, agree to join a single brief. In addition, all Intervenors committed to minimizing overlap between briefs to the fullest extent possible, and subsequently exchanged preliminary drafts in furtherance of this objective. This brief addresses the issues of most immediate concern to the Casino Intervenors—namely, the statutory-interpretation questions before the Court. The Casino Intervenors incorporate by reference the arguments set forth in the briefs being filed today by the Tribal Intervenors.

Dated: November 28, 2022

Respectfully submitted,

/s/ Ian Heath Gershengorn

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Counsel for MGM Grand Detroit, LLC, Detroit Entertainment, LLC, and Greektown Casino, LLC.

INTRODUCTION

The Michigan Indian Land Claims Settlement Act ("MILCSA") imposes an unusual duty on the Interior Department by compelling it to take into trust certain lands that the Sault Ste. Marie Tribe acquires. But it limits that duty to specific circumstances. On appeal, the D.C. Circuit rejected a reading of MILCSA that would have permitted the Tribe to acquire any land (regardless of location or purpose), force Interior to take that land into trust, and then build a for-profit casino on that land anywhere in the country. *Sault Ste. Marie Tribe of Chippewa Indians v. Haaland*, 25 F.4th 12, 24 (D.C. Cir. 2022). Now on remand, the Tribe offers an alternative interpretation that would achieve the same result the D.C. Circuit rejected. Rather than argue that the Sibley Parcel will be used directly for "consolidation or enhancement" of its existing landholdings, the Tribe claims that it will use the land for a for-profit casino. And, so long as that casino "generat[es] income," and the Tribe "intend[s]" to use some sliver of those proceeds to provide social services or improve tribal lands, the casino is for "social welfare … purposes" and for "enhancement of tribal lands." MILCSA § 108(c)(4), (5); MSJ 1-2.

Interior correctly rejected this strained interpretation. When the Tribe acquires land to build a for-profit casino, the expenditure is for gaming and economic-development purposes. A for-profit casino is not a "social welfare" purpose. Nor does building a for-profit casino on the Lower Peninsula—350 miles from the Sault's headquarters—enhance the quality or value of the Tribe's existing lands in the Upper Peninsula. All that remains true even if the Tribe insists that, eventually, it will use money from that economic development for purposes that *actually* constitute "social welfare" or the "enhancement of tribal lands." For one thing, there is no assurance that the Sault will ever be permitted to game on the lands, and it is surpassing strange to rely on the Tribe's

someday hope for eventual approval under a different statute – IGRA – to compel Interior to take land in trust under MILCSA today. More important, the Sault's position is inconsistent with the statutory text and structure and, if accepted, would destroy the limits that Congress carefully imposed in MILCSA on the Sault's expenditure of Fund income.

ARGUMENT

I. Interior Correctly Rejected The Sault's Reading Of Section 108(c)(4).

MILCSA carefully differentiates between Fund principal and Fund interest. Section 108(b) vests discretion in the Tribe's board of directors to use Fund *principal* for any expenditures the board "determines … are reasonably related to" either "economic development beneficial to the tribe" or "development of tribal resources," or are "otherwise financially beneficial to the tribe or its members." MILCSA § 108(b)(1)(A)-(B). Section 108(c) – which triggers § 108(f) – limits use of Fund *income* to only five purposes, stating that such "income … shall be distributed" for (inter alia) "educational, social welfare, health, cultural, or charitable purposes which benefit the [Tribe's] members" or "for consolidation or enhancement of tribal lands." *Id.* § 108(c)(4), (5).

Section 108(c)(4) does not permit the Tribe to spend Fund income to acquire land for general economic development—*e.g.*, a for-profit casino—simply because the Tribe claims that, if that development succeeds, some of the profit will be devoted to social services.[1] That interpretation conflicts with the plain meaning of 108(c)(4) and ignores MILSCA's structure.

i. The Sault's interpretation contradicts the plain meaning of the statute.

Courts interpret statutes in accordance with "ordinary meaning," based on how "ordinary people understand" the statutory language. *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1484-85

[1] Indeed, it is far from clear 108(c)(4) can justify the purchase of land at all. Only Section 108(c)(5) expressly authorizes the purchase of land; the remaining subsections of Section 108(c) address the direct expenditure of funds, not the purchase of lands.

(2021); *accord Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070-71 (2018). Here, no ordinary English-speaker would look at the for-profit casino that would rise from the Sibley Parcel and say, "That casino is for social welfare" (or "education[]," or "health," or "cultur[e]," or "charit[y]"). MILCSA §108(c)(4). The Sault acquired the Sibley Parcel for gaming and for profit-making—that is, economic development. A different label cannot alter that reality.

Let's turn first to the dictionary. *See Niz-Chavez*, 141 S. Ct. at 1484 ("dictionary definitions … often inform how ordinary people understand" statutes). Dictionaries confirm that the word "for" "indicate[s] purpose." *See Merriam-Webster*, https://www.merriam-webster.com/dictionary/for (last visited Oct. 29, 2022); *see also The American Heritage Dictionary* 685 (5th ed. 2011) (defining "for" as a word used to "indicate the object, aim, or purpose of an action or activity."); *The Oxford English Dictionary* (Mar. 2021), https://www.oed.com/view/Entry/72761?rskey=vKD4ly&result=2#eid (defining "for" as "with the object or purpose of"). Merriam-Webster offers as an example "a grant *for* studying medicine." If a father gives his daughter $200,000 "for studying medicine," he would expect her to use the funds to pay for medical school (or maybe pre-med courses or MCAT preparation), not to use the funds to gamble in Vegas. If the daughter did so, the father would be no less dismayed if she swore that she intended to dedicate 3% of any winnings to medical-school tuition. In just the same way, the Sault can spend Fund income on social welfare but cannot use those funds to build a for-profit casino—even if they promise to eventually spend some of the profits on social welfare.

That ordinary usage also refutes Sault's claim that their for-profit casino is no different from "purchas[ing] land for a health clinic," which they say "does not immediately or directly provide health benefits to tribal members" but does so "only through the subsequent operation of the clinic." MSJ 11. An ordinary English speaker would readily say that building a health-care

clinic is a "health" purpose. In that hypothetical, the "income of the … Fund" would "be distributed" for that "health" purpose. MILCSA § 108(c)(4). Here, by contrast, the only "income" that might possibly "be distributed" for a "social welfare" purpose would not be income "of the … Fund" at all. In common parlance, income spent on social welfare purposes under the Sault's proposal is income "of the casino," not income "of the Self-Sufficiency Fund."[2]

At its core, the Sault's textual argument is that it is linguistically possible to interpret the word "for" in isolation to reach any "ultimate objective." MSJ 10. To be sure, "for" can carry many shades of meaning; care is thus required to stick to the meaning that "makes sense in the context of the statutory scheme as a whole." *Jennings v. Rodriguez*, 138 S. Ct. 830, 845 (2018). *See also Truck Trailer Mfrs Ass'n v. EPA*, 17 F.4th 1198, 1205 (D.C. Cir. 2021) ("Because common words typically have more than one meaning, you must use the context in which a given word appears to determine its aptest, most likely sense." (internal quotation marks omitted) (quoting Antonin Scalia & Bryan A. Garner, *A Note on the Use of Dictionaries*, 16 GREEN BAG 2d 419, 423 (2013))). That is why we do not understand a father's grant of $200,000 "for studying medicine" to authorize a fundraising trip to the blackjack tables. And that is why courts interpret similar statutory phrases to impose similar directness requirements and to exclude indirect consequences that accrue, if at all, only through multiple intervening steps.

Take, for example, the Racketeer Influenced Corrupt Organization ("RICO") Act, which limits its civil remedy to victims harmed "by reason of" a RICO violation. 18 U.S.C. § 1964(c).

[2] This point also illustrates why the Sault's example—"[s]pending money to enroll in an LSAT prep course," "for the purpose of securing law school admission," MSJ 11—is not analogous. That example would be like this case if the would-be applicant decided to *start a business*, in hopes of making money, in hopes that at least some of that money might fund an LSAT prep course. The Sault's example thus omits the unrelated but critical intervening steps (the creation and operation of a for-profit business) that render their interpretation untenable.

The Supreme Court has interpreted that phrase to "require 'some direct relation between the injury asserted and the injuries conduct alleged'" and to exclude links that are "too remote," "purely contingent," "indirect," or "attenuated," *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 9-10 (2010) (cleaned up)—consistent with the background principle, articulated by Justice Holmes, that the "general tendency of the law, in regard to damages at least, is not to go beyond the first step," *id.* at 10 (ultimately quoting *S. Pac. Co. v. Darnell–Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918)). *See also Mortensen v. United States*, 322 U.S. 369, 373-75 (1944) (rejecting literalist interpretation of phrase "for . . . prostitution" in Mann Act that would have yielded "boundless" liability). The Sault's interpretation ignores these principles, renders Section 108(c)(4) "boundless," 322 U.S. at 377, and frustrates Congress's purpose in authorizing specific, limited uses for Fund income.

ii. The Sault's interpretation is out of step with MILCSA's statutory scheme and Indian gaming law.

The Sault's interpretation of Section 108(c)(4) also cannot be squared with Section 108(b), which governs Fund principal. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 121 (2000) ("[T]he court should not confine itself to examining a particular statutory provision in isolation. Rather, it must place the provision in context, interpreting the statute to create a symmetrical and coherent regulatory scheme."). To begin, their interpretation nullifies Congress's careful distinction between the permissible uses of Fund *principal* and the permissible uses of Fund *interest*. "The appropriate expenditures of Fund principal are delineated in terms that arguably leave substantial discretion" to the Tribe to determine its "particular use." *Sault Ste. Marie*, 25 F.4th at 18. "By contrast, the use of Fund interest … makes no mention of the [Tribe's] determinations but instead lists five specific uses for which Fund interest 'shall be distributed,' reinforcing that the Tribe may expend Fund interest exclusively for those uses." *Id.*

This explains why the Sault are wrong to claim that the "purposes" for which Fund interest may be spent under Section 108(c) are "expansive and flexible." MSJ 10. To the contrary, *Section 108(b)* is expansive, requiring deference to the determination of the board of directors, extending to matters that the board determines are "reasonably related to" (among other things) "economic development," and even allowing expenditures that are simply "otherwise financially beneficial to the tribe and its members." MILCSA § 108(b). Section 108(b) shows that where Congress wanted to provide the Sault with flexibility, it knew how. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). Section 108(c) notably lacks those textual markers of pliability, reflecting not expansiveness and flexibility, but precision and constraint.

Similarly misguided is the Sault's effort to use the funds subject to Section 108(c) for economic development at all. Congress knew how to identify economic development as a permissible purpose, and it did so expressly in Section 108(b). The purposes of Section 108(c) are, by contrast, distinctly *non-economic*. This Court cannot ignore that textual distinction. *See, e.g.*, *Russello*, 464 U.S. at 23 (rejecting interpretation that gave "differing language in the two subsections . . . the same meaning").

Moreover, the Sault's interpretation circumvents Congress's judgment to limit MILCSA's mandatory trust duty to certain lands acquired with Fund income but not Fund principal. Under the Tribe's reading, MILCSA imposes a mandatory trust duty whenever the Tribe claims to have expended fund interest for economic development. The sole additional requirement that the Sault's reading on paper imposes—that the economic development must in part be "intended … to fund educational, social welfare, and other" qualifying purposes, MSJ 2—in reality adds nothing.

Every Tribe has as a core "ultimate objective" "advancing the educational, social, health, and cultural well-being of" its members. MSJ 10, 14. So any Tribe that pursues any economic development initiative could say just what the Sault say here—that it intends to put at least a few percentage points of the proceeds to social welfare or education. *Cf.* MSJ 10, 14. When Congress has taken the trouble to enumerate five (and only five) permissible purposes for Fund income, courts should reject interpretations, like the Sault's here, that are "so attenuated as to undermine [Congress's] enumeration." *Jinks v. Richland Cnty.*, 538 U.S. 456, 464 (2003).

The icing on the cake is what the Sault's position means for gaming. They trumpet that, under their position, any gaming-related acquisition satisfies Section 108(c)(4) and triggers Interior's mandatory trust duty—because "gaming is simply a calculated means by which the Tribe can help satisfy the social welfare and other needs of its members," and because the "Indian Gaming Regulatory Act … dictate[s] that gaming revenue be used only for" purposes that the Sault claim satisfy Section 108(c)(4). MSJ 14. But that just underscores that the Sault are trying to rewrite MILCSA to create authority Congress never conferred. Congress in MILCSA did not authorize the Sault to spend Fund income on gaming. Nor did Congress require Interior to take into trust land the Sault acquired for gaming purposes. Indeed, as noted, 108(c)(4) does not permit the Sault to use fund income for commercial purposes at all. *See supra* at 6. And for good reason. When tribes seek trust lands for "a school, a job training center, a health clinic, or a museum," MSJ 9, the acquisition is unlikely to be contentious. Gaming purchases, however, are the *most* controversial type of trust acquisition. *See, e.g.*, S. Rep. No. 100-446, at 5 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3071, 3075 ("The regulation of gaming activities on Indian lands has been the subject of much controversy …"); *accord Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1300 (11th Cir. 2015). That often includes (as here) controversy among Tribes. That is why Congress

in MILCSA did not endorse the Sault's view that the Tribe may force Interior to take unlimited land into trust to build as many casinos as the Tribe desires, anywhere nationwide.

Finally, the Sault's emphasis on gaming highlights yet another flaw in their approach: the Sault simply assume that they will be able to operate a casino on the purchased parcels. But under IGRA, "lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988" cannot be used for gaming unless certain statutory exceptions apply. 25 USC § 2719(a). As the Sault acknowledged in briefing on its original motion for summary judgment, it is far from settled that the lands it plans to acquire will satisfy one of these statutory requirements. ECF 56 at 2, 15. True, they contend that the lands "might" fall under one of these exceptions. *Id.* But "might" just underscores the uncertainty that the Sault will be able to generate the planned income. And without that planned income, the Sault's entire justification for forcing Interior to take the land into trust falls apart. A mandatory trust duty under MILCSA cannot reasonably arise today from the use of casino revenues that may never materialize.

II. Interior Correctly Rejected The Sault's Reading Of Section 108(c)(5).

Interior also correctly rejected the Sault's argument under Section 108(c)(5). That subsection authorizes the Sault to use Fund income "for … enhancement of tribal lands." MILCSA § 108(c)(5). To qualify, as the D.C. Circuit held, an acquisition must "improv[e] the quality or value of existing tribal lands." *Sault Ste. Marie*, 25 F.4th at 24. The Sault's argument here just reruns their argument under Section 108(c)(4) and fails for the same reasons. The Sault say that they intend to game on the Sibley Parcel, that this gaming will create "revenue streams," and that they will use some of the proceeds "to maintain and improve the value of the Tribe's existing land holdings." MSJ 19 (quoting AR2215). But again, no normal speaker of English would say that building a for-profit casino on the Lower Peninsula, hundreds of miles from the Sault's existing

Upper Peninsula lands, improves the "quality or value" of those lands. And again, the Sault cannot evade the limits that Section 108(c)(5) imposes, and compel Interior to take the Sibley Parcel into trust, by insisting that they "could" use a fraction of gaming revenue to finance "defer[red] capital expenditures." *Id.* (quoting AR2215).

III. Deference, Not The Indian Canon, Governs Here.

For the reasons above, the plain text of the statute forecloses the Sault's arguments. But if more were needed, Interior certainly acted *reasonably* in rejecting the Sault's boundless interpretations of Sections 108(c)(4) and 108(c)(5). *See* ECF 64 at 16 (Jan. 19, 2017 Letter from Ann Marie Bedsloe Downes, Dep't of Interior, explaining that Fund income cannot be used "to start an economic enterprise, which may generate its own profits, which profits might then be spent on social welfare purposes"). Interior's interpretation is therefore entitled to *Chevron* deference.

The Sault maintain that the Indian Canon "trumps . . . [this] normally-applicable deference." MSJ at 13 (alternation and quotation marks omitted). But "deference does not disappear from the process of reviewing an agency's interpretation of those statutes it is trusted to administer for the benefit of the Indians, although that deference applies with muted effect." *Cobell v. Salazar*, 573 F.3d 808, 812 (D.C. Cir. 2009). In Indian law cases, courts must still "determine if the agency's interpretation is permissible, and if so, defer," while simply remaining "mindful" of the Indian canon. *Confederated Tribes of Grand Ronde Cmty. of Or. v. Jewell*, 830 F.3d 552, 558 (D.C. Cir. 2016). The deference due to Interior, in carrying out its duty as the Tribe's trustee, underscores why Interior acted permissibly in rejecting the Sault's interpretation.

The Casinos recognize that, after the prior briefing, this Court concluded that it need only give "careful consideration" to Interior's views, akin to the deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). ECF No. 72 at 41. That type of deference would be more than

enough to reject the Sault's interpretation. And this Court reached that conclusion before the D.C. Circuit emphasized on appeal that Interior has an "obligation to ensure a lawful trusteeship" under MILCSA, and must therefore "have the authority to verify that the land was legitimately acquired . . . for the limited uses detailed in Section 108(c)." *Sault Saint Marie*, 25 F.4th at 18-19. Although the D.C. Circuit found that it did not need to resolve how to reconcile *Chevron* and the Indian Canon, *see id.* at 21 n.7, its analysis underscores that Congress gave Interior "broad power to carry out the federal government's unique responsibilities with respect to" the Sault, to which courts properly defer. *Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1267 (D.C. Cir. 2008). Moreover, when Interior's "interpretation actually advances 'the trust relationship between the United States and the Native American people,'" "adherence to *Chevron* is consistent with the customary Indian-law canon." *Id.* at 1266 n.7. Where Congress has thus "entrusted to [Interior] the duty of applying, and therefore interpreting, a statutory duty …, we cannot ignore the responsibility of the agency for careful stewardship of limited government resources." *Cobell*, 573 F.3d at 812.[3]

CONCLUSION

The Court should deny summary judgment for the Plaintiff and enter judgment for the Defendants on all claims.

[3] This Court's prior decision also did not address other considerations cutting against application of the Indian canon. The Sault's interpretation would impose on Interior a sweeping obligation to take land into trust anywhere in the country. That brings to the fore the "presumption" that "'the historic police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress.'" *California v. FERC*, 495 U.S. 490, 497 (1990); *see Narragansett Indian Tribe v. Nat'l Indian Gaming Comm'n*, 158 F.3d 1335, 1341–42 (D.C. Cir. 1998). The Casinos also preserve for further review the argument that the Indian canon (or other policy-based canons) never trumps *Chevron*, an issue on which the circuits are split. *Compare Rancheria v. Jewell*, 776 F.3d 706, 713 (9th Cir. 2015) *and Penobscot Indian Nation v. Key Bank of Maine*, 112 F.3d 538, 550 (1st Cir. 1997) (both holding that *Chevron* governs), *with S. Ute Indian Tribe v. Sebelius*, 657 F.3d 1071, 1078 (10th Cir. 2011) (holding Indian canon governs).

Dated: November 28, 2022

Respectfully submitted,

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