IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF CONNECTICUT, ET AL.

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,

Defendants.

No. 1:17-cv-02564-RC

PLAINTIFFS' REPLY IN SUPPORT OF SUPPLEMENTAL BRIEF ON JUDICIAL ESTOPPEL

As set forth in detail in Plaintiffs' Supplemental Brief (Doc. 51-1), the Federal Defendants should be judicially estopped from arguing that provisions of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701, *et seq.*, and supporting regulations referring to "compacts," should be interpreted in a way that treats mediator-selected compacts promulgated as Secretarial procedures pursuant to 25 U.S.C. § 2710(d)(7)(B) differently than—and inherently inferior to—negotiated compacts established under other provisions of IGRA. Nothing in the Federal Defendants' response undercuts Plaintiffs' argument. Despite their attempted hair-splitting, their position here is, simply put, irreconcilable with the position that the Federal Defendants successfully advocated in *Stand Up for California! v. United States Department of the Interior*, No. 2:16-cv-02681-AWI-EPG, 2018 WL 3473975 (E.D. Cal. July 18, 2018). Accordingly, here is no sound reason why this Court should not apply judicial estoppel.

I. The Federal Defendants have taken inconsistent positions.

The Federal Defendants spend the bulk of their brief on a futile effort to explain away their inconsistent positions here and in the *Stand Up* case. They do so by contending that (1) the

two cases present different issues and (2) the Federal Defendants' positions in the two cases are actually consistent. Both arguments are unavailing.

According to the Federal Defendants, the issues presented in this case and *Stand Up* are completely different because *Stand Up* dealt with IGRA's Johnson Act exception, whereas this case involves statutory and regulatory provisions for approving compacts and compact amendments. *See* Doc. 55 at 6-7. This is a facile argument. While *Stand Up* and the instant case do involve different sub-sections of IGRA, the lynchpin of the analysis in both cases is the same: Are provisions of IGRA that refer only to "compacts" inapplicable to mediator-selected compacts approved as Secretarial procedures? And the practical consideration that informs the answer to that question is the same in both cases: Did Congress intend to create two classes of compacts with different legal statuses? Although *Stand Up* and the instant case present these issues in slightly different packaging, both cases ask identical questions.[1]

While the issues in this case and *Stand Up* are the same, the Federal Defendants' positions are plainly diametrically opposite. In *Stand Up*, the Federal Defendants argued that (1) while the provision of IGRA in question referred only to "compacts" and not to Secretarial procedures, Congress did <u>not</u> intend to create two classes of compacts and (2) a reading of IGRA leading to such a result would be absurd, as "Secretarial Procedures are designed to operate as a complete substitute to the existence of an effective Tribal-State compact."[2] *Stand Up*, 2018 WL

[1] We note that both the section specifically at issue in *Stand Up* (25 U.S.C. § 2710(d)(6)) and the section specifically at issue in the present case (25 U.S.C. § 2710(d)(8)(C)) use the term "compacts."

[2] It is important to note that in *Stand Up*, the Federal Defendants explicitly urged the court to reject a hyper-technical reading of IGRA, *i.e.,* that when IGRA says "compact" it excludes mediator-selected compacts:

> Stand Up's argument is essentially that because the text of IGRA does not say "Compact and Secretarial procedures" in 25 U.S.C. § 2710(d)(6), Secretarial Procedures are a "second best." . . . If Stand Up's argument were applied to the rest

3473975, at *6. Here, they argue the opposite: that because 25 U.S.C. § 2710(d)(8) and related federal regulations governing the review and approval of compacts and amendments refer only to "Tribal-State compact[s]," Congress must have intended to strictly limit the Secretary's ability to deny or delay approval of agreed-upon amendments[3] to negotiated compacts while granting the Secretary unfettered discretion to deny or ignore identical agreed-upon amendments to compacts promulgated as Secretarial procedures for any or no reason. In short, the Federal Defendants here claim that there are two classes of compacts, one of which is entitled to post-adoption protection from and safeguards against political manipulation, and one of which is not. This is flatly inconsistent with their argument in *Stand Up*.

Even when confronted with the inconsistency of their arguments here and in the *Stand Up* litigation, the Federal Defendants continue their doublespeak. They repeatedly concede in their brief that compacts issued as Secretarial procedures and negotiated compacts "have the same legal effect" once they are in place. Doc. 55 at 6; *see also id.* at 2. But at the same time, they

> of IGRA, Secretarial Procedures would accomplish nothing …. For example, IGRA authorizes class III gaming "only if such activities are … conducted in conformance with a Tribal-State compact." 25 U.S.C. § 2710(d)(1)(c). That provision doesn't mention Secretarial Procedures either. Stand Up does not argue that provision should be interpreted the same way it thinks 25 U.S.C. § 2710(d)(6) should be interpreted.

See Defs.' Mem. in Supp. of Federal Defs.' Cross-Mot. for Summ. J. at 15. The *Stand Up* court accepted this argument, finding plaintiff's proposed reading would be "absurd" and "result in internal inconsistencies within IGRA." *Stand Up*, 2018 WL 3473975, at *6. Nevertheless, the Federal Defendants now urge the Court to adopt the same hyper-technical reading of IGRA which they urged the *Stand Up* court to reject. *See* Doc. 32 at 2 ("The plain language of IGRA thus shows that tribal-state compacts are treated differently than procedures.").

[3] It is not disputed here that the State of Connecticut and the Pequot Tribe agreed to the amendment at issue and that the amendment is substantively identical to the amendment agreed to by the State and the Mohegan Tribe. After this litigation was filed, the Federal Defendants conceded that the State-Mohegan amendment was "deemed approved" and it has been published in the Federal Register. And they provide no rational basis as to why the State-Pequot amendment has not been "deemed approved" and published in the Federal Register, notwithstanding that the State-Mohegan and State-Pequot Compacts have identical provisions addressing amendments to the Compacts.

insist that the Secretary is free to selectively ignore IGRA's legal requirements for approving or denying compact amendments when the compact in question was issued as Secretarial procedures. *See id.* This argument is not even internally cohesive; it certainly is not consistent with the notion that compacts issued as Secretarial procedures, once adopted,[4] operate as a complete substitute for and on an equal legal footing with negotiated tribal-state compacts.

The question presented here, as in *Stand Up*, is whether procedures, once in place, are entitled to the same treatment and effect as negotiated compacts. In *Stand Up*, the Federal Defendants said "yes." Here, they say "no." No amount of obfuscation can make these positions consistent for purposes of the judicial estoppel analysis.[5]

And obfuscate is what the Federal Defendants attempt. Their central contention is that the approval process for tribal state compacts do not apply to the approval of procedures. *See, e.g.*, Doc. 55 at 6 ("the specific provisions of IGRA that address Secretarial approval,

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[4] Whatever the merits of the Federal Defendants' argument that IGRA's 45-day deadline for the initial approval of negotiated tribal-state compacts is inapplicable to compacts issued as Secretarial procedures, *see* Doc. 55 at 7, that argument is irrelevant to the case at bar. Once a mediator selected compact is adopted as Secretarial procedures, it is a full substitute for a negotiated compact, and the Federal Defendants offer no reason why amendments to a negotiated compact must be timely approved while an identical amendment to a materially identical compact (including an identical provision for how to amend such a compact) issued as Secretarial procedures is allowed to languish indefinitely.

[5] The Federal Defendants' actions are particularly troubling in this case since they owe a trust responsibility to the Pequot Tribes (and all tribes) to execute the law in a manner that will advance the tribe's interests. *See, e.g., Morton v. Ruiz*, 415 U.S. 199, 236 (1974) ("The overriding duty of our Federal Government to deal fairly with Indians"); *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (The United States "has charged itself with moral obligations of the highest responsibility and trust."); *Cobell v. Norton,* 240 F.3d 1081, 1099 (D.C. Cir. 2001) ("The Secretary has an overriding duty . . . to deal fairly with Indians. This duty necessarily constrains the Secretary's discretion." (Internal quotations and citations omitted)). *Nance v. E.P.A.*, 645 F.2d 701, 711 (9th Cir.) ("It is fairly clear that any Federal government action is subject to the United States' fiduciary responsibilities toward the Indian tribes"), *cert. denied*, 454 U.S. 1081 (1981). Yet here, in stark contradistinction to their pro-tribal interpretation of IGRA and related regulations in *Stand Up,* the Federal Defendants provide a hostile construction of IGRA and related regulations to deny the Pequot Tribe critical procedural protections.

disapproval, or deemed approval of tribal-state compacts do not apply to Secretarial procedures."). Whether that proposition is correct or incorrect is not before the Court. What is before this Court is whether, once a compact is adopted (whether by negotiating to signature or through mediation and adoption by the Secretary), is there somehow a difference in the process for amendments that are agreed to by both the state and tribe and presented to the Secretary as an agreement (fulfilling the very purpose of IGRA as to Class III gaming). To say materially identical amendments to materially identical compacts can be treated differently is irreconcilable with the Federal Defendants' concession that "the legal impact of either authorization — a tribal-state compact or Secretarial procedures — is the same." *Id.* at 2. Since the Federal Defendants' position directly contravenes their position in *Stand Up*, they are estopped from taking that position here.

II. The *Stand Up* court did accept the Federal Defendants' inconsistent argument.

The Federal Defendants concede that their argument on the question of whether the *Stand Up* court accepted an inconsistent argument hinges on their claims that the issues in the two cases are in fact different. *See* Doc. 55 at 8. The Plaintiffs agree. And because, for reasons explained above, the Federal Defendants' arguments on these points are unavailing, so too is their argument that the *Stand Up* court did not accept and rely upon an inconsistent argument from the Federal Defendants in its disposition of that case.

The Federal Defendants also briefly argue that judicial estoppel is inappropriate here because Plaintiffs allegedly have not shown a connection between this case and the *Stand Up* litigation. *See id.* at 9. To the extent that such a connection is even required – a doubtful proposition – such connection plainly exists here.[6] *See, e.g.,* *Konstantinidis v. Chen*, 626 F.2d

[6] The alleged connection requirement urged by the Federal Defendants is drawn from *dicta* in a D.C. Circuit decision. *See* Doc. 55 at 9 (citing *Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 799

933, 937 (D.C. Cir. 1980) ("Judicial estoppel . . . does not require proof of privity, reliance, or prejudice.") (internal quotations and citations omitted); *Edwards v. Aetna Life Ins. Co*., 690 F.2d 595, 598 (6th Cir. 1982) ("Unlike equitable estoppel, judicial estoppel may be applied even if detrimental reliance or privity does not exist."). The Federal Defendants in both cases are the same, and they stand in the same position—that of trustee—with respect to Plaintiff Pequot Tribe, the North Fork Rancheria of Mono Indians, and all other federally recognized Indian tribes that seek to conduct gaming under IGRA. Allowing them to apply IGRA differently to identically situated parties—and to obtain the imprimatur of the courts in so doing—based on whim, back room political dealings, or any other reason, is exactly the sort of "playing fast and loose with the courts" that the doctrine of judicial estoppel is intended to prevent. *See, e.g., State of Ariz. v. Shamrock Foods Co.*, 729 F.2d 1208, 1215 (9th Cir. 1984), *cert. denied*, 469 U.S. 1197 (1985). Any "connection" requirement that is intended to ensure that the purposes of judicial estoppel are served in its application is thus easily met in this case.

(D.C. Cir. 2010)). In *Moses*, the D.C. Circuit surmised that there must be a "discernable connection" between the two proceedings in which a party has taken inconsistent positions in order for judicial estoppel to apply. That statement was not operative in the Court's holding, however. Moreover, the Supreme Court has set forth the rules for judicial estoppel and applied the doctrine without any discussion of a requisite connection between the cases. *See New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001). The Third Circuit has noted that the majority view does not require a relationship between the cases where the inconsistent positions were taken and succinctly explains the rationale for that rule: "Where the contentions are mutually exclusive, it is irrelevant that they are asserted against diverse parties for the purposes of determining judicial estoppel. The integrity of the court is affronted by the inconsistency notwithstanding the lack of identity of those against whom it is asserted." *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 361 (3d Cir. 1996); *see also Allen v. Zurich,* 667 F.2d 1162, 1167 (4th Cir. 1982) (Applying judicial estoppel even though parties were different); *Yanez v. United States,* 753 F. Supp. 309, 313 (N.D. Cal. 1990) ("As a general policy matter, privity of parties should not be a prerequisite to the application of judicial estoppel because the main policy of judicial estoppel is to prevent dishonesty in the judicial process. If preventing dishonesty is a main goal, it should not matter against which party the dishonesty occurred."), *rev'd on other grounds,* 989 F.2d 323 (9th Cir. 1993).

Likely aware that they cannot credibly reconcile their inconsistent positions here and in the *Stand Up* case, the Federal Defendants also assert that an allegedly inconsistent position taken in a prior case by Plaintiff Pequot Tribe bars the application of judicial estoppel here. *See* Doc. 55 at 9. This argument suffers numerous flaws. First and foremost, unlike the Federal Defendants, the Pequot Tribe has not taken and persuaded a court to rely upon an irreconcilable position. In the *Tassone* briefing cited by the Federal Defendants, the Pequot Tribe did note that its gaming was conducted pursuant to Secretarial procedures rather than a compact, but its legal argument—adopted by the trial court and the Second Circuit—was that the Tribe had not waived its sovereign immunity from tort and RICO claims brought against it by a self-identified pathological gambler. *See id.* (citing two Pequot Tribe briefs in the *Tassone* litigation); *Tassone v. Foxwoods Resort Casino*, No. 3:11CV1718 WWE, 2012 WL 1885586 (D. Conn. May 23, 2012) (holding that the Tribe had not waived its sovereign immunity), *aff'd*, 519 Fed. App'x 27 (2d Cir. 2013) (holding that Tassone failed to identify "any express abrogation nor waiver of Defendants' sovereign immunity"). The critical issue for the parties and the court was that there was no waiver of immunity as to Tassone whether it is called a compact or procedures. Even a cursory skimming of the briefs and opinions in *Tassone* shows that the Pequot Tribe never argued that its Secretarial procedures had a different legal status than negotiated compacts under IGRA, nor did any court so hold.

In short, the Federal Defendants' argument that somehow Plaintiffs have been inconsistent is erroneous and merely an effort to distract from their own inconsistent conduct. It is nothing more than a red herring.

III. The government is not entitled to a free pass on judicial estoppel.

Finally, the Federal Defendants contend that judicial estoppel does not apply with equal vigor to the federal government as to private parties. Doc. 55 at 10-11. Notably, the cases they largely rely upon for this proposition are not judicial estoppel cases but ones dealing with equitable estoppel or other equitable defenses. *See id.* at 10 (citing, *e.g.*, *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.,* 467 U.S. 51, 60 (1984) (addressing application of equitable estoppel on federal government) and *Bartko v. Sec. & Exch. Comm'n*, 845 F.3d 1217, 1227 (D.C. Cir. 2017) (addressing the application of equitable defense of unclean hands on the federal government)). These cases are accordingly inapposite. It is well established that because equitable estoppel and judicial estoppel play different functions, they are applied in distinct ways. As the D.C. Circuit explained in *Konstantinidis*, equitable estoppel and judicial estoppel have different "policy objectives: in contrast to equitable estoppel's concentration on the integrity of the parties' relationship to each other, judicial estoppel focuses on the integrity of the judicial process." 626 F.2d at 937. *See also Edwards,* 690 F.2d at 598 ("Equitable estoppel protects litigants from less than scrupulous opponents. Judicial estoppel, however, is intended to protect the integrity of the judicial process."); *Jones v. United States,* No. 1:11-cv-00771-JOF, 2011 WL 13185776, at *2 (N.D. Ga. July 8, 2011) ("The doctrine of unclean hands does not affect the court's consideration of judicial estoppel."). That is precisely why judicial estoppel "does not require proof of privity, reliance, or prejudice," which are strict requirements of equitable estoppel. *Konstantinidis,* 626 F.2d at 937. Thus, the Federal Defendants' attempt to slyly use equitable estoppel cases to restrict use of judicial estoppel here should be rejected.

To be sure, there are certain narrow limitations when seeking to invoke judicial estoppel against the United States relative to private parties. As the court explained in *County of San*

Miguel v. Kempthorne, 587 F. Supp. 2d 64, 73 (D.D.C. 2008), the "doctrine applies equally against the government as a litigant unless the government can show that 'estoppel would compromise a governmental interest in enforcing the law,' 'the shift in the government's position is the result of a change in public policy,' or 'the result of a change in facts essential to the prior judgment.'" *Id.* (emphasis added) (citation omitted). The government has not and cannot show that estoppel here would compromise its ability to enforce the law. To the contrary, judicial estoppel applied in this case would prevent an arbitrary and capricious application of the law. Similarly, the shift of positions between the *Stand Up* case and this one is obviously not a result of changed policy because they occurred essentially simultaneously. And finally, there has been no material change in facts between the two cases. The Federal Defendants merely decided that it would – for rank political purposes – simply take the position in this case that compacts adopted as procedures would be treated as less than tribal-state compacts, a position the Federal Defendants vigorously asserted was wrongheaded in *Stand Up*.

In short, there is no escape hatch simply because we seek to enforce judicial estoppel in a proceeding against the United States.

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Respectfully submitted,

/s/ *Keith M. Harper*
Keith M. Harper, Bar No. 451956
KHarper@kilpatricktownsend.com
Catherine F. Munson, Bar No. 985717
cmunson@kilpatricktownsend.com
KILPATRICK TOWNSEND & STOCKTON LLP
607 14th Street, N.W., Suite 900
Washington, D.C. 20005
Telephone: 202-508-5800
Facsimile: 202-508-5858

Counsel for the Mashantucket Pequot Tribe

/s/ *Mark Francis Kohler*
Mark Francis Kohler (admitted pro hac vice)
Mark.kohler@ct.gov
STATE OF CONNECTICUT, OFFICE OF THE
ATTORNEY GENERAL
55 Elm Street
Hartford, CT 06141-0120
Telephone: (860) 808-5020

Counsel for the State of Connecticut

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2018, I electronically filed the foregoing Plaintiff's Reply In Support of Supplemental Brief on Judicial Estoppel with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ *Keith M. Harper*
Keith M. Harper, Bar No. 451956
KHarper@kilpatricktownsend.com
KILPATRICK TOWNSEND & STOCKTON LLP
607 14th Street, N.W., Suite 900
Washington, D.C. 20005
Telephone: 202-508-5800