NOS. 18-2259 / 18-2302

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BAY MILLS INDIAN COMMUNITY,

Plaintiff–Appellant

v.

GOVERNOR GRETCHEN WHITMER,

Defendant–Appellee

On Appeal from the United States District Court
for the Western District of Michigan, Southern Division

REPLY BRIEF OF PLAINTIFF–APPELLANT BAY MILLS INDIAN COMMUNITY

Vernle C. ("Skip") Durocher, Jr.
Timothy J. Droske
James K. Nichols
Dorsey & Whitney LLP
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402-1498
Telephone: (612) 340-2600
Facsimile: (888) 214-4821

COUNSEL FOR PLAINTIFF–APPELLANT

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INTRODUCTION

The sole issue in this appeal is undisputed: whether MILCSA's requirement that lands Bay Mills purchases pursuant to §107(a)(3) "shall be *held as Indian lands are held*," means such lands are "subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." *See* State Br. 4; *see also id.* at 13-14.

The State concedes this appeal's narrow focus, yet from its opening pages wrongly asserts that a decision in Bay Mills' favor would allow it "to purchase land virtually anywhere and to open a casino on that property." *See* State Br. 3; *see also id*. at viii, 39-41. This sky-is-falling argument is baseless. As the State concedes, there are a "variety of factual and legal bases to challenge" the Vanderbilt Parcel's eligibility for gaming under IGRA. *See* State Br. 13-14. But those bases, by the parties' stipulation and the district court's order, are not before the Court at this time. *See id.* The State's parade of horribles is a strawman and should be treated as such.

Moreover, it strains credulity that a statutory command, passed by Congress in a law giving Bay Mills redress for its fifty-plus-year legal fight over the federal government's "unconscionable" underpayment for lands previously ceded, is devoid of any special meaning. Yet that is the State's (and district court's) position. That "[w]hen Congress stated that the land [acquired under §107(a)(3)]

would be 'held as Indian lands are held,'" it was "merely not[ing] that the standard rules applicable to lands purchased by tribes on the open market would apply." *See* State Br. 26; *see also id.* at 17. But no statutory command was needed to grant Bay Mills permission to do what it could already do. Tribes can already purchase lands on the open market and then seek to place those lands in trust. The State's position is another example of what Justice Gorsuch recently recognized as a "familiar story" when the Supreme Court considered another state's attempt to undermine tribal rights. *Washington State Dep't of Licensing v. Cougar Den, Inc.*, __ U.S. __, 2019 WL 1245535, at *14 (2019) (Gorsuch, J. concurring). There, as here, a tribe ceded millions of acres under significant pressure and "[i]n return, the government supplied a handful of modest promises." *Id*. In fact, in this case, the "modest promises" were later recognized as "unconscionable," and this was what MILCSA was enacted to redress. But the "State is now dissatisfied with the consequences." *Id.* This Court should follow the Supreme Court's recent example and reject the State's effort to deprive Bay Mills the benefit of its bargain. Adopting the State's position would be another miscarriage of justice against Bay Mills.

All the State's arguments are meritless. *Compare with* State. Br. 20-62 (Arguments I-IV).

I. The State's construction of MILCSA's plain text is indefensible. The State nowhere disputes that the phrase "held as Indian lands are held" is unique to Indian treaties dating back to the 19th century. Yet the State ignores the canons of construction dictating that a term of art's historical understanding controls over any "ordinary, contemporary, common meaning." *See* Bay Mills Br. 20-21. The State's dismissal of that same phrase's appearance in treaties and Supreme Court cases simply because Bay Mills was not a party to those treaties or cases is nonsensical.

Even if not interpreted as a term of art, the State fails to explain how the "plain," "ordinary, contemporary, common meaning" of "shall be held as Indian lands are held" simply means "the Tribe could acquire and hold land with all possible titles." *See* State Br. 2. That eviscerates Congress's mandate that such lands "shall be held as *Indian lands* are held." And the State's response that the land still has "special qualities unique to tribal landholdings" because "Bay Mills *could*, for example, request that the land be taken into trust," *see* State Br. 17 (emphasis added), ignores what Bay Mills emphasized—§107(a)(3) does not merely *permit* that lands *could* or *may* be placed in trust. Congress was clear that any lands acquired "*shall* be held as Indian lands are held."

The State's interpretation would impose unique constraints, and no corresponding benefit, on Bay Mills' right to acquire land with MILCSA funds.

Bay Mills can use other funds to purchase any land it chooses, anywhere in the country on the open market, and it would have precisely the same status as MILCSA purchases according to the State—with Bay Mills able to request the land be placed into trust. But with MILCSA funds, Bay Mills is limited to purchases that "consolidate[e] and enhance[]" its "tribal landholdings"—a limitation that only makes sense if a special status attaches to land purchased under §107(a)(3). To instead construe §107(a)(3) as only giving Bay Mills the authority to purchase land the same as any other open-market purchase, but also with this additional limitation, "would amount to 'an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more.'" *Cougar Den*, 2019 WL 1245535, at *7 (internal quotation omitted).

Nor does the State explain why—even under its construction that such lands could be acquired and held with all possible titles—those same lands are definitively *not* subject to a restriction on alienation or tribal governance. This is contrary to what *Cohen's* treatise makes clear (which the State invokes, but does not follow, in its brief): that "the precise character of the tribal interest in land … makes little difference … because absent contrary congressional action, the restrictions on alienation and other unique attributes of Indian trust land apply equally to lands held in trust for the tribes by the United States and to lands held in fee title by tribes with which the federal government maintains a trust

relationship." *Cohen's Handbook of Federal Indian Law* §15.04; *compare* Bay Mills Br. 29, *with* State Br. 22. And the State's position that there is no *contemporary* basis for thinking Congress in 1997 contemplated that such lands would be subject to a restriction on alienation or tribal governance strains reason. Modern statutes, including IGRA, explicitly define "Indian lands" as *including* land with those very features.

II. While both parties agree the statute is unambiguous and the plain text dispositive, any ambiguity cuts clearly in Bay Mills' favor. The State's invocation of *Chevron* deference for the Department of Interior's letter opinion and NIGC decision concerning the Vanderbilt Parcel is contrary to law and was properly rejected by the district court. Those letter opinions, and the State's construction of the legislative history, provide nothing more than a revisionist history and illogical theory that Congress, by *rejecting* the statutory language the agency proposed, somehow *adopted* the meaning for which the agency was advocating. Finally, any ambiguity would trigger the Indian law canons' applicability—canons that, tellingly, the State ignores.

III. The State's preemption argument is irrelevant. MILCSA was not enacted in a vacuum; IGRA resolves the preemption question. Even the State acknowledges that whether gaming can occur on lands properly acquired under §107(a)(3) simply depends on whether such lands are subject to a restriction on

alienation and tribal governance under the definition of "Indian lands" under both IGRA and the Compact.

IV. The State's Nonintercourse Act arguments likewise fail. The State ignores that lands acquired under §107(a)(3) can be subject to a restriction on alienation independent of the Nonintercourse Act. Nor does the State meaningfully argue that the Nonintercourse Act would not apply here. The State *only* addresses the Act's possible limits on open-market purchases of land and fails to confront why it would not apply to an explicit Act of Congress (MILCSA) mandating that lands acquired "shall be held as Indian lands are held."

For all these reasons, and those in Bay Mills' opening brief, reversal and remand is required.

ARGUMENT

I. The Plain Language of "Shall be Held as Indian Lands are Held" Mandates Such Lands are Subject to a Restriction on Alienation and Tribal Governance.

The State does not dispute that §107(a)(3)'s language, requiring that lands acquired "shall be held as Indian lands are held," is plain and unambiguous. *See* State Br 17, 45. But the State's conclusory pronouncement that the phrase's plain meaning merely reflects that Bay Mills "could acquire and hold land with all possible titles" is meritless. *See* State Br. 2, 20. Well-established canons dictate that the phrase's meaning as a term of art controls. *See* Bay Mills Br. 20-21 (and

authorities). Even if not interpreted as a term of art, the State offers no cogent argument that the "ordinary, contemporary, common meaning" of the phrase negates a restriction on alienation or exercise of tribal governance.

A. Interpreting "Held as Indian Lands are Held" as a Term of Art Does Not Depend Upon Whether the Phrase's Prior Use Involved Bay Mills or MILCSA.

The State's primary argument against interpreting the phrase "held as Indian lands are held" as a term of art is that prior uses of that phrase "have no connection to Bay Mills or MILCSA." *See* State Br. 23, 26. This argument is nonsensical. Decisions from the Supreme Court and this Court make clear that it is the term of art's use in the historical legal landscape that is relevant, not any need for identical party-to-party parity. *See* Bay Mills Br. 20-21 (and authorities). The State's position is fatally undercut by its own argument that had Congress intended MILCSA to transfer lands into restricted-fee status, it would have used the same language as in the Seneca Nation Settlement Act ("SNSA"), P.L. 101-503, 104 Stat. 1292 (1990). *See* State Br. 35-36. That Act has no connection to Bay Mills or MILCSA. Instead of looking to the SNSA, which does not even use the same *language* as MILCSA, well-established canons dictate this Court should look to the historical legal landscape—past treaties and cases where the precise phrase "held as Indian lands are held" was used.

That these treaties and cases may date back to "a different era in federal Indian law," as the State argues, is immaterial. *See* State Br. 32-33. To paraphrase the Supreme Court, "[a]lthough the precise nature and use of [the phrase 'held as Indian lands are held'] may have evolved over time, … this Court's decisions make clear that the concept … has a long pedigree in the law." *Molzof v. United States*, 502 U.S. 301, 306 (1992). The nature of that "long pedigree in the law" was clearly explained by Professor Clinton, whose historical analysis was not challenged by the district court.[1] Lands designated to be "held as Indian lands are held" were distinct from trust lands, and subject to a restriction on alienation and tribal governance. *See* Bay Mills Br. 21-22 (and authorities). The State instead inappropriately points to the Department of Interior's reasoning in an opinion letter

[1] The district court only found that "Clinton's reasoning and conclusion fails to consider the contemporary congressional understanding of how Indian lands are held." Summary Judgment Order, R. 91, Page ID #927. But the district court's and State's argument concerning the "contemporary" meaning is wrong. *See infra* 11.

The State's argument that Clinton's declaration is inadmissible is not before the Court. *See* State Br. 22 n.3. No motion to strike was filed; nor did the State ever ask that the report not be considered at summary judgment. Such an argument cannot be raised for the first time on appeal. *Thurman v. Yellow Freight Sys.*, 90 F.3d 1160, 1172 (6th Cir. 1996). And expert admissibility is one for the district court under an abuse of discretion standard; it is not for this Court to decide in the first instance. Regardless, the State's argument that experts may not opine on the "meaning of statutory terms" has no bearing on Clinton's expert opinion regarding the *facts* surrounding the historical use of the phrase "held as Indian lands are held."

as to the meaning of that phrase. State Br. 24-25. But the conclusion in that opinion that "[t]he phrase was used in place of a more definitive directive regarding the nature of the underlying land ownership," *see* State Br. 25, does not change that the lands "held as Indian lands are held" in each treaty have all been subject to a restriction on alienation and the exercise of tribal governance.

Herein lies the fundamental problem with the State's argument. The State concedes that "several types of tribal titles and statuses are subject to both a restriction on alienation held by the United State[s] and to a tribe's governance," including "reservation, trust land, and restricted fee" lands. *See* State Br. 33-34. Nor, despite all its efforts to distinguish the Supreme Court's decisions in *United States v. Cook*, 86 U.S. 591 (1873) and *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968), does the State contest the two key points from those opinions. *See* State Br. 26-31. The State does not (and cannot) dispute that *Cook* held that Indians "had no power of alienation except to the United States." *See* Bay Mills Br. 23 (quoting *Cook*, 86 U.S. at 591-93). The State's efforts to distinguish between restricted-fee and the aboriginal title described in *Cook*, *see* State Br. 29, ignores the key feature common to both—a restriction on alienation. As for *Menominee Tribe*, the Court recognized some degree of tribal governance and rights independent of the state's jurisdiction. *See* Bay Mills Br. 24-25. That this came in the form of hunting and fishing rights does not undermine this basic

principle. *See* State Br. 30-31. It is likewise irrelevant that, as the State argues, the historical decision in *Worcester v. Georgia*, 31 U.S. 515 (1832) "do[es] not consider the nature of tribal authority over land purchased on the open market." *See* State Br. 32 (quoting Summary Judgment Order, R. 91, Page ID #927). The lands acquired under §107(a)(3) are not mere lands purchased on the open market, but lands Congress mandated "shall be held as Indian lands are held." As *Worcester* and other cases like *Johnson v. M'Intosh*, 21 U.S. 543, 574 (1823) make clear, *see* Bay Mills Br. 23-24, historically Indian lands have been subject to restrictions on alienation and the exercise of tribal governance.

"[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken…." *Morissette v. United States*, 342 U.S. 246, 263 (1952). It thus makes no difference that §107(a)(3) did not explicitly identify a restriction on alienation or tribal governance, when those are indisputably common features to land that "shall be held as Indian lands are held." *See id.*

B. Aside from a Term of Art, the Plain, Ordinary, Contemporary, and Common Meaning Connotes Restricted Fee Status and Tribal Governance.

As Bay Mills made clear, even if not interpreted as a term of art, §107(a)(3)'s requirement that lands acquired "*shall* be held as *Indian lands* are

held," plainly means that such lands *must* be treated as *Indian lands*. This, in turn, compels that such lands are subject to a restriction on alienation and tribal governance. *See* Bay Mills Br. 26-37.

The fundamental flaw in the State's argument that at the time of MILCSA's passage, "'Indian lands' could have different meanings in different contexts," is that the common element in *all* the sources the State cites is that lands are subject to a restriction on alienation. *See* State Br. 34-35 (citing 16 U.S.C. §4302(3); 42 U.S.C. §12511(20); 25 U.S.C. §3103(10)). The State's argument, that there is no "*contemporary*" grounding for finding lands "held as Indian lands are held" under §107(a)(3) to be subject to a restriction on alienation and tribal governance, is spurious. *See* State Br. 21. The State ignores that Congress' contemporary enactment of IGRA in 1988 (and the State's own Compact) explicitly defined "Indian lands" as including lands subject to a restriction on alienation and tribal governance. *See* State Br. 36.

It is error to assume that, if Congress intended for lands acquired under §107(a)(3) to be subject to a restriction on alienation, it would have explicitly stated that the lands "shall be held in *restricted fee status*" like it did in the SNSA. State Br. 35 (emphasis by State). The SNSA—unlike MILCSA, IGRA, and the other statutes the State references—does not reference "Indian lands." *See generally* SNSA, P.L. 101-503, 104 Stat. 1292. And common to various forms of

"Indian lands," including "restricted fee" lands, but also those held in trust or as part of the reservation, is that they are subject to a restriction on alienation and tribal governance. As *Cohen's* explains, and the State does not dispute, "[t]he precise title granted to the tribe makes little difference, however, because absent contrary congressional action, the restrictions on alienation and other unique attributes of Indian trust land apply equally to lands held in trust for the tribes by the United States and to lands held in fee by tribes with which the federal government maintains a trust relationship." *Cohen's* §15.04. The plain, contemporary, and ordinary meaning of the requirement that lands "shall be held as *Indian lands* are held" is that such lands are subject to a restriction on alienation and tribal governance.

C. MILCSA has Procedural Safeguards.

The State further argues that the district court properly found that a "lack of procedural safeguards in MILCSA for tribal acquisition of land" supports its interpretation "that Congress did not intend for the lands acquired to be held with restrictions on alienation." *See* State Br. 36-37 (quoting Summary Judgment Order, R. 91, Page ID #916). But such policy arguments regarding "safeguards" that the State and district court hypothesize MILCSA *should have included* (but did not) cannot trump the plain meaning of the language Congress *included* in §107(a)(3). *See Michigan v. Bay Mills Indian Cmty. ("Bay Mills II")*, 572 U.S.

782, 794 (2013). There is nothing sacrosanct about the SNSA, and no requirement for Congress to use the same terms for a restriction on alienation to exist.[2] *See* State Br. 38-39.

The State's argument about a lack of procedural safeguards is undercut by its own concession that "[t]here are a variety of factual and legal bases to challenge Bay Mills' claim that the Vanderbilt Parcel is Indian lands eligible for gaming under IGRA." State Br. 13. Just because those issues are not presently before the Court, *see* State Br. 14, does not mean Bay Mills' authority to acquire and conduct gaming on lands is unchecked. Specifically, §107(a)(3) does "limit[] the geographic area where lands may be acquired," *see* State Br. 38, by requiring that the funds "be used exclusively for improvements on tribal land or the consolidation and enhancement of tribal landholdings." These restrictions do not apply to Bay Mills' other non-MILCSA purchases of land on the open market. Bay Mills accepted a limitation on what land may be eligible for purchase in exchange for greater power over the land it purchased. The State would improperly render this bargain "impotent." *Cougar Den*, 2019 WL 1245535, at *7. And significantly, the

[2] For example, the Tohono O'Odham Nation's acquisition of lands under the Gila Bend Indian Reservation Lands Replacement Act, P.L. 99-503, 100 Stat. 1798 (1986), was found to be eligible for gaming under IGRA, *see Arizona v. Tohono O'odham Nation*, 818 F.3d 549 (9th Cir. 2016), even though Section 6 of that Act allowed the Tribe to purchase private lands that would be held in trust, without any state or local government notice of approval being required.

Vanderbilt Parcel is part of the aboriginal-title lands ceded to the United States in 1836.[3]

Concerns about a lack of input from state or local governments on whether the land should become eligible for gaming, *see* State Br. 40, ignores the compacting process between the State and Bay Mills. Nor is an explicit designation of a federal official or agency to enforce the restriction on alienation required, when as is clear from §108 regarding the Sault Tribe (which the State fails to address in this section), Congress is capable of expressly acting in this regard. *See* Bay Mills Br. 35-36. And the notion that no notice is given on the face of a deed is belied by the deed here, which states the land was purchased "in accordance with Section 107(a)(3) …." Ex. B to Amended Complaint, R. 25-2, Page ID #188.

Finally, the State is wrong that "the lack of federal superintendence in MILCSA indicates that Congress did not intend to restrict the alienation of lands purchased with Land Trust funds." *See* State Br. 41. MILCSA §107(6) only limits federal superintendence over "*funds* from the Land Trust." (Emphasis added.) It

[3] As noted in *People v. LeBlanc*, 248 N.W.2d 199, 203 (Mich. 1976), the Treaty of 1836 included the cession to the United States of "territory now constituting roughly the northern third of Michigan's Lower Peninsula." Appendix – Map II to the published decision in the North Western Reporter, Second Series, shows that this included the location of the Vanderbilt Parcel.

has no bearing on federal superintendence over Bay Mills or the lands it acquires.[4] The purported lack of procedural safeguards is a strawman.

D. The State's *Chevron* Argument is Baseless.

The State's *Chevron* argument, that the Interior letter opinion and NIGC decision concerning the Vanderbilt Parcel are entitled to deference, is squarely contrary to law.

First, the State raises this argument to support its position on §107(a)(3)'s "plain meaning." But agency deference is improper where the congressional statute's language is plain and unambiguous. *Thornton v. Graphic Commc'ns. Conf. of the Int'l Bhd. of Teamsters Supplemental Ret. & Disability Fund*, 566 F.3d 597, 603 (6th Cir. 2009). Here, both parties agree that the statute is unambiguous and its plain text controls. Agency deference is inapplicable.

Second, even if the statute were ambiguous, "[n]either opinion is entitled to any deference," as the district court correctly found. Summary Judgment Order, R. 91, Page ID #919. Congress did not delegate any authority to Interior or NIGC to implement the MILCSA provision at issue, and "explicitly withdrew any

[4] Section 6(b) of the Gila Bend Indian Reservation Lands Replacement Act contained a similar provision stating, "[t]he Secretary shall not be responsible for the review, approval or audit of the use and expenditure of the moneys referred to in this section," which were authorized to be used for the acquisition of private lands. P.L. 99-503, 100 Stat. 1798. Yet such lands were found to be eligible for gaming under IGRA. *Tohono O'odham Nation*, 818 F.3d 549.

oversight" by the Interior Secretary over acquisition of land using MILCSA Land Trust funds. *Id.* (citing MILSCA § 107(a)(6)). Deference is warranted only when "Congress delegated authority to the agency" and "the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001); *see also Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 727 (6th Cir. 2013). No such delegation is present here.

The State is also factually wrong in asserting that "[t]he plan Bay Mills proposed, and which Interior approved and submitted to Congress, became §107 of MILCSA." State Br. 43. Bay Mills and Interior disagreed on the plan, and Congress adopted Bay Mills' position and rejected Interior's proposed changes. Interior's first proposal simply called for Bay Mills to submit a plan to the Secretary for approval; it in no way resembles the codified version of Bay Mills' plan in §107.[5] Bay Mills' proposal to Congress became §107, with Congress rejecting numerous proposed amendments by Interior. This includes Congress keeping §107(a)(3)'s requirement that lands "shall be held as Indian lands," despite Interior's request the language be "[d]elete[d]" as "unnecessary." *See* Bay Mills

[5] Interior submitted its proposed plan in *Bay Mills Indian Community v. Babbitt*, No. 96-0553 S.S. (D.D.C. 1996). *See* Bay Mills' Motion for Judicial Notice and Exs. A-C.

Br. 39. The notion that "Interior's interpretation of the language should be given considerable weight because of its role in submitting that language" is ill-conceived. *See* State Br. 43.

Third, the State's argument that even without notice and comment rulemaking, Interior's interpretation is entitled to *Chevron*, or some other level of deference, is contrary to law. *See* State Br. 43-45. The Supreme Court has long held that "[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). At best, "interpretations contained in formats such as opinion letters are 'entitled to respect' … only to the extent that those interpretations have the 'power to persuade.'" *Id*. (internal quotations omitted); *see also Chao v. OSHRC*, 540 F.3d 519, 527 (6th Cir. 2008). And Interior's opinions—which the State largely recycles (differing only by claiming the language is "plain" rather than ambiguous, *see* Ex. B to State's Summary Judgment Br., R. 54-3, Page ID #444)—are *not* persuasive. For all the reasons stated in the original brief and this reply, those arguments are meritless.

II. If Ambiguous, Bay Mills' Construction is Compelled by the Legislative History and Indian Law Canons.

A. The Legislative History Compels Bay Mills' Construction.

The State's main legislative history argument is misleading and improperly asks the Court to reach a conclusion based on the purported *absence* of relevant history. *See Harrison v. Ppg Indus.*, 446 U.S. 578, 591-92 (1980) ("In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark."). The State claims that "[w]hat is clear … is that *no one* ever proposed adding language to say that land purchased with Land Trust funds would be subject to a restriction against alienation held by the United States and would subject the land to the Tribe's governance." State Br. 46 (emphasis in original). But the "precise" phrase Congress used—that lands acquired "shall be held as Indian lands are held"—means that such lands are subject to a restriction on alienation and tribal governance. *See Mansell v. Mansell*, 490 U.S. 581, 592 (1989).

The State offers no meaningful response to Bay Mills' point that Congress's later Act making Sault Tribe lands alienable shows that lands "held as Indian lands are held" under MILCSA—like the Vanderbilt Parcel—are subject to a restriction on alienation. If there were no restriction on alienation, then there would be no need for an Act making the lands alienable.

The legislative history shows that Congress considered and rejected Interior's position that this land be categorically foreclosed from gaming. As the State recognizes, the originally proposed language that lands purchased under §107(a)(3) would be "held in trust by the United States for the Bay Mills Indian Community," was "objectionable" to the Department of the Interior, "precisely because it could potentially make such lands eligible for gaming under section 20 of IGRA, 25 U.S.C. §2719." State Br. 46-47. But Congress did not agree with Interior's specific concerns or accede to its request to "clarif[y] that the Secretary retains jurisdiction under existing regulations (25 C.F.R. Part 151) and that this section does not repeal the limitations in section 20 of the Indian Gaming Regulatory Act." *See* State Br. 47. Instead, Congress mandated that such lands "shall be held as Indian lands are held" in §107(a)(3) for Bay Mills, and §108(b)(4) for the Sault Tribe.

Any uncertainty regarding Congress's rejection of Interior's position is clarified by Congress's refusal to modify the new language (which is how it appeared in the final law), despite Assistant Secretary Michael J. Anderson's requests for "clarifying amendments." *See* State Br. 49-51. Anderson maintained that Congress should "[d]elete the last sentence [containing 'held as Indian lands are held'] because it is unnecessary" and argued the same for the provision applicable to the Sault Tribe. Ex. H to State's Summary Judgment Br., R. 54-9,

Page ID #510. Anderson suggested several similar changes, all aimed at interjecting his agency into MILCSA's administration by requiring the tribes to follow the land-into-trust process if any acquired land were to be "Indian land." State Br. 49. Congress's refusal to make these changes is a clear rejection of Interior's and the State's position on what "held as Indian lands are held" means (*i.e.*, simply being "subject to the land-into-trust process," *see* State Br. 52), and their argument that Congress did not deem any such acquired lands as eligible for gaming under IGRA.

Far more credible than Congress choosing to maintain language that had a meaning rendering it "unnecessary" is that it provided a remedy to Bay Mills for centuries-old wrongs in the cession of its lands—a means to acquire lands imbued with the fundamental attributes of "Indian lands."

B. The State Ignores the Indian Law Canons.

To the extent §107(a)(3) is ambiguous, the Indian law canons require that the phrase "shall be held as Indian lands are held" be interpreted as imbuing such lands with the intrinsic qualities of "Indian lands" (*i.e.*, a restriction on alienation and being subject to tribal governance), rather than merely stating the "unnecessary" (*i.e.*, that the standard rules for open-market purchases applied). The State does not dispute that the canon requiring that "statutes are to be construed liberally in favor of the Indians" would compel this result. *See* Bay

Mills Br. 43 (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)). Nor does it dispute what Bay Mills argued and the Supreme Court has squarely found—that the Indian law canons apply in the face of statutory ambiguity. *See* Bay Mills 43-47.

The State's summary dismissal of the Indian law canons as being "not afforded any particular weight" when applied to statutes, citing *Chickasaw Nation v. United States*, 534 U.S. 84 (2001), is fundamentally misplaced. *Chickasaw* does not diminish the canons' relevance; it merely confirms they do not apply where there is *no* ambiguity. *See Chickasaw Nation*, 534 U.S. at 94; *see* Bay Mills Br. 45-46. Thus, the canons have robust force if §107(a)(3) is deemed ambiguous.

The State also argues in a passing footnote, devoid of legal authority, that the Indian law canons should not apply in Bay Mills' favor because its position "is not favorable to tribes generally." This argument is meritless. MILCSA is not generally applicable to tribes—the provision at issue is specific to Bay Mills. Nor are any other tribes a party to this suit.[6] Bay Mills' position has no direct impact

[6] The State claims Bay Mills is seeking a "competitive advantage" as to other tribes and notes the Little Traverse Bay Band of Indians ("LTTB") challenged Bay Mills' conduct of gaming on the Vanderbilt parcel. LTBB's complaint was dismissed for lack of jurisdiction, and it declined to join in a petition for a writ of certiorari to the Supreme Court or to initiate further proceedings consistent with the Court's opinion in *Bay Mills II*, 572 U.S. 782.

on any other tribe. But allowing the State to undermine the Indian canons and deny a tribe the benefits of a hard-fought land settlement would perpetuate historic injustices and create precedent harmful to all tribes. The Indian canons do not preclude a tribe from realizing a purported "competitive advantage." The State's argument conflates tribal business interests with the more important considerations that the Indian canons protect, including tribes' unique status as domestic dependent nations and advancement of tribal autonomy and self-government, as is the case here. *See* Bay Mills Br. 44. Notably, the State's argument ignores *Bay Mills II*, where the Supreme Court applied the Indian law canons in Bay Mills' favor in this very dispute. *See id.* (citing and quoting *Bay Mills II*, 572 U.S. at 788-91). The Indian law canons apply here to the extent there is any ambiguity in §107(a)(3) and compel a construction in Bay Mills' favor.

III. The State's Preemption Argument Fails.

Bay Mills does not dispute the basic principle that "*[a]bsent express federal law to the contrary*, Indians going beyond reservation boundaries generally have been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973) (emphasis added); *see also* State Br. 3, 53. But the State ignores that here there *is* express federal law on point. IGRA created a statutory framework for tribal

gaming that confirms[7] federal preemption of state law on "Indian land"—including off-reservation land—thus eliminating the need for Congress to separately express preemptive intent for qualifying land. Specifically, gaming is permitted on lands subject to a restriction on alienation and tribal governance, even if the land is off-reservation. The State does not dispute this point, and acknowledges that lands acquired under MILCSA §107(a)(3) would be "Indian lands" for IGRA purposes if those lands "are subject to a restriction against alienation held by the United States and are also subject to the Tribe's governmental power." State Br. 56.

Thus, the State's preemption argument is only a smokescreen meant to create confusion around an issue not actually in dispute.[8]

IV. There is a Restriction on Alienation, Regardless of Whether its Source is the Nonintercourse Act.

The State's arguments that the Nonintercourse Act does not apply to the Vanderbilt Parcel are wrong and meaningless. As Bay Mills emphasized, the

[7] IGRA followed the Supreme Court's decision that California could not regulate tribal gaming on Indian land. *See California v. Cabazon* Band *of Mission Indians*, 480 U.S. 202 (1987). That case, not cases with no connection to Indian law cited by the State, sets forth the preemption analysis that would apply if not for IGRA.

[8] The State fails to mention that Bay Mills exercises governmental authority to regulate hunting "and the other usual privileges of occupancy" by members in all of the 1836 ceded area, including the Vanderbilt parcel, as secured by Article 13 of the 1836 Treaty of Washington, 7 Stat. 491. *See* Consent Decree, *United States v. Michigan*, No. 2:73-cv-00026-PLM (W.D. Mich. November 2, 2007), ECF No. 1799; *see also* Motion for Judicial Notice and Ex. D.

restriction on alienation had its roots in the Constitution's Indian Commerce Clause and was specifically found by the Supreme Court to apply to land "held as Indian lands are held." Bay Mills Br. 30; *see also Cook*, 86 U.S. at 592-93; *Johnson*, 21 U.S. at 574 (cited at Bay Mills Br. 23-24, 30 and unaddressed by the State). The restriction on alienation for lands acquired under §107(a)(3) does not depend upon the Nonintercourse Act's applicability.

Even if the Nonintercourse Act controlled, the State fails to explain why it would not apply here. It makes no difference that "the lands at issue in this case were purchased *by* an Indian tribe, not *from* one." State Br. 57. Because the Nonintercourse Act's plain text (and that of the corresponding regulation) restricts the purchase from an *Indian tribe*, lands that Bay Mills holds under §107(a)(3) now fall within that category. *See* Bay Mills Br. 30-31. Even if the predecessor versions of the Nonintercourse Act from 1790 and 1793 that the State cites "merely codified the principle that a sovereign act was required to extinguish aboriginal title," *see* State Br. 58 (quoting *Oneida Cty. v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 245 (1985)), there can be no meaningful dispute that the current Nonintercourse Act's plain text sweeps more broadly.

The State's argument is also based on the fundamental misconception that lands Bay Mills acquires under §107(a)(3) do not differ from any other lands purchased on the "open market." This is clear from the State's framing of its

Statement of Issues, where it asserts "[t]he U.S. Supreme Court has held that the Non-Intercourse Act does not apply to land purchased on the open market," citing *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 203 (2005). *See* State Br. 2. But *Sherrill*'s holding that "standards of federal Indian law and federal equity preclude the Tribe from rekindling embers of sovereignty that long ago grew cold," involved sovereign immunity from state taxes, not the Nonintercourse Act, and involved lands purchased by the Oneida Tribe on the open market rather than pursuant to a federal act.[9] *See id*. at 214. And the question the Supreme Court left open in *Cass County*—"whether the Indian Nonintercourse Act, which was enacted in 1834, applies to land that has been rendered alienable by Congress and later reacquired by an Indian tribe"—is not at issue, where the land here was not simply reacquired on the open market, but was purchased under a specific federal law, MILCSA §107(a)(3). *See* State Br. 58-59 (quoting *Cass Cty., Minn. v. Leech Lake Band of Chippewa Indian*, 524 U.S. 103, 115 n.5 (1998)); Bay Mills Br. 32 n.14. There is no basis for the State's assertion that "[t]aking Bay Mills' argument to its logical end would mean that [1] *any tribe* could buy lands [2] *anywhere*, using [3] *any funds*, and the lands would be held in restricted fee and gaming eligible." State Br. 60. The State is unable to offer any

[9] The State is also wrong that the Vanderbilt Parcel is land in which Bay Mills never held aboriginal title. *Compare* State Br. 59, *with supra* n.3.

meaningful response to Bay Mills' actual position: That lands acquired under §107(a)(3)—which is [1] specific to Bay Mills, for [2] "the consolidation and enhancement of tribal landholdings," and [3] requires the use of "earnings generated by the Land Trust"—are subject to a restriction on alienation because of Congress's mandate that such lands "shall be held as Indian lands are held."

Finally, the restriction on alienation for lands "held as Indian lands are held" by Bay Mills under §107(a)(3) is further confirmed by Congress's later law lifting any such restriction on alienation for lands "held as Indian lands are held" by the Sault Tribe under MILCSA §108(b)(4). *See* Bay Mills Br. 33-34. The State's response relies on the same flawed analysis: "Because this law only applies to the Sault Tribe, it is implausible to assume that it demonstrates the Non-Intercourse Act applies to land purchased by *any* tribe on the open market, makes all purchased lands subject to a restriction against alienation, and in so doing makes these lands eligible for gaming under IGRA." State Br. 61 (emphasis in original). The State does nothing to refute what is instead the necessary conclusion: Congress's subsequent lifting of a restriction on alienation for Sault Tribe lands—which would include those "held as Indian lands are held" under §108(b)(4)—demonstrates that a restriction on alienation would otherwise necessarily exist for lands "held as Indian lands are held," including by Bay Mills under §107(a)(3). The State's

arguments fail. Lands Congress mandates "shall be held as Indian lands are held" are subject to a restriction on alienation.

CONCLUSION

For the foregoing reasons, and those stated in its opening brief, Bay Mills respectfully requests that this Court reverse the district court's grant of summary judgment.

Dated: March 27, 2019

Respectfully submitted,

DORSEY & WHITNEY LLP
Attorneys for Plaintiff–Appellant

By: s/ Vernle C. ("Skip") Durocher, Jr.
Vernle C. ("Skip") Durocher, Jr.
James K. Nichols
Timothy J. Droske
Dorsey & Whitney LLP
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402-1498
Telephone: (612) 340-2600
Facsimile: (888) 214-4821
E-mail: durocher.skip@dorsey.com
nichols.james@dorsey.com
droske.tim@dorsey.com

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a). This brief contains 6494 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) because it is prepared in a proportionally spaced, 14-point Times New Roman typeface.

Dated: March 27, 2019

Respectfully submitted,

DORSEY & WHITNEY LLP
Attorneys for Plaintiff–Appellant

By: s/ Vernle C. ("Skip") Durocher, Jr.

Vernle C. ("Skip") Durocher, Jr.
James K. Nichols
Timothy J. Droske
Dorsey & Whitney LLP
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402-1498
Telephone: (612) 340-2600
Facsimile: (888) 214-4821
E-mail: durocher.skip@dorsey.com
nichols.james@dorsey.com
droske.tim@dorsey.com

CERTIFICATE OF SERVICE

I certify that on March 27, 2019, I served the foregoing Brief upon Governor Whitmer, through counsel who have entered appearances in this matter, by means of the Court's ECF system.

Dated: March 27, 2019

Respectfully submitted,

DORSEY & WHITNEY LLP
Attorneys for Plaintiff–Appellant

By: s/ Vernle C. ("Skip") Durocher, Jr.
Vernle C. ("Skip") Durocher, Jr.
James K. Nichols
Timothy J. Droske
Dorsey & Whitney LLP
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402-1498
Telephone: (612) 340-2600
Facsimile: (888) 214-4821
E-mail: durocher.skip@dorsey.com
nichols.james@dorsey.com
droske.tim@dorsey.com