STATE OF MICHIGAN
IN THE SUPREME COURT

FRED PAQUIN,

Plaintiff-Appellant,

v

CITY OF ST. IGNACE,

Defendant-Appellee,

and

ATTORNEY GENERAL BILL SCHUETTE,

Intervening Defendant-Appellee.
_____/

Supreme Court No. 156823

Court of Appeals No. 334350

Mackinac County Circuit Court
No. 15-7789-CZ

INTERVENING DEFENDANT-APPELLEE ATTORNEY GENERAL BILL SCHUETTE'S SUPPLEMENTAL BRIEF

Bill Schuette
Attorney General

Aaron D. Lindstrom (P72916)
Solicitor General
Counsel of Record

B. Eric Restuccia (P49550)
Chief Legal Counsel

Heather S. Meingast (P55439)
Assistant Attorney General
Attorneys for Intervening Appellee
Attorney General Bill Schuette
P.O. Box 30212
Lansing, Michigan 48909
517-241-8403

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INTRODUCTION

Both the text and purpose of article 11, § 8 support the Court of Appeals' conclusion that Paquin's elected position on the Sault Tribe's Board of Directors and his employment as Police Chief for the Sault Tribe were positions of "elective office or . . . employment in local . . . government," as contemplated by § 8. The Court of Appeals correctly affirmed the trial court's July 26, 2016 opinion and order dismissing Paquin's complaint. As a result, this Court should deny leave.

ARGUMENT

I. Under the plain text of article 11, § 8, the government of the Sault Tribe is a "local . . . government," and therefore Paquin's federal conspiracy-to-defraud conviction prohibits him from holding local office.

Article 11, § 8 of Michigan's Constitution consists of two components, an ineligibility component and a covered-felony component:

> [1] A person is ineligible for election or appointment to any state or local elective office *of this state* and ineligible to hold a position in public employment *in this state* that is policy-making or that has discretionary authority over public assets [2] if, within the immediately preceding 20 years, the person was convicted of a felony involving dishonesty, deceit, fraud, or a breach of the public trust and the conviction was related to the person's official capacity while the person was holding any elective office or position of employment *in local, state, or federal government*. . . . [Const 1963, art 11, § 8 (emphasis added).]

While the ineligibility component is limited to governments "of this state" or "in this state," the covered-felony component does not include those limitations but rather applies to any local government. Because a tribe is a local government, § 8 applies to Paquin.

A. The covered-felony part of § 8 is not limited to governments "of this state."

In his supplemental brief, Paquin argues that this constitutional provision must be strictly construed and that applying such a construction leads to the conclusion that the phrase "local . . . government" includes only local units of government of the State of Michigan or possibly of another State. (Paquin's Suppl Br, pp 4–6.) But this construction ignores § 8's plain (and broad) language.

As just noted, § 8 consists of two parts, an ineligibility component and a covered-felony component. While the ineligibility component focuses on preventing certain felons from holding office in Michigan government, the covered-felony component covers a category of conduct, regardless of whether that conduct occurred in Michigan government or in some other government. And while the text of the ineligibility component limits its prohibition on election or appointment to "any state or local elective office *of this state*" and its prohibition on public employment to "employment *in this state*," the text of the covered-felony component does not limit its concern to felonies that occurred when the person was holding an office or a position "in" or "of" "this state." 1963 Const, art 11, § 8 (emphasis added). Rather, the second part of § 8 leaves out this limitation and broadly covers felonies committed while holding "any elective office or position of employment in local, state, or federal government."

This difference in language is significant. It is a basic rule of construction that when limiting language is included in one provision but not in another, the difference matters. E.g., *People v Peltola*, 489 Mich 174, 185 (2011) ("Generally,

when language is included in one section of a statute but omitted from another section, it is presumed that the drafters acted intentionally and purposely in their inclusion or exclusion."); *State Farm Fire & Cas Co v US ex rel. Rigsby*, 137 S Ct 436, 442 (2016) (noting "the general principle that Congress' use of 'explicit language' in one provision 'cautions against inferring' the same limitation in another provision").

This difference in language shows that coverage of a prior felony is not limited to felonies committed in a position in *Michigan*'s local or state government. For example, if someone were convicted of a covered felony when serving as the mayor of Toledo, Ohio, and the felony related to the individual's conduct in an official capacity as mayor, that individual would be covered by the plain language of § 8: that individual would have been convicted of a covered felony "while the person was holding [an] elective office or position of employment in local . . . government." 1963 Const, art 11, § 8. As this example shows, the inclusion of "local government" without the limiting phrase "of this state" means that § 8's plain text covers offices in local governments that are not local governments of this State.

Indeed, the plain text of the covered-felony provision does not require the local government to be a local government of a State at all; it applies to any entity that is a local government. In other words, if the individual convicted of a felony were the mayor of Windsor, Ontario, instead of the mayor of Toledo, the individual would still fall within § 8's plain language. Any English speaker of ordinary competence would agree that the City of Windsor is a local government (just as

much as the City of Detroit is a local government). *People v Nash*, 418 Mich 196, 209 (1983) ("[O]ur task is to divine the 'common understanding' of the provision, that meaning 'which reasonable minds, the great mass of the people themselves, would give it.' ").

Since the covered-felony component of § 8 is not limited to local governments of Michigan, it applies to any type of local government, not only to local governments of the sort specifically defined elsewhere in Michigan's Constitution. This is important because it shows that the covered-felony component is not limited to the types of local governments set out in article 7 of the Constitution (i.e., to counties, townships, cities, villages, or metropolitan governments) or to the types listed in the definition of "Local Government" provided in article 9, § 33 (which in any event applies on its own terms only to "Section 25 through 32 of Article IX") or to types identified elsewhere in the Michigan Constitution. Rather, § 8 applies to anything that fits within the ordinary meaning of "local government." This makes sense, because § 8 does not set out rules about how local or state (or federal) governments are supposed to be structured; rather, it lists generic classes of government so that it can address a particular class of conduct—conduct breaching the public trust—that renders someone unfit for office.

B. A tribe fits within the ordinary meaning of "local government."

And an Indian tribe is a type of local government. Start first with the plain meaning of the word "government": as the Court of Appeals recognized, a government is "the body of persons that constitutes the governing authority of a

political unit or organization." (Opinion, p 5, quoting *Merriam-Webster's Collegiate Dictionary* (2007), p 730.) A tribe is a political unit or organization, as both this Court and the U.S. Supreme Court have recognized. *Taxpayers of Michigan Against Casinos v State*, 471 Mich 306, 319 (2004) (stating that Indian tribes are " 'distinct political communities' "), quoting *Worcester v Georgia*, 31 US 515, 557 (1832); *Santa Clara Pueblo v Martinez*, 436 US 49, 55 (1978) ("Indian tribes are distinct, independent political communities . . . .") (quotation marks omitted); see also, e.g., *Puerto Rico v Sanchez Valle*, 136 S Ct 1863, 1872 (2016) (describing tribes as "separate sovereigns" and as "domestic dependent nations"). And when Paquin was on the Board of Directors of the Sault Tribe, he was part of the body of persons that constituted the governing authority of that particular tribe. See Constitution & Bylaws of the Sault Ste. Marie Tribe of Chippewa Indians, art IV (available at https://www.saulttribe.com/government). Indeed, Paquin does not seem to be disputing the fact that a tribal government is a government, as his briefs repeatedly emphasize the fact that tribes are sovereign entities. (E.g., Paquin Suppl Br, pp 4–6; Paquin Appl'n for Leave, pp iv–vi, 5–10.)

So the question comes down to whether a tribe is a *local* government. As the Court of Appeals recognized, the phrase "local government" means " 'the government of a specific local area constituting a major political unit (as a nation or a state); *also*: the body of persons constituting such a government.' " (Opinion, p 5.) Indian tribes fall comfortably within this definition. As Paquin admits, tribes cover a "geographic area" which may "extend to several parts of a state or states."

(Paquin Suppl Br, p 5.) And as is common knowledge, many tribes govern a local area known as a reservation. As to the Sault Tribe specifically, it provides governmental services in a local area, namely seven counties in the eastern part of Michigan's Upper Peninsula. See https://www.saulttribe.com/about-us/service-area.

Consistent with these definitions, the U.S. Supreme Court has described Indian tribes as local governments: "Indian tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-government." *Santa Clara Pueblo v Martinez*, 436 US 49, 55 (1978) (quotation marks omitted); *id.* at 56 ("Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess."); *Merrion v Jicarilla Apache Tribe*, 455 US 130, 158 (1982) (recognizing that "the Tribe, as local government," could impose a certain tax); *id.* at 146 n 12 (quoting "the 1958 treatise on Indian law written by the United States Solicitor for the Department of the Interior" for the proposition that " '[o]ver tribal lands, the tribe has the rights of a landowner as well as the rights of a local government, dominion as well as sovereignty' "); *Puerto Rico v Sanchez Valle*, 136 S Ct 1863, 1872 (2016) (describing tribes as "separate sovereigns under the Double Jeopardy Clause" because they retain " 'powers of local self-government,' " including "the power to prosecute").

And so have lower federal courts: "modern tribal governments routinely exercise civil governmental authority over a range of day-to-day activities, much like comparable state and local government entities." *MacArthur v San Juan Cty*,

391 F Supp 2d 895, 937–938 (D Utah, 2005), rev'd in part, aff'd in part, 497 F3d 1057 (CA 10, 2007); see also *McDonald v Means*, 309 F3d 530, 539 (CA 9, 2002) ("[T]he Code of Federal Regulations makes clear that '[t]he administration and maintenance of Indian reservation roads and bridges is basically a function of the local government,' 25 C.F.R. § 170.6, which, as regards Route 5, is the Northern Cheyenne Tribe.").

Like the U.S. Supreme Court and other federal courts, the Michigan Legislature has equated Indian tribes to various government units in a number of statutes, including equating them to local governments. E.g., MCL 141.1053(j) ("governmental unit includes an Indian tribe"); MCL 333.13704(1) (" 'Municipality' means a city, village, township, or Indian tribe."). And so has the executive branch. MCL 408.101, Executive Reorganization Order, Department of Labor (" 'Local units of government' means counties, townships, cities, villages or federally-recognized Indian tribes"); Mich Admin Code, R 29.2163(h) (" 'Local government' has the meaning given this term by applicable state law and includes Indian tribes"); OAG, 2013-2014, No. 7273 ("[T]he phrase 'local . . . government' for purposes of Section 8 includes a recognized Tribal government."). Indeed, local governments of Michigan may enter into interlocal agreements with recognized Indian tribes just as they may with local governments of this State or of another State. MCL 124.504, 124.502(e); see also Matthew L.M. Fletcher *et al*, *Indian Country Law Enforcement and Cooperative Public Safety Agreements*, 89 Mich BJ 42 (2010) (detailing public safety cooperative and cross-deputization agreements within Michigan).

In short, tribes fit the common understanding of and general definition of "local government" because a tribe is a major political unit—"a domestic dependent nation[ ] that exercise[s] sovereign authority," *Michigan v Bay Mills Indian Community*, 134 S Ct 2024, 2030 (2014)—that governs a local area.

As the foregoing shows, the fact that the word "tribe" does not describe a unit of local government established by Michigan law does not mean that a tribe is not a local government. Indeed, there are numerous examples of local governments that are not labeled "city," "village," "county," or "township" (just as there are four States, namely Kentucky, Massachusetts, Pennsylvania, and Virginia, that refer to themselves as Commonwealths, not as States). Some States have local governments known as "boroughs" (such as Pennsylvania and New York); Louisiana has "parishes"; and the local government in Washington, D.C., is a local government even though it is not under any particular State. See US Const, art I, § 8, cl 17 (describing the district as "the seat of government of the United States"); DC Code §§ 1-201.01–1-207.71 (2013) (describing, in the District of Columbia Home Rule Act, the district's powers as a local government); *id.* § 1-201.2 (stating Congress's intent to "grant to the inhabitants of the District of Columbia powers of local self-government"). It would be a stretch to think that the Michigan public would have thought that § 8 would cover felonies committed by the Detroit mayor, but not to identical felonies committed by the mayor of Toledo, the mayor of the Bronx, the mayor of New Orleans, or the mayor of D.C. *Coal of State Emp Unions v State*, 498 Mich 312, 323 (2015) ("Our primary goal in construing a constitutional provision is

to give effect to the intent of the people of the State of Michigan who ratified the Constitution, by applying the rule of 'common understanding.' We locate the common understanding of constitutional text by determining the plain meaning of the text as it was understood at the time of ratification.") (footnotes omitted).

Given the broad purpose of protecting Michigan government from officials who have been convicted of felony-level breaches of the public trust, it makes sense that the drafters defined categories of government in general terms, rather than attempting to list specific forms of government. In fact, this approach especially makes sense in light of the fact that the forms of local governments for this State could not be fully listed, given that Michigan's Constitution expressly provides for the creation of other forms of local government: "Notwithstanding any other provision of this constitution the legislature may establish in metropolitan areas *additional forms of government or authorities* with powers, duties and jurisdictions as the legislature shall provide." Const 1963, art 7, § 27 (emphasis added).

Taxpayers of Michigan Against Casinos, 471 Mich 306, 319 (2004) (*TOMAC*), is not to the contrary. In that case, this Court addressed whether tribal gaming compacts approved by the Legislature through a joint resolution were local or special acts under article 4, § 29. This Court concluded that the tribal-state compacts were not "local acts" because casinos operating on tribal lands were " 'international in character' " in that they "would be frequented by Michigan citizens from throughout the state as well as by members of various Indian Tribes." *Id*. at 335, quoting *Attorney General ex rel Eaves v State Bridge Comm*, 277 Mich

373 (1936) (holding that state legislation authorizing bridge to Canada did not constitute prohibited local act). Thus, "the approval of state compacts regarding Indian casinos . . . constitutes a unique state function with interests 'international in character,' rather than a function of a local unit of government with predominantly local interests." *Id.* Accordingly, a majority agreed that the purpose of the "act," i.e., the gaming compacts, was not "local" but rather a "state function" because the various tribal casinos would be open for business to all Michigan citizens and to members of all tribes, similar to the international bridge to Canada discussed in *Attorney General ex rel Eaves*, 277 Mich at 377. Because the analysis under article 4, § 29 was not predicted on the nature or status of the Indian tribes, but rather on the *state-wide* purpose and substance of the compacts, this holding in *TOMAC* does little to inform the analysis of article 11, § 8.

Nor does the expressio unius analysis from Justice Markman's partial dissent in *TOMAC* cut against recognizing that a tribe is a local government. In his partial dissent, Justice Markman addressed article 3, § 5 of the Michigan Constitution when evaluating whether state law authorized the Governor to authorize the compact by a resolution. Section 5 allows "this state or any political subdivision thereof" to enter into intergovernmental agreements "with any one or more of the other states, the United States, the Dominion of Canada, or any political subdivision thereof," Const 1963, art 3, § 5, and Justice Markman observed that the authority to enter into agreements was "specifically limited" to the agreements with the listed entities and that the "power to enter into an intergovernmental

agreement with an Indian tribe is conspicuously absent," 471 Mich at 400–401 (Markman, J., concurring in part and dissenting in part). But even if a tribe is not a political subdivision of the United States (as Justice Markman impliedly concluded), that does not mean that a tribe is not a local government. What is more, here it is the limitation at issue—that the local government be "of this state"—that is conspicuously absent from the covered-felony component of § 8. In short, a tribe *is* a type of local government, just as a city, town, or village is a type of local government, and because tribes are included within the ordinary meaning of "local government," they are present in, not absent from, § 8's listing of governments.

Finally, this Court may have some concern that interpreting the term "local . . . government" in § 8 to include Indian tribes will open the door to similar interpretations of other constitutional provisions. That result is unlikely. Simply recognizing that Indian tribes, or at least the Sault Tribe, function like a "local" government within the general meaning of that term, similar to traditional local units of government in Michigan and elsewhere, is not determining that the Sault Tribe *is* a local government *of* Michigan. Thus, constitutional provisions referring to local governments *of* Michigan would not be impacted.

II. Recognizing that a tribe is a type of local government advances the purpose of § 8 by preventing those who have been convicted of a felony that breaches the public trust while serving in government from holding office.

Furthermore, this result is entirely consistent with the purpose of § 8, which is to maintain the public trust in Michigan's elected and appointed officials. See *Coal of State Emp Unions*, 498 Mich at 323 ("Interpretation of a constitutional provision also takes account of 'the circumstances leading to the adoption of the provision and the purpose sought to be accomplished.' "). Section 8 effectuates this purpose by seeking to ensure that only trustworthy persons will hold public office in Michigan, and it uses criminal history of certain specific felonies as evidence pertaining to trustworthiness. There is nothing in § 8 to suggest that previous convictions related to service in tribal government are any less relevant to protection of the public trust than convictions related to service in other types of local, state, or federal government. The purpose of § 8 supports a conclusion that § 8 applies to Paquin's convictions related to his service with the Sault Tribe.

CONCLUSION AND RELIEF REQUESTED

In sum, the phrase "local . . . government" is broad enough to include the Sault Tribe where the Tribe functions like a traditional local government, the context of the anti-fraud constitutional provision demonstrates that it does not narrowly apply only to political subdivisions of this State or another State, and the provision's purpose was to prevent the very thing at issue here, to stop someone convicted of fraud from running from public office. The Court of Appeals did not err. This Court should deny leave to appeal.

Respectfully submitted,

Bill Schuette
Attorney General

Aaron D. Lindstrom (P72916)
Solicitor General
Counsel of Record

B. Eric Restuccia (P49550)
Chief Legal Counsel

/s/ Aaron D. Lindstrom (P72916)
Aaron D. Lindstrom (P72916)
Heather S. Meingast (P55439)
Assistant Attorney General
Attorneys for Intervening
Defendant-Appellee
Attorney General Bill Schuette
P.O. Box 30212
Lansing, Michigan 48909
517-241-8403
LindstromA@michigan.gov

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