UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

State of Connecticut, *et al.*, Plaintiffs, v. Ryan Zinke, in his official capacity as Secretary of the Interior, *et al.*, Defendants.	Civil Action No. 17-cv-02564-RC ORAL ARGUMENT REQUESTED

PLAINTIFFS' OPPOSITION TO DEFENDANTS' PARTIAL MOTION TO DISMISS

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From the enactment of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701, *et seq.* (IGRA), in 1988 until the Defendants filed their motion to dismiss on February 5, 2018, all parties to this case treated compacts approved by the Secretary of the Interior pursuant to different sub-sections of 25 U.S.C. § 2710(d) identically in all material respects relevant to this dispute. Specifically, the parties viewed the 1991 compact between the State of Connecticut (the State) and the Mashantucket Pequot Tribe (the Pequot Tribe), established pursuant to the process set forth in § 2710(d)(7)(B) (the Pequot Compact), as the legal equivalent of the 1994 compact between the State and the Mohegan Tribe of Indians of Connecticut (the Mohegan Tribe), established pursuant to the process set forth in § 2710(d)(3) (the Mohegan Compact). Indeed, less than a year ago, Acting Deputy Secretary of the Interior James Cason explicitly denoted the two compacts "collectively" as "Compacts" and said that the regulatory provisions that the Defendants now contend are *inapplicable* to the Pequot Compact were, in fact, *applicable* to that Compact. *See* Letter from James E. Cason, Acting Deputy Sec'y to the Hon. Rodney Butler, Chairman of the Pequot Tribe (May 12, 2017), Doc. 9-13, at 3.

In a stunning about-face, the Defendants now ask this Court to adopt a hyper-technical reading of the law that would create two classes of compacts under § 2710(d), stripping one of key protections and safeguards otherwise afforded by IGRA and related federal regulations. The statutory construction urged by the Defendants places form over substance in a way that would lead to absurd results. Furthermore, the position that the Defendants now advocate is demonstrably inconsistent with the position that they have held for more than three decades, and it would severely undermine the purpose and

congressional intent of IGRA. It also is inconsistent with the terms of the Pequot Compact, which the Defendants themselves approved. It should be rejected out of hand.

BACKGROUND

The Plaintiffs brought this action to compel the Defendants to take the non-discretionary act, mandated by both IGRA and 25 C.F.R. Part 293 (the Part 293 Regulations), of treating amendments to the Tribes' gaming compacts with the State as deemed approved and publishing them as such in the Federal Register. *See* Complaint, Doc. 1. The Defendants moved to dismiss claims relating to the compact between the State and the Pequot Tribe, contending that the relevant provisions of IGRA and the Part 293 Regulations are inapplicable to that compact. The Defendants are incorrect.

I. Governing Legal Framework

After years of disputes between states and Indian tribes regarding gaming, the Supreme Court in 1987 held that Indian tribes possess sovereign authority to conduct and regulate gaming on their lands without state interference unless the lands in question are located within a state that prohibits such gaming as a matter of criminal law or public policy. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). In the wake of *Cabazon*, Congress enacted IGRA "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). While affirming the

Cabazon Court's holding regarding tribal sovereignty,[1] Congress also gave states a limited role in the regulation of Class III, casino-style gaming on Indian lands. Specifically, Congress required that Indian tribes enter into a tribal-state compact in order to lawfully conduct Class III gaming. *See* 25 U.S.C. § 2710(d)(1)).

To prevent this requirement from effectively granting states a veto over tribal gaming, Congress designed two methods for the adoption and approval of a compact, both of which are set forth in § 2710(d). *First*, a tribe and a state may negotiate and agree upon a compact. *See* § 2710(d)(3). *Second*, if a state fails to engage in good faith compact negotiations with a tribe, IGRA provides that the tribe may file suit in federal court to obtain an order requiring the state to negotiate a compact. *See* § 2710(d)(7)(B). If the state and the tribe then fail to negotiate a compact within 60 days, the federal court can appoint a mediator to facilitate negotiations and, if negotiations reach an impasse, select the last proposed compact of either the state or the tribe. *See* § 2710(d)(7)(B)(iv). Thereafter, if the state does not consent to the mediator-selected compact, the mediator must notify the Secretary of the Interior (the Secretary), and the Secretary must "prescribe" the compact as "procedures" under which the tribe may proceed with Class III gaming. *See* § 2710(d)(7)(B)(vii).[2]

[1] *See* 25 U.S.C. § 2710(5) ("Indian tribes have the exclusive right to regulate gaming activity on Indian lands if such gaming is … conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity ….").

[2] In 1996, the Supreme Court held that Congress lacked power under the Indian Commerce Clause to abrogate the Eleventh Amendment immunity of states to subject them to suit by tribes under 25 U.S.C. § 2710(7)(A) & (B). *See Seminole Tribe of Fla. v. Florida,* 517 U.S. 44 (1996).

A compact goes into effect only when the Secretary publishes a notice of approval of the compact in the Federal Register. *See* § 2710(d)(3)(B). The Secretary's substantive authority in this area was narrowly circumscribed by Congress, however. The Secretary may only disapprove a compact if it violates (1) any provision of IGRA; (2) any other federal law not relating to jurisdiction over gaming on Indian lands; or (3) the United States' trust obligations to Indians. *See* § 2710(d)(8). Furthermore, to prevent undue delay and ensure that compacts do not become bogged down in administrative review, Congress provided that when the Secretary neither approves nor disapproves a compact within 45 days of its submission, the compact is deemed approved by the Secretary by operation of law so long as it complies with IGRA. *Id.* Finally, Congress mandated that the Secretary publish in the Federal Register notice of any compact that is approved or deemed approved. *Id.*[3]

Although IGRA's compact review and approval provisions do not expressly refer to amendments to compacts, it would defeat congressional intent in streamlining the compact review and approval process if the Defendants failed to apply these provisions for both compacts and compact amendments. Accordingly, the Part 293 Regulations, promulgated in 2009, explicitly recognize these provisions' applicability to both compacts and compact amendments and provide additional specificity regarding the review and approval process. *See generally* 25 C.F.R. Part 293. The Part 293 Regulations essentially track IGRA's compact review and approval provisions, stating in pertinent

[3] The statutory provisions described in this paragraph are hereinafter collectively referred to as "IGRA's compact review and approval provisions."

part that: (1) the Secretary must approve or disapprove amendments within 45 days; (2) the Secretary will notify the Tribe and State in writing of his approval or disapproval of any compact or amendment; (3) if the Secretary fails to approve any compact or amendment within 45 days, that compact or amendment is deemed approved to the extent that it complies with IGRA; (4) the Secretary can disapprove a compact or amendment only for the three reasons stated in § 2710(d)(8); (5) an approved or deemed approved compact or amendment takes effect on the date that notice of its approval is published in the Federal Register; and (6) notice of approval must be published in the Federal Register within 90 days of its receipt by the Office of Indian Gaming. *See* 25 C.F.R. §§ 293.10(a), 293.12 293.14 & 293.15.

II. Factual Background

In 1989, shortly after the enactment of IGRA, the Pequot Tribe sought to negotiate a tribal-state gaming compact with the State. *See Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1026 (2d Cir. 1990), *cert. denied* 499 U.S. 975 (1991). Taking the position that state law did not allow gaming, the State failed to join negotiations with the Pequot Tribe within 180 days of the Tribe's request, as required by § 2710(d)(7)(B), and the Pequot Tribe filed suit in the United States District Court for the District of Connecticut. The district court held, and the Second Circuit affirmed, that the State had failed to meet its statutory obligation to negotiate and ordered the State and the Tribe to enter into a compact within 60 days in accordance with IGRA. *See Mashantucket Pequot Tribe*, 913 F.2d at 1032-33; *Mashantucket Pequot Tribe v. Connecticut*, 737 F. Supp. 169, 176 (D. Conn. 1990).

When the Pequot Tribe and the State failed to reach agreement on a compact during the statutorily prescribed 60-day period, their final compact proposals were submitted to a mediator as required by 25 U.S.C. § 2710(d)(7)(B)(iv). *See* 56 Fed. Reg. 15,746 (April 17, 1991). The mediator adopted the State's last compact proposal after being informed that the Pequot Tribe was willing to accept it. *Id.* The State declined to accept the compact that it had proposed and the mediator had selected.[4] *Id.* As a result, the Defendants invoked the procedures set forth in § 2710(d)(7)(B)(vii) and, in consultation with the Pequot Tribe, approved the mediator-selected compact (*i.e.*, the State's final compact proposal) to govern the Tribe's Class III gaming. *See* Doc. 1 ¶ 6. Consistent with § 2710(d)(8)(D)'s requirement that the Secretary publish in the Federal Register "notice of any Tribal-State compact that is approved," the Secretary subsequently published notice of approval of the Pequot Compact in the Federal Register. *See id.*; 56 Fed. Reg. 24,996 (May 31, 1991). The Pequot Tribe has conducted Class III gaming consistent with the Pequot Compact since it went into effect in 1991. *See* Doc. 1 ¶ 6.

After the resolution of the legal dispute between the State and the Pequot Tribe as to whether the State had an obligation to negotiate in good faith with Indian tribes with respect to Class III gaming under IGRA, the Mohegan Tribe and the State negotiated a compact and the Secretary approved and published that compact as required by IGRA.

[4] The State, at the time, was engaged in active litigation regarding its obligations under IGRA and had unsuccessfully requested a stay of compact mediation proceedings pending the outcome of that litigation. *See Mashantucket Pequot Tribe*, 913 F.2d at 1027-28. Accepting the compact would have mooted the litigation.

See Doc. 1 ¶¶ 5 & 24; 59 Fed. Reg. 65,130 (Dec. 16, 1994); *see also* 25 U.S.C. § 2710(d)(8)(D). The Mohegan Tribe has conducted Class III gaming in Connecticut consistent with the Mohegan Compact since it went into effect. *See* Doc. 1 ¶ 5.

The Pequot Compact was used as the model for the Mohegan Compact and the substantive terms of the two compacts are identical in all material respects.[5] As relevant to this dispute, both compacts provide that they shall become effective upon publication of notice of approval by the Secretary in the Federal Register "in accordance with 25 U.S.C. § 2710(d)(3)(B)" and that they can be modified only by written agreement of the parties and published notification of the Secretary's approval of the amendments, also in accordance with § 2710(d)(3)(B). *See* Mohegan Compact at 47; Pequot Compact at 49-50.

In 2015, the Tribes and the State began to discuss amendments to the compacts and related Memoranda of Understanding (hereinafter the compact amendments) to clarify that a joint venture by the Tribes to build and operate a new, off-reservation commercial gaming facility would not alter or amend the Tribes' existing agreements with the State related to the Tribes' IGRA gaming facilities. *See* Doc. 1 ¶¶ 27 & 32-33. During the course of their discussions with the State, the Tribes requested and received technical assistance from the Defendants.[6] *See id.* ¶¶ 28-30. While providing technical

[5] Both compacts are accessible with related Memoranda of Understanding at http://www.portal.ct.gov/DCP/Gaming-Division/Gaming/Tribal-State-Compacts-and-Agreements (last visited on February 8, 2018).

[6] The Office of Indian Gaming is tasked with providing "technical assistance" to Indian tribal governments on the legal requirements for gaming, including "the statutory and regulatory requirements of IGRA." See https://www.bia.gov/as-ia/oig (last visited February 8, 2018).

assistance, the Defendants repeatedly informed the Tribes that they intended to approve the compact amendments in accordance with IGRA's compact review and approval provisions and the Part 293 Regulations. *Id.* ¶ 31; *see also* Doc. 9-1 ¶¶ 4-7 (Declaration of Mohegan Chairman Kevin Brown); Docs. 9-2—9-4 (exhibits to Brown Dec.); Doc. 9-9 ¶¶ 4-7 (Declaration of Pequot Chairman Rodney Butler); Docs. 9-10—9-11 (exhibits to Butler Dec.). In response to direct inquiries from the Chairman of each Tribe, Acting Deputy Secretary of the Interior referred to the Part 293 Regulations and recognized that "the Tribes and the State have long-relied upon the Compacts that have facilitated a significant source of revenue for the Tribes and the State. The Department does not anticipate disturbing these underlying agreements." Doc. 9-13 at 3; *see also* Doc. 9-5 at 4 (identical response from Acting Deputy Secretary Cason to Mohegan Chairman Brown).

After reaching agreement with the State, both Tribes submitted compact amendments to the Department's Office of Indian Gaming for review and approval pursuant to the process outlined in 25 C.F.R. § 293.8 and referenced in Acting Deputy Secretary Cason's letters. *See* Doc. 1 ¶¶ 32-33. The Office of Indian Gaming received the compact amendments on August 2, 2017. *Id.* ¶ 34. The Defendants thereafter failed to approve or disapprove the amendments within 45 days as required by the Part 293 Regulations and IGRA. *Id.* ¶ 37. Instead, on September 15, 2017 (one day shy of the 45-day time period), Michael S. Black, the Acting Assistant Secretary—Indian Affairs, wrote nearly identical letters to each Tribe's Chairman confirming the Defendants' receipt of the proposed compact amendments and purporting to "return" them to the

Tribes without approving, publishing, or affirmatively disapproving them for any of the permissible reasons provided by § 2710(d)(8). *Id.* ¶ 37.

The letters from the Acting Assistant Secretary to Chairman Brown and Chairman Butler inexplicably copied Nevada Senator Dean Heller and Nevada Congressman Mark Amodei, but not any of the members of the Connecticut congressional delegation. *See* Doc. 9-8; Doc. 9-16 at 2. It subsequently came to light that MGM Resorts International (MGM) had lobbied the Defendants not to act on the compact amendments. *See* Doc. 11-2 ¶ 218. And it has recently been reported that Senator Heller and Congressman Amodei, whose state is a major center of employment for MGM, have each tried to impede the compact amendments. *See Zinke's Agency Held up Indians' casino after MGM Lobbying*, Politico (Feb. 1, 2018), available at https://www.politico.com/story/2018/02/01/zinkes-indian-casino-interior-312671 (last accessed Feb. 28, 2018).[7] MGM is in the process of developing a commercial casino in Springfield, Massachusetts, and perceives the Tribes' joint venture, which will be located approximately 12 miles south of Springfield, as a competitor. *See* Doc. 11-2 at 4-5.

STANDARD OF REVIEW

When considering a motion to dismiss under Rule 12(b), "the court must assume all the allegations in the complaint are true (even if doubtful in fact), and the court must give the plaintiff the benefit of all reasonable inferences derived from the facts alleged." *Webster v. U.S. Dep't of Energy*, 267 F. Supp. 3d 246, 254 (D.D.C. 2017) (citations and

[7] A copy of this news article is attached as Exhibit 6 to the Plaintiffs' Request for Judicial Notice being filed contemporaneously herewith.

quotations omitted). "Where, as here, a defendant makes a facial challenge to subject matter jurisdiction, a court must accept as true all factual allegations contained in the complaint," but "may also consider materials outside the pleadings as it deems appropriate." *Dist. No. 1, Pac. Coast Dist., Marine Eng'rs' Beneficial Ass'n, AFL-CIO v. Liberty Mar. Corp.*, 70 F. Supp. 3d 327, 340 (D.D.C. 2014), *aff'd*, 815 F.3d 834 (D.C. Cir. 2016) (citations and quotations omitted).

ARGUMENT

In their motion to dismiss, the Defendants urge a hyper-formalistic reading of IGRA and the Part 293 Regulations that renders many of their provisions inapplicable to compacts, including the Pequot Compact, entered into through mediation and adoption of secretarial procedures. Such compacts, the Defendants contend, are not compacts at all, and they therefore are exempt from the statutory and regulatory provisions governing the Defendants' review and approval of compacts and compact amendments. This argument flies in the face of explicit and implicit congressional intent, relevant canons of statutory construction, the past conduct of all parties, including the Defendants themselves, prior legal opinions from the Defendants' own Solicitor, the terms of the Pequot Compact itself, and common sense. The Pequot Tribe and the State have a compact and, based on the existence of that compact, have stated claims upon which relief can be granted and over which this Court has subject matter jurisdiction. The Defendants' motion to dismiss those claims must be denied.

The Defendants also erroneously allege that the State lacks standing to assert any claims related to the Pequot Compact because it ostensibly is not a party "to the

Secretary's procedures prescribed for Mashantucket." Doc. 18 at 12. The State is bound by the terms of the Pequot Compact under IGRA and has operated under it for more than two decades. Moreover, the State is a party to the agreement to amend the Pequot Compact, which is at issue in this case. For the Defendants to claim, in this setting, that the State lacks standing to challenge their actions with respect to the compact is patently absurd. Likewise, any assertion that the Mohegan Tribe or the Pequot Tribe lacks standing to litigate claims based on the Defendants' failure to perform mandatory, non-discretionary duties pertaining to each Tribes' respective compact amendments is plainly without merit.

I. The Defendants' Argument is Inconsistent with the Intent and Overall Statutory Scheme of IGRA.

At the heart of the Defendants' argument is the flawed notion that the alternate methods to establish tribal-state compacts set forth in § 2710(d) produce fundamentally different results with wildly disparate legal status. According to the Defendants, only compacts negotiated under § 2710(d)(3) are entitled to the benefit of the procedural requirements and safeguards set forth in IGRA and related regulations. Compacts selected by a mediator under § 2710(d)(7), the Defendants argue, are legal orphans to which these fundamental provisions of IGRA and the Part 293 Regulations can never apply. This argument is irreconcilable with both the intent and text of IGRA.

"[T]o prevent statutory interpretation from degenerating into an exercise in solipsism, 'we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law.'" *Cty. of Los Angeles v. Shalala*, 192 F.3d 1005, 1014

(D.C. Cir. 1999 (quoting *U.S. Nat'l Bank v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993)); *see also Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It 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."); *City of Roseville v. Norton*, 348 F.3d 1020, 1027 (D.C. Cir. 2003) (emphasizing that individual provisions of IGRA must be interpreted "in light of the general environment in which IGRA was enacted, its structure and general purpose"). A look at the statutory scheme of IGRA as a whole, as well as both the explicit and implicit congressional intent underlying the act, shows that Congress never intended to deprive compacts arrived at through the mediation process of the benefit of the circumscribed review and approval process under § 2710(d)(8). Indeed, the Defendants' view of mediator-selected compacts, if applied consistently throughout IGRA, would produce absurd results and render § 2710(d)'s mediation alternative meaningless.

A. *Section 2710(d)'s compacting process reflects careful congressional balancing of tribal and state interests that would be frustrated by the Defendants' unduly formalistic, narrow reading of the statute.*

Congress intended for IGRA to provide "a comprehensive approach to the controversial subject of regulating tribal gaming," and in drafting the Act it "struck a careful balance among federal, state, and tribal interests." *Florida v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1247 (11th Cir. 1999). Tribal-state compacts established pursuant to § 2710(d) are "[t]he lynchpin of IGRA's balancing of interests." *Texas v. United States*, 497 F.3d 491, 507 (5th Cir. 2007). Accordingly, Congress took care to ensure that tribes could access and enjoy the benefits of a compact with—through § 2710(d)(3)—or

without—through § 2710(d)(7)—state cooperation. In the words of the Supreme Court, "[s]ections 2710(d)(7)(B)(ii)-(vii) describe an elaborate remedial scheme designed *to ensure the formation of a Tribal-State compact*" when a state declines to negotiate a compact in good faith. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 50 (1996) (emphasis added). Given congressional recognition of the importance of tribal-state compacts and its care in providing two alternative ways for tribes and states to establish them, differentiating between compacts entered into through negotiation under § 2710(d)(3) and those selected by a mediator pursuant to § 2710(d)(7) in the manner urged by the Defendants plainly would frustrate congressional intent. *See, e.g.*, *King v. Burwell*, 135 S. Ct. 2480, 2490 & 2490 n.1 (2015) (explicitly declining to read a statutory phrase "in its most natural sense" when doing so would frustrate the apparent intent of Congress in enacting the Affordable Care Act).

The Defendants officially and dispositively recognized this fact in the course of approving the Pequot Compact in 1991. Then, the Nevada Resort Association (the Association) asserted that one of IGRA's criminal provisions, 18 U.S.C. § 1166, mandated that all of the Pequot Tribe's gaming activity comport with the entire body of Connecticut state law. *See* Memorandum from Office of Solicitor to Asst. Secretary, BIA.IA.1101 at 3-4 (April 9, 1991) (Solicitor Opinion).[8] The Association based its contention on § 1166's declaration that state law continues to apply to Class III tribal gaming unless such gaming is "conducted under a Tribal-State compact approved by the

[8] A copy of the Solicitor Opinion is attached as Exhibit 5 to the Plaintiffs' Request for Judicial Notice being filed contemporaneously herewith.

Secretary of the Interior under [§] 11(d)(8)" of IGRA. 18 U.S.C. § 1166(c). Because the Pequot Tribe conducted its Class III gaming under procedures approved by the Secretary under § 2107(d)(7)(B)(vii) rather than a compact negotiated under § 2710(d)(3), the Association argued, the Tribe's gaming fell outside the scope of § 1166's compact-based exception. *See* Solicitor Op. at 3.

While conceding that § 1166 "could be literally interpreted" in the way urged by the Association, Defendants rejected that formalistic reading because "such an interpretation renders meaningless the Subsection (vii) procedures requirement." *Id.* at 4. "Congress intended through [§] 2710(d)(7) to establish a comprehensive process," Defendants reasoned, with § 2710(d)(7)(B)(vii) "[i]ndisputably … intended as the last step in the dispute resolution process *leading to a final gaming compact*." Solicitor Opinion at 4-5 (emphasis added); *see also* 56 Fed. Reg. 15,746 (explicitly adopting the Solicitor Opinion's "legal analysis"). Stated differently, the Defendants have long recognized that "Congress intended that the entire process resulting in establishment of a gaming compact should be a single, unified and internally consistent mechanism, covering both negotiated compacts and mediator chosen compacts where negotiation fails." *Id.* at 7. So, while § 1166 made no reference to mediator-selected compacts or Secretary-approved procedures consistent with such a compact, interpreting the statute in a way that excluded those forms of compacts would be "clearly inconsistent with Congressional intent" and "absurd." *Id.* at 4. The Plaintiffs could not agree more.

This Solicitor Opinion and its legal analysis, which reflect the Defendants' longstanding and reasoned position, are entitled to *Chevron* deference. *See Chevron USA,*

Inc. v. NRDC, 467 U.S. 837 (1984). The D.C. Circuit explicitly accorded *Chevron* deference to the legal analysis of a Solicitor Opinion where, as here, that analysis provided the basis for a secretarial decision and had been incorporated into a Federal Register notice. *See Citizens Exposing the Truth About Casinos v. Kempthorne*, 492 F.3d 460, 466 (D.C. Cir. 2007). The court explained that the incorporated legal analysis was "*Chevron*-worthy" because it formed the basis of the Secretary's decision to take land into trust for a tribe and "reflect[ed] a deliberating agency's self-binding choice, as well as a declaration of policy." *Id.* at 467. Likewise here, the Defendants incorporated the Solicitor Opinion and "adopted its legal analysis" in the Federal Register notice published in connection with a formal decision-making process to approve the Pequot Compact, a decision that also has a binding legal effect. Therefore, the Solicitor Opinion and its legal analysis are entitled to *Chevron* deference.[9] *See* 56 Fed. Reg. 15,746.

[9] If this court determines that the Solicitor Opinion is not entitled to *Chevron* deference, it is at least "entitled to respect" under the *Skidmore* standard, particularly in light of its persuasive reasoning and consistency with other pronouncements of the Defendants' position prior to this litigation. *See, e.g.*, *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000); *R.J. Reynolds Tobacco Co. v. U.S.D.A.*, 130 F. Supp. 3d 356, 371 (D.D.C. 2015) (concluding that agency position was at least entitled to respect under *Skidmore* and could be adopted on that basis, so it was unnecessary to address potential *Chevron* deference). This stands in stark contradistinction with the Defendants' newly adopted position in their motion to dismiss, which is entitled to no deference whatsoever. Rather than "reflect[ing] the agency's fair and considered judgment on the matter in question," the Defendants' argument is by all appearances merely "a convenient litigating position" that conflicts with their prior positions and seems to be nothing more than a "*post-hoc* rationalization … seeking to defend past agency action against attack." *Christopher v. SmithKline Beecham, Inc.*, 567 U.S. 142, 155 (2012) (internal quotations & punctuation omitted); *see also United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988)). Deference is inappropriate under such circumstances. *See Christopher*, 567 U.S. at 155. Moreover, the Defendants' litigation position inappropriately treats similar situations—the identical proposed amendments to the substantively identical Pequot and Mohegan Compacts—differently without offering a sufficient basis for doing so, which also militates against affording it deference. *Shalala*, 192 F.3d at 1022. Finally,

B. *Disparate treatment of compacts entered into under different subsections of § 2710 would lead to absurd results and render parts of IGRA meaningless.*

In addition to upsetting IGRA's carefully crafted balancing of tribal and state interests, treating compacts entered into under different sub-sections of § 2710 differently would lead to absurd results that would render provisions of IGRA meaningless. Such an outcome would contravene well-settled principles of statutory interpretation. *See, e.g.*, *Abourzek v. Reagan*, 785 F.2d 1043, 1054 (1986) (referring to the "familiar canon of statutory construction [that] cautions the court to avoid interpreting a statute in such a way as to make part of it meaningless") (citing 2A Norman J. Singer, Sutherland Statutes and Statutory Construction § 46.06 (4th ed. 1984)); *see also Burwell,* 135 S. Ct. at 2489 (2015) ("[W]hen deciding whether the language is plain, we must read the words in their context and with a view to their place in the overall statutory scheme. Our duty, after all, is to construe statutes, not isolated provisions.") (citation and quotations omitted).

The Solicitor Opinion described above addresses and rejects one absurd result of the Defendants' new proposed statutory interpretation—that if compacts selected by a mediator and approved by the Secretary under § 2710(d)(7)(B)(vii) are not treated as compacts under IGRA, then § 1166 would require tribal gaming conducted under such compacts to be fully compliant with all state law applicable to non-Indian gaming. The

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the Indian canons of construction, which mandate that statutes and regulations be interpreted for the benefit of Indians with ambiguities resolved in their favor and are discussed in more detail *infra*, trump any deference that might otherwise be available. *See Cobell v. Norton*, 240 F.3d 1081, 1102 (D.C. Cir. 2001).

Solicitor Opinion correctly labels this outcome as absurd and contrary to congressional intent to balance state and tribal interests.

Similarly, if mediator-selected compacts approved under subsection (vii) were legally distinct from and lesser than negotiated compacts entered into under § 2710(d)(3), then Indian gaming conducted pursuant to the former would be unlawful under the Johnson Act, 15 U.S.C. § 1175, which forbids, *inter alia*, the possession or use of "any gambling device" in Indian Country. *Id.* IGRA excludes from the purview of the Johnson Act any gaming conducted under "a Tribal-State compact that — (A) is entered into under [§ 2710(d)(3)] by a State in which gambling devices are legal and (B) is in effect," § 2710(d)(6). Accordingly, if the Defendants were correct that the Pequot Compact is not a "tribal-state compact" within the meaning of § 2710(d)(3), this exception would not apply. As with § 1166, however, the Defendants have at all times prior to their current motion to dismiss sensibly rejected the crimped reading that they now advocate. In 1998, they admonished that IGRA's exception to the Johnson Act should not be read "woodenly," because a reading that would exclude subsection (vii) compacts "would negate the entire part of IGRA that calls for mediation and Secretarial procedures." 63 Fed. Reg. 3289, 3292 (Jan. 22, 1998). "To avoid such an absurd result, the statute must be read to mean that all Secretarial-sanctioned gaming is exempt from the provisions of the Johnson Act …. The 'procedures' adopted by the Secretary … are *properly viewed as a full substitute for the compact* …." *Id.* (emphasis added). Once again, the Department's prior analysis is correct—in order to avoid absurd results, mediator-selected compacts

like the Pequot Compact are generally afforded the same status under IGRA as negotiated compacts like the Mohegan Compact.

The Defendants' restrictive, technical definition of what constitutes a compact cannot even be reconciled with other subsections of § 2710. Much like the Johnson Act, § 2710(d)(1) provides that Class III gaming on Indian lands is lawful only if "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect." *See id.* So if, as the Defendants argue, a mediator-selected compact approved by the Secretary pursuant to § 2710(d)(7)(B)(vii) did not have the same legal status as a § 2710(d)(3) negotiated compact, then the same section of IGRA that provides for Secretarial approval of mediator-selected compacts would render Class III gaming pursuant to such compacts unlawful. The Defendants' interpretation renders subsection (vii) entirely meaningless and is patently irrational, particularly given that they approved the compact pursuant to which Class III gaming has taken place at Mashantucket for more than 25 years.

Congress explicitly provided that Secretary-approved compacts through procedures under § 2710(d)(7)(B)(vii) would serve as the basis "under which class III gaming *may be conducted* on Indian lands over which the Indian tribe has jurisdiction." *Id.* Plainly then, it did not intend the absurd results that would flow from adoption of the Defendants' argument that only compacts entered into pursuant to negotiations under § 2710(d)(3) are "tribal-state compacts" under IGRA. Perfectly consistent with this understanding, the National Indian Gaming Commission's (NIGC) regulations defining terminology used in IGRA provide that "Tribal-State compact means an agreement

between a tribe and a state about Class III gaming under 25 U.S.C § 2710(d)" without distinguishing between agreements entered into under various subsections of that statute. 25 C.F.R. § 502.21. It would be absurd to suggest that the NIGC's regulations do not apply to both mediator-selected and negotiated compacts. And the Defendants have recognized as much on several prior occasions before arguing a new interpretation of the law in their motion to dismiss. *See supra*. This Court should adopt the Defendants' longstanding interpretation that compacts reached through § 2710(d)(3) and those reached through § 2710(d)(7)(B)(vii) are both tribal-state compacts, and it should reject their current, litigation-driven effort to upset a balance carefully struck by Congress, render meaningless the congressionally established mediation process, and produce an utterly unworkable and absurd outcome.

C. *The Defendants' interpretation of the law would give the Secretary powers far beyond those prescribed by Congress.*

The Defendants' reading would further frustrate congressional intent and the overall framework of IGRA by giving the Defendants unchecked power over amendments to compacts entered into under § 2710(d)(7)(B)(vii). Section 2710(d)(8) of IGRA and 25 C.F.R. §§ 293.10-.12 spell out exactly how the Secretary should proceed when presented with proposed compact amendments. Their plain language reflects an intent to narrowly circumscribe the Defendants' review and approval process to prevent them from stalling the implementation of tribal-state agreements as to the terms under which Class III gaming will proceed. Those provisions require, *inter alia*, that the Defendants (1) may only disapprove a compact for 3 enumerated reasons; (2) must

approve or disapprove a compact or amendments thereto within 45 days of receipt or treat it as deemed approved; and (3) publish notice of the approval or deemed approval of a compact or amendments thereto, rendering it effective, within 90 days of receipt. *See id.*

Given the strict statutory and regulatory limitations on the Defendants' discretion with respect to the review and approval of compacts and amendments, there is no reason to assume that Congress wanted to vest them with unfettered discretion to delay, reject, or simply ignore tribal-state agreements to amend § 2710(d)(7)(B)(vii) compacts. Yet the Defendants argue just that. They ask this Court to adopt a reading of the law that grants them the authority to reject tribal-state agreements to amend subsection (vii) compacts for any or no reason, to extend their review for an indeterminate amount of time, and to refrain completely from publishing any amendment in the Federal Register to make it effective.

It would make no sense whatsoever to deprive the Pequot Tribe and the State of the safeguards that Congress set to ensure that compacts and compact amendments timely proceed to approval or "deemed approval" status by the Secretary. These safeguards ensure that tribes and states are not stymied by bureaucratic delays that would prevent them from realizing the fruits of their labors after long and arduous compact negotiations. They further ensure that an agreement mutually acceptable to a tribe and state is not overridden by the Secretary except in limited, justifiable circumstances. The Pequot Tribe and the State are no less entitled to the benefits of these safeguards than any other tribe and state that go through that process. The Defendants' position should be rejected.

D. *The Defendants' position would deprive the Pequot Tribe and State of benefits and safeguards incorporated into the Pequot Compact.*

In addition to being unworkable and contrary to prior understanding and congressional intent, the Defendants' argument that the review and approval requirements of § 2710(d)(8) and the Part 293 Regulations are inapplicable to amendments to the Pequot Compact nullifies the terms of that secretarially-approved Compact. The Pequot Compact explicitly can be amended only pursuant to its own § 17, which provides that amendments must be agreed to in writing, then submitted to the Defendants for approval and publication in accordance with § 2710(d)(3)(B). *See* Pequot Compact § 17. Section 2710(d)(3)(B), however, cannot be read wholly apart from § 2710(d)(8) and the Part 293 Regulations that precisely dictate and constrain the Secretary's review and approval authority under the former provision. *See, e.g.*, *Shalala*, 192 F.3d at 1014 ("We must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law." (internal quotation omitted)).

When the Defendants approved the Pequot Compact and, pursuant to its express terms, made § 2710(d)(3)(B) applicable to any amendments thereto, they necessarily accepted that IGRA's other, inextricably related compact review and approval provisions would likewise apply. Together, these provisions reflect and implement an intent to allow compacts and compact amendments to take effect with minimal bureaucratic interference and delay. Now, by arguing that § 2701(d)(8) and the Part 293 Regulations are inapplicable to the Pequot Compact, the Defendants attempt to undermine and frustrate

the spirit and intent of the Pequot Compact's amendment provisions—*which the Defendants expressly approved*. They should not be allowed to do so.

II. The Pequot Tribe and the State Have a Compact Within the Meaning of IGRA and the Part 293 Regulations.

Under the plain language of IGRA and the Part 293 Regulations, the Pequot Tribe and the States have a valid compact to which the 45-day secretarial review period for compact amendments applies. Because this deadline applies and the Secretary failed to affirmatively approve or deny the amendments submitted by the Pequot Tribe within that period, the Tribe has stated a claim upon which relief can be granted, this Court has subject matter jurisdiction, and the Defendants' motion should be denied.

While "compact" is not a defined term in IGRA, the Part 293 Regulations define a "Compact" or "Tribal-State Gaming Compact" as "an intergovernmental agreement executed between Tribal and State governments under [IGRA] that establishes between the parties the terms and conditions for the operation and regulation of the tribe's Class III gaming activities." § 293.2. The Pequot Compact meets this definition.

The Pequot Compact unquestionably sets out terms and conditions for the operation of Class III gaming by the Pequot Tribe. *See, e.g.*, 56 Fed. Reg. 15,746 (describing the Pequot Compact as a "comprehensive document which establishes the regulatory framework for a broad spectrum of activities" including and related to Class III gaming); *see generally* Pequot Compact. The Pequot Tribe has conducted and regulated Class III gaming in accordance with the Pequot Compact for more than 25 years. *See* Doc. 1 ¶¶ 6 & 25. During that time, the State has fulfilled the regulatory role

set out for it in the Pequot Compact. *See, e.g.*, Pequot Compact §§ 7, 11, 14. In this way, the parties have executed the Pequot Compact for an extended period of time. *See* Black's Law Dictionary (10th ed. 2014) (providing that the primary definition of the verb "execute" is "[t]o perform or complete a contract or duty" (internal punctuation omitted); *see also, e.g.*, *Mid-Continent Cas. Co. v. Global Enercom Mgmt., Inc.*, 323 S.W.3d 151, 157 (Tex. 2010) (holding that a contract may be "executed" by performance); *Frank Gari Productions, Inc. v. Smith*, 2012 WL 12895672 at *3 (C.D. Cal. June 15, 2012) (holding that parties "executed" an agreement where they "acknowledged it as a binding agreement for more than a decade and met obligations and accepted benefits thereunder").[10] Neither the State nor the Tribe would contend that they have not performed pursuant to the Pequot Compact or that they are not bound by it. Indeed, their mutual agreement to enter into the compact amendments that are at issue in this litigation reflects their understanding that they have a binding, intergovernmental agreement for the operation of Class III gaming by the Pequot Tribe.

The Defendants' own conduct further shows that the State and the Pequot Tribe have a compact within the meaning of IGRA and the Part 293 Regulations. For example, IGRA requires the Secretary to publish in the Federal Register "notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph." § 2710(d)(8)(D). The Defendants' publication of notice of the Pequot Compact, *see* Doc. 1 ¶ 25, thus evinces their recognition and understanding of its status. Of specific relevance

[10] To the extent that there is any ambiguity as to whether a tribal-state compact can be "executed" via performance, the Indian canons of construction require that such ambiguity be resolved in favor of the Pequot Tribe. *See discussion*, Part II, *infra*.

to this case, the Defendants' approval and publication of the Pequot Compact included approval of its § 17, which explicitly adopts the IGRA approval and publication process for amendments. *See* discussion, *supra*. More recently, the Defendants cited the Part 293 Amendments and IGRA's compact review and amendment procedures in the course of providing technical assistance to the Tribes as they negotiated the subject amendments with the State. *See, e.g.*, Docs. 9-5 & 9-13 (both stating that (1) the Secretary has the authority under IGRA "to review compacts and compact amendments similar to what is being proposed by the Tribes," (2) the Part 293 Regulations applied to such amendments, and (3) the Defendants recognized that "the Tribes and State have long-relied upon the Compacts"). Once again, this shows that the Defendants, contrary to the position asserted in their motion, have long viewed and treated the nearly identical Mohegan and Pequot Compacts as legal equivalents.

Relevant canons of statutory construction reinforce this conclusion and undermine the Defendants' argument. The Indian canons of construction require, *inter alia*, that statutes must be "construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1444-45 (D.C. Cir. 1988); *see also Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *Roseville*, 348 F.3d at 1032; 63 Fed. Reg. at 3291 (stating, in the context of concluding that IGRA's Johnson Act exception applies to compacts under all subsections of § 2710, that "it is a well-settled principle of Indian law that Indian affairs statutes be construed where possible to benefit Tribes, not in a way that results in the backhanded deprivation of tribal rights."). Pursuant to these canons, both IGRA and the Part 293

Regulations[11] must be interpreted to the benefit of the Pequot Tribe, with any ambiguities resolved in its favor. Liberally construed in favor of the Pequot Tribe, § 292.2's definition of "compact" easily encompasses the Pequot Compact. Meanwhile, the Defendants' interpretation takes the exact opposite of the approach required by the Indian canons of construction, narrowly construing IGRA and the Part 293 Regulations in a way that is harmful to the Pequot Tribe. Their reading of the law would produce exactly the sort of "backhanded deprivation of tribal rights"—*i.e.*, the right to prompt review, approval or disapproval, and publication of a compact or amendments thereto—that the Indian canons are meant to prevent. 63 Fed. Reg. at 3291.

Because the Pequot Compact meets the definition of "Tribal-State compact" set forth in the Part 293 Regulations, those regulations apply to any amendments to it. *See* 25 C.F.R. § 293.1 (stating that the Secretary "will use" the procedures set forth in the Part 293 Regulations when reviewing compact amendments). And it is indisputable that the compact amendments were appropriately entered into by the State and the Pequot Tribe "as evidenced by the appropriate signature of both parties." § 293.3; *see* Doc. 1 ¶ 33. Defendants thus were obligated to comply with the Part 293 Regulations when addressing the compact amendments. Because they failed to do so, and concomitantly failed to carry out the mandatory, non-discretionary duties imposed by those regulations, the Pequot Tribe and the State have stated claims on which relief can be granted, this Court has subject matter jurisdiction, and the Defendants' motion to dismiss fails.

[11] It is well-settled that "the rules of statutory interpretation apply when interpreting an agency regulation." *Williams v. Chu*, 641 F. Supp. 2d 31, 38 (D.D.C. 2009).

III. The Defendants' Standing Arguments Should be Rejected.

The Defendants assert that the State lacks standing to litigate claims pertaining to the Pequot Compact amendments because the State is not a party to the Pequot Compact. *See* Doc. 18 at 10. This argument fails for at least two reasons. First, as discussed *supra*, the Pequot Compact sets out terms and conditions that are binding and enforceable on the State and the Pequot Tribe, and both the State and Tribe have jointly performed their obligations under the Pequot Compact for more than 25 years. To argue, in light of this history, that the State is a stranger to the Pequot Compact and has no interest in it is incredible. Second, even if the Defendants were correct vis-à-vis the Pequot Compact, their argument plainly fails with respect to the amendments. The amendments to the Pequot Compact, were negotiated between the Pequot Tribe and the State, signed and approved by both sovereigns, and affect both sovereigns' rights and responsibilities. *See, e.g.*, Butler Dec., Doc. 9-9 ¶ 9; Doc. 9-15; Conn. Pub. Act No. 17-89 § 14(c)(1)(A); House Joint Res. 301, 2017 Gen. Assemb., Spec. Sess. (Conn. 2017) (HJR 301).[12] Because the Complaint alleges the Defendants' failure to carry out mandatory, non-discretionary duties with respect to compact amendments to which the State and the Pequot Tribe agreed, both entities necessarily have standing.

Identically, the amendments to the Mohegan Compact were negotiated between the Mohegan Tribe and the State, signed and approved by both sovereigns, and affect both sovereigns' rights and responsibilities. *See* Brown Dec., Doc. 9-1 ¶ 9; Doc. 9-7;

[12] A copy of HJR 301 is attached as Exhibit 7 to the Plaintiffs' Request for Judicial Notice being filed contemporaneously herewith.

Conn. Pub. Act No. 17-89 §14(c)(1)(A); HJR 301. Because the Complaint alleges the Defendants' failure to carry out mandatory, non-discretionary duties with respect to compact amendments to which the State and the Mohegan Tribe agreed, both entities necessarily have standing.

Standing is determined by considering the facts at the time of filing of the complaint. *Wheaton Coll. v. Sebelius*, 703 F.3d 551, 552 (D.C. Cir. 2012); *Delta Air Lines, Inc. v. Export-Import Bank of United States*, 85 F. Supp. 3d 250, 260 (D.D.C. 2015). The Defendants' argument on standing assumes both the accuracy of all of the arguments in their motion for partial dismissal and an action by the Court that has not yet occurred and may not occur. Accordingly, the Defendants' challenges to standing should be rejected.

CONCLUSION

The Defendants' motion urges this Court to adopt a hyper-formalistic interpretation of IGRA that the Defendants themselves have repeatedly rejected in the past due to the fact that it would undermine congressional intent and lead to absurd results. The Court should not do so.

In order for all of IGRA to work as the cohesive, comprehensive framework that Congress intended, it generally must treat compacts equally regardless of whether they were reached through negotiation between a state and a tribe and approved by the Secretary or selected by a mediator and approved by the Secretary. Here, in particular, where the express terms of the secretarially-approved Pequot Compact require adherence to the IGRA review and approval provisions, the Defendants' argument—baldly

conducted for litigation purposes—must fail. Their newly adopted position would leave the State and the Pequot Tribe in a state of paralysis, with any efforts to amend their compact—even when negotiated and agreed to by both the Tribe and the State—subject to unchecked, indefinite delay at the Defendants' whim. IGRA, the Part 293 Regulations, and the express provisions of the Pequot Compact clearly demonstrate the error of the Defendants' newfound position. The Defendants' motion should be denied.

Dated: March 5, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of March, 2018, I electronically filed the forgoing PLAINTIFFS' OPPOSITION TO DEFENDANTS' PARTIAL MOTION TO DISMISS with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all registered CM/ECF users.

/s/ Catherine F. Munson
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