In The
Supreme Court of the United States

ARNOLD SCHWARZENEGGER,
Governor of California; State of California,

Petitioners,

v.

RINCON BAND OF LUISENO MISSION INDIANS of the Rincon Reservation, aka RINCON SAN LUISENO BAND OF MISSION INDIANS, aka RINCON BAND OF LUISENO INDIANS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

EDMUND G. BROWN JR.
Attorney General of California
MANUEL MEDEIROS
Solicitor General of California
SARA J. DRAKE
Senior Assistant Attorney General
MARC A. LEFORESTIER*
Supervising Attorney General
1300 I St., Suite 125
Sacramento, CA 95818
(916) 322-5452
mleforestier@doj.ca.gov

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Blank Page

QUESTIONS PRESENTED

The Indian Gaming Regulatory Act of 1988 ("IGRA") compels federally recognized Indian tribes to enter into compacts with states to set the terms by which tribes may conduct casino-style gaming on their Indian lands. IGRA's compact requirement did not abrogate Indian tribes' immunity to state taxation, and provides that a state's demand for direct taxation in compact negotiations is evidence of bad faith. This petition for a writ of certiorari presents the following questions:

1. Whether a state demands direct taxation of an Indian tribe in compact negotiations under Section 11 of the Indian Gaming Regulatory Act, when it bargains for a share of tribal gaming revenue for the State's general fund.

2. Whether the court below exceeded its jurisdiction to determine the State's good faith in compact negotiations under Section 11 of the Indian Gaming Regulatory Act, when it weighed the relative value of concessions offered by the parties in those negotiations.

PARTIES TO THE PROCEEDINGS

Petitioner Arnold Schwarzenegger is the Governor of the State of California; he was a defendant in the district court, and an appellant and cross-appellee in the court of appeals. He was sued in his official capacity. Petitioner State of California ("the State"), is a constituent State of the United States, a defendant in the district court, and an appellant and cross-appellee in the court of appeals. Respondent Rincon Band of Luiseno Mission Indians of the Rincon Reservation ("the Rincon Band") is an Indian entity located within the geographic boundaries of the State of California and is recognized and eligible to receive services from the United States Bureau of Indian Affairs, a plaintiff in the district court, and an appellee and cross-appellant in the court of appeals.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

STATUTES

25 U.S.C.

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals, (App. 1-127) is reported at 602 F.3d 1019. The opinion of the district court (App. 128-172) is reported at 2008 WL 6136699. A prior opinion in this case (on rulings not sought to be reviewed by this petition for a writ of certiorari) is reported at 290 Fed. Appx. 60 (9th Cir. 2008), cert. den., 129 S.Ct. 1995 (2009).

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on April 20, 2010. The court of appeals denied a timely petition for rehearing *en banc* on June 7, 2010, App. 174, but stayed the issuance of its mandate to allow time to file this petition for a writ of certiorari. The jurisdiction of this court is invoked under 28 U.S.C § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, section 8 of the United States Constitution provides:

> The Congress shall have power . . . [t]o regulate Commerce . . . with the Indian tribes;

Section 3 of the Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2702, provides:

> The purpose of this chapter is –
>
> (1) 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;
>
> (2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and
>
> * * *

Section 11 of the Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2710, provides:

> (d)(1) Class III gaming activities shall be lawful on Indian lands only if such activities are –
>
> (A) authorized by an ordinance or resolution that –
>
> (i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,
>
> (ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

* * *

(3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to –

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations

described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

* * *

(7)(A) The United States district courts shall have jurisdiction over –

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

* * *

(B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that –

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith, the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to

conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court –

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable

Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures –

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8)(A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State

governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates –

(i) any provision of this chapter,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

* * *

Article IV, section 19, of the California Constitution provides:

(a) The Legislature has no power to authorize lotteries, and shall prohibit the sale of lottery tickets in the State.

* * *

(e) The Legislature has no power to authorize, and shall prohibit casinos of the type currently operating in Nevada and New Jersey.

(f) Notwithstanding subdivisions (a) and (e), and any other provision of state law, the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law. Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts.

STATEMENT

1. In *California v. Cabazon Band of Mission Indians*, 480 U.S 202 (1987), this Court held that the State of California lacked authority to regulate high-stakes bingo operations on the Morongo and Cabazon Indian reservations. In response to the *Cabazon Band* decision, Congress enacted the Indian Gaming Regulatory Act of 1988 to create a statutory framework for the conduct of gaming on tribal lands that balances the sovereign interests the federal government, states, and tribes all have in tribal gaming. *Seminole*

Tribe of Florida v. Florida, 517 U.S. 44, 48 (1996). Under this framework, gaming activity is divided into three separate classes, over which the three governments have varying degrees of regulatory authority. States have a significant regulatory role only with regard to the most lucrative form of gaming, class III, which generally means blackjack, slot machines, and other banked and percentage games common in Nevada and Atlantic City at the time of IGRA's passage. § 2710(b)(7)(B).[1] IGRA authorizes Indian tribes to conduct class III gaming only in states that permit such gaming, and in "conformity with a tribal-state compact negotiated by the Indian tribe and the State under [§ 2710(d)(3) *et seq.*] that is in effect." § 2710(d)(1). According to the Senate Report accompanying the passage of IGRA,

> *both State and tribal governments have significant governmental interests in the conduct of class III gaming.* States and tribes are encouraged to conduct negotiations within the context of *the mutual benefits* that can flow to and from tribe [sic] and States. *This is a strong and serious presumption that must provide the framework for negotiations. . . .* A State's governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the

[1] All statutory citations are to Title 25 of the United States Code, unless otherwise specified.

> State's regulatory system, *including its economic interest in raising revenue for its citizens.*

S. Rep. No. 100-446, at 13 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3071, 3083 (emphasis added).

IGRA provides that a tribal-state gaming compact *may* include provisions relating to the following: (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity; (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations; (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity; (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities; (v) remedies for breach of contract; (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and (vii) *any other subjects that are directly related to the operation of gaming activities.* § 2710(d)(7)(C). Under IGRA, once a compact is negotiated, it must be approved by the Secretary of the Department of the Interior, prior to the compact going into effect; the Secretary may disapprove a compact only if the compact violates federal law or the trust obligations of the United States to Indians. § 2710(d)(8)(B).

States are required by IGRA to negotiate gaming compacts with tribes "in good faith," § 2710(d)(3)(A), and tribes may enforce this good faith obligation by filing suit in federal court. § 2710(d)(7)(A).[2] Since 2000, when class III gaming became lawful in California, sixty-seven tribes have negotiated compacts that have been approved by the Secretary of the Interior, and come into effect under the provisions of IGRA. Under the authority of a compact concluded in 1999, the Rincon Band operates the Harrah's Rincon Hotel and Casino, under a management contract with Harrah's Entertainment, Inc.

2. This case arises from the Rincon Band's request to negotiate an amendment to its existing tribal-state gaming compact with the State ("the 1999 Compact"). App. 7. Under the 1999 Compact, which expires in 2020, the Tribe is authorized to operate up to 2,000 slot machines at its tribal casino, and pays annually into the Revenue Sharing Trust Fund ("RSTF"), which supports other California tribes that either do not game, or operate small casinos. The

[2] This Court has ruled that the Indian Commerce Clause does not grant Congress the power to abrogate the State's Eleventh Amendment Immunity to suit, and so § 2710(d)(7) cannot grant jurisdiction to the federal courts over a State that does not consent to be sued. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 47 (1996). However, the State of California waived its Eleventh Amendment Immunity to this action under the terms of the 1999 Compact.

State derives no revenue sharing of any kind from the Rincon Band under the 1999 Compact.[3]

In these negotiations for an amendment, the Tribe sought to raise the cap on the number of slot machines allowed by the 1999 Compact, and to lengthen the compact's term. Negotiations for an amendment reached an impasse over the threshold question of whether, in exchange for an expansion of the Rincon Band's gaming rights, the State could lawfully bargain for a share of the Tribe's slot machine revenue to be contributed to the State's general fund. App. 8-12; see Cal. Govt. Code § 16300 (the State's general fund "consists of money received into the treasury and not required by law to be credited to any other fund").

The State had concluded that such negotiations for general fund revenue sharing would be lawful, and not otherwise violate public policy, because: (1) IGRA specifically authorizes negotiations over "subjects that are directly related to the operation of gaming activities," (§ 2710(d)(3)(C)(7)); (2) courts

---

[3] The 1999 Compact between the Rincon Band and the State of California is one of sixty compacts approved by the Secretary in May 2000, all of which shared the same terms. *See* 65 Fed. Reg. 31189 (May 16, 2000) (approving the 1999 Compacts). The Rincon Band is not subject to revenue sharing under the Special Distribution Fund provisions of § 5 of the 1999 Compact, because it did not conduct gaming prior to 1999. The full compact can be accessed at the Internet site of the California Gambling Control Commission: http://www.cgcc.ca.gov/?pageID=compacts, last visited Aug. 19, 2010.

adjudicating a State's good faith may consider "the public interest, public safety, criminality, [a State's] financial integrity, and adverse economic impacts on existing gaming activities" (§ 2710(d)(7)(B)(iii)(I)); (3) the Ninth Circuit Court of Appeals had stated that "Congress . . . did not intend to require that States ignore their economic interests when engaged in compact negotiations" (see *In re Indian Gaming Related Cases* (*"Coyote Valley II"*), 331 F.3d 1094, 1115 (9th Cir. 2003)); and (4) ten compacts in California, memoranda of understanding in Massachusetts, and compacts in New York and Wisconsin already included general fund revenue sharing provisions approved by the Secretary of the Interior. App. 103-06.[4] The Tribe, in contrast, contended that any bargaining position seeking general-fund revenue sharing would constitute a demand for direct taxation in violation of IGRA. App. 142, 152-53.

Toward the end of negotiations, the State made two alternative offers to the Tribe. Its October 23, 2006, offer would have provided a five-year extension of the 1999 Compact's term, an additional layer of protection against an attack on exclusive tribal gaming rights which other California tribes had accepted, and the right to operate 900 additional slot machines. In exchange for the right to operate the 1,600 slot machines it already operated under the

[4] Today, fifteen compacts in California include revenue sharing, as do compacts in Connecticut, Florida, Michigan, New York, New Mexico, Oklahoma, and Wisconsin. App. 103-05.

1999 Compact for an additional five years, the Rincon Band would provide ten percent of its net win on these devices to the State for general fund purposes. In exchange for the right to operate the additional 900 slot machines, the Rincon Band would provide fifteen percent of its net win on these devices to the State for general fund purposes. App. 7-12. Substantially similar terms had been accepted by other California tribes in renegotiations of their 1999 Compacts, and had been approved by the Department of the Interior in an exercise of its trust responsibility over Indian tribes. App. 123-24 (Bybee, J., dissenting).

At the Rincon Band's request, the State made an alternative offer on October 31, 2006. If accepted, this offer would have authorized the Tribe to operate 400 additional slot machines. In exchange the Rincon Band would have paid annually $2 million to the RSTF for small and non-gaming tribes, and twenty-five percent of the net win on the additional 400 slot machines to the State for general fund purposes. App. 11. Under either of these offers made by the State, the Rincon Band would remain the "primary beneficiary" of its tribal gaming operations, as is required by IGRA. § 2702(2).

Under the first of these offers, the Rincon Band's annual slot machine revenue would increase from $59 million to $61 million, App. 11-12; the State's annual revenue share with the Rincon Band would increase from $0 to $38 million; and Harrah's Entertainment, Inc. would receive an annual management fee of

$36.3 million.[5] Negotiations closed upon the Rincon Band's rejection of these offers. App. 12.

3. On June 9, 2004, the Rincon Band filed suit alleging the State's bargaining for general fund revenue sharing constituted bad faith negotiation, invoking the jurisdiction of the federal district court under 28 U.S.C. §§ 1331, 1343, 1367, 2201, and 2202, and 25 U.S.C § 2710(d)(7)(A). On April 29, 2008, the district court granted in part the Rincon Band's motion for summary judgment, and found the State to have engaged in bad faith negotiations in violation of IGRA. App. 130. The district court's analysis of the parties' cross-motions for summary judgment began with § 2710(d)(4). This provision bars the "imposition" of "any tax, fee, charge, or other assessment upon an Indian tribe" other than one agreed to under § 2710(d)(3)(C)(iii), which contemplates reimbursement to the State for its regulatory costs. App. 156. According to the district court, § 2710(d)(4) "does not categorically prohibit fee demands" and while a State lacks authority to "exact" revenue sharing payments, "it could bargain to receive them in exchange for a *quid pro quo* conferred in the compact." App. 157-62. Applying what the district court described as "basic

---

[5] In *Coyote Valley II*, the Ninth Circuit approved revenue sharing to the State for allocation to the "Special Distribution Fund," which was established primarily to mitigate regulatory and other costs of Indian gaming. *Coyote Valley II*, 331 F.3d at 1114. The Rincon makes no payment to this fund, so to date the costs imposed upon the State by Harrah's Rincon Casino have not been mitigated.

contract principles" to the modification of the 1999 Compact, it concluded that the State's revenue sharing demands would constitute an "attempt to impose a tax" unless the State provided a "meaningful concession" to the Rincon Band in exchange. App. 162-62.

The district court concluded that because the State sought revenue for general purposes, rather than for the mitigation of gaming impacts, "the State's fee demands constitute an improper attempt to impose a tax on Rincon." App. 167. The district court next turned to the value of the consideration proposed by the State and concluded that "the payment of such a large fee to its general fund in return for concessions of markedly lesser value was in bad faith." App. 168. Pursuant to § 2710(d)(7)(B), the district court ordered the State and the Rincon Band to conclude an amended compact within sixty days, or submit to the arbitration process provided by the Act. App. 172. This order was stayed pending appeal to the Ninth Circuit Court of Appeals.

4. The Ninth Circuit Panel affirmed the district court in a two-to-one ruling. The majority first analogized the State's conduct of negotiations in this case to other official acts of depredation against Indian tribes, including the treaty violations imposed upon the Sioux Nation following the discovery of gold in the Black Hills. App. 14-15 (citing *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980)). Against this backdrop, the majority turned to IGRA's text, noting that IGRA required it to "consider any demand

by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith." App. 16 (quoting § 2710(d)(7)(B)(iii)). The majority understood § 2710(d)(3)(C) as enumerating an exclusive list of permissible topics of compact negotiation, which list is circumscribed by § 2710(d)(4), providing that "nothing in this section shall be interpreted as conferring upon a State . . . authority to impose any tax, fee, charge, or other assessment upon an Indian tribe. . . ." App. 16-18. According to the majority, IGRA limits the permissible subjects of negotiation to "restrain aggression by powerful states," and prevents State interests from being served through compact negotiations. App. 15-20.

Turning to the negotiations between the Rincon Band and the State, the majority concluded that the State's negotiations for "a non-negotiable, mandatory payment of 10% of net profits into the State treasury for unrestricted use" constituted a demand for taxation, which it presumed to be evidence of bad faith. App. 21-22. The majority then concluded that this presumption of bad faith was not overcome because, in their view, the State failed to offer any "meaningful concession" of sufficient value in return for general fund revenue sharing. It is not at all clear, however, what the majority would consider a sufficiently "meaningful" concession, other than something that is "exceptionally valuable." App. 39. The majority was "unconvinced" an alternative remedy provision offered by the State would be "better" for the Tribe than

what it had; it considered that the financial benefit of one of the State's offers was "negligible" because "Rincon stood to gain only about $2 million in additional revenues;" and it concluded that the "relative value" of the State's demands and concessions "suggests the State was improperly using its authority." App. 43.

Finally, the majority rejected the State's argument that earlier approvals of general fund revenue sharing in compacts negotiated in California, and other states, and approved by the Secretary of the Interior, provided an objective, good faith basis for the State's bargaining position. "We . . . therefore hold that good faith should be evaluated objectively based on the record of negotiations, and that a state's subjective belief in the legality of its requests is not sufficient to rebut the inference of bad faith created by objectively improper demands." App. 48-53. The majority affirmed the district court order compelling further negotiations, followed by arbitration.

In a vigorous and lengthy dissent, Judge Bybee disputed the majority's conclusion that the State demanded direct taxation from the Rincon Band, or did anything other than engage in good faith negotiations: "[W]e have long held that the power to tax is defined by the sovereign's power to impose the tax. California has exercised no such power here. The majority has confused California's hardball negotiations with the taxing power." App. 54. Judge Bybee explained that, while the IGRA framework arose against an "intricate backdrop of federal-state-tribal

relations" under which Indian tribes are exempt from direct state taxation, App. 59-60 (citing *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 183 n. 14 (1989)), it also reflects "cooperative federalism" under which Congress "'balance[d] the competing sovereign interests of the federal government, state governments and Indian tribes, by giving each a role in the regulatory scheme.'" App. 62 (quoting *Coyote Valley II*, 331 F.3d at 1096 and *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1092 (E.D. Cal. 2002)). The mechanism Congress developed to advance the "important – and potentially divergent – interests" of the sovereign states and sovereign tribes, was "as old as the free market itself: allow states and tribes to bargain over the terms of their class III gaming relationship." App. 63.

The dissent noted that IGRA's Senate Report encourages states and tribes "to conduct negotiations within the context of the mutual benefits that can flow to and from tribe [sic] and States," App. 63-64 (quoting S. Rep. No. 100-446, at 13 (1988)). However, to ensure that "IGRA's compact requirement did not '[lift] the Indians' exemption from state taxes,'" App. 65-66 (quoting *California v. Cabazon Band of Mission Indians*, 480 U.S. at 215 n. 17), Congress did two things: (1) in § 2710(d)(4), Congress explained that IGRA's compact requirement did not abrogate tribal immunity to taxation by stating that "[e]xcept for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section

shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe . . . to engage in a class III activity," App. 66; and (2) in § 2710(d)(7)(B)(iii)(II), Congress declared that if a state demanded that a tribe abrogate its immunity to direct taxation as a condition of compact negotiations, the demand would be evidence of bad faith. App. 66-67. Viewed in this context, the dissent concluded that §§ 2710(d)(4) and (d)(7)(B)(iii)(II) were not intended to prevent negotiations over revenue sharing, but to prevent states using the "promise of class III gaming to otherwise impose taxes on Indian tribes and their land." App. 67-68.

Turning to the facts of this case, the dissent concluded that the State never sought to tax the Rincon Band because a tax, in contrast to negotiated revenue sharing, "is imposed by the state and may be collected by the state, under penalty of law, over the objections of its citizens." App. 76. Here, because California and the Rincon Band are independent sovereigns, "they may negotiate an agreement or not, but neither has the power to tax the other," a fact that is underscored by the fact that "[f]or all of its posturing and demands, California has, to date, not one penny to show for its negotiations with the [Rincon] Band." App. 77. Accordingly, the dissent concluded that California's bargaining may constitute a "hard line stance," but not a tax. App. 77. Finally,

the dissent's conception of what constitutes a "meaningful concession" sufficient to overcome a presumption of bad faith negotiation fundamentally differs the majority's. The dissent contends that a "meaningful concession" is essentially the same as "consideration" under the common law of contracts. Under this view, the court should not apply its own subjective assessment of the value of the parties' respective concessions because a "meaningful concession" is made whenever "a bundle of rights more valuable than the *status quo*" is offered. App. 91.

REASONS FOR GRANTING THE PETITION

A. The decision below presents urgent, important and recurring issues concerning the permissible scope of tribal-state negotiations under IGRA, and the authority of the Executive and Judicial Branches to intercede in tribal-state compact negotiations

1. Whether negotiations for general fund revenue sharing constitute a demand for direct taxation is an important and recurring issue demanding immediate resolution

The majority has thrown the law of tribal-state compact negotiations into disarray by holding that negotiation for general fund revenue sharing constitutes a demand for direct taxation in violation of IGRA. This conclusion is irreconcilable with the

numerous existing tribal-state relationships where general fund revenue sharing is an element of a settled gaming compact. In the dissent's words, the majority "does not just upset the apple cart – it derails the whole train." App. 56.

The majority's bad faith holding is not only remarkable for its sweeping impact on California's ability to negotiate with Indian tribes, but it will also have dramatic practical implications around the Nation. There are 562 recognized Indian tribes in the United States and gaming is currently conducted in 28 states.[6] General fund revenue sharing provisions are found in the fifteen compacts California has negotiated or renegotiated with tribes over the last six years, and in tribal-state compacts negotiated in Connecticut, Florida, Michigan, New York, New Mexico, Oklahoma, and Wisconsin. App. 103-106 (Bybee, J., dissenting). In every instance, these compacts have been approved by the Secretary of the Interior, in an exercise of the federal government's trust responsibility over Indian tribes. § 2710(d)(8)(B).

Indian gaming is an expanding industry, and at any given time states and tribes are engaged in expensive and time-consuming compact negotiations that may take months or years to conclude. These

---

[6] General information related to Indian gaming is available at the National Indian Gaming Commission's Internet site. See http://www.nigc.gov/About_Us/Frequently_Asked_Questions.aspx, last visited Aug. 26, 2010.

negotiations are typically extraordinarily delicate and, when concluded, reflect a political accommodation between the sovereigns that is not entered into lightly. A compact must be entered in accordance with the law of each sovereign. See *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1548 (10th Cir. 1997) (Interior Secretary may not approve a tribal-state gaming compact entered into by state governor in violation of state law). In California, negotiations are conducted by the Governor, and any resultant compact must be ratified by the California Legislature. Cal. Const., Art. IV, § 19, subd. (f). Tribes also enter into compacts through a formal act of tribal government, § 2710(d)(1)(A), and significant tribal government resources are expended to engage the State in negotiations.

If the majority decision is allowed to stand, it will create an incentive for revenue sharing tribes to avoid paying millions, tens-of-millions, or even hundreds-of-millions of dollars in revenue-sharing to their respective states, by seeking to void or renegotiate their compacts. Indeed, the dissent recognizes the likely impact of the majority decision, and describes the result as "chaos as tribe after tribe seeks to reopen negotiations concluded and duly approved." App. 56. It may take years of further litigation in the federal courts to unwind disputes that are the fruit of the decision below. And for tribes without compacts, this decision will likely frustrate efforts to develop significant gaming operations because states, once

denied any meaningful benefit from tribal gaming, will have a powerful incentive to limit it.

The Court should grant review to consider the questions presented here because the decision below raises important and recurring issues demanding immediate resolution in order to preserve existing tribal-state compact relations, preserve the ability to conduct meaningful negotiations under IGRA, and to prevent enormous resources from being expended in litigation over the status of the existing general fund revenue sharing compacts that have been concluded in eight different states.

2. Whether federal courts have jurisdiction to weigh the value of concessions offered by the parties in tribal-state compact negotiations is an important and recurring issue demanding immediate resolution

The majority's analysis exceeded a legitimate inquiry into the State's good faith and went beyond the jurisdiction of the federal courts established by Congress in IGRA, and usurped authority more appropriately exercised by the Executive Branch. IGRA authorizes courts to determine only whether a state "has failed to negotiate in good faith. . . ." § 2710(d)(7)(B)(iii). When a court looks beyond the question of a state's good faith, and weighs the relative value of concessions offered by the parties, it assumes a policy making role Congress never envisioned. It is not for the federal courts to develop federal Indian policy on a circuit-by-circuit basis.

IGRA does not define "good faith," but the Ninth Circuit has recognized that it is appropriate to look at the closest analog to IGRA's good faith requirement, the National Labor Relations Act ("NLRA"), for guidance in interpreting the standard. *Coyote Valley II*, 331 F.3d at 1094. Under the NLRA there is an obligation to bargain collectively, defined as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in *good faith* with respect to wages, hours, and other terms and conditions of employment. . . ." 29 U.S.C. § 158(d). Under cases interpreting the NLRA, the duty of good faith bargaining does not require the parties to make particular concessions, or even to reach agreement. See *Livadas v. Bradshaw*, 512 U.S. 107, 117 n. 11 (1994) (Under the NLRA the obligation to bargain in good faith does not compel either party to agree to a proposal or require the making of a concession.) (citing 29 U.S.C. 158(d)).[7] It does envision, however,

---

[7] Similarly, IGRA's Senate Report indicates that the compact negotiation process was not intended to guarantee the successful conclusion of negotiations:

> Under this act, Indian tribes will be required to give up any legal right they may now have to engage in class III gaming if: (1) they choose to forgo gaming rather than to opt for a compact that may involve State jurisdiction; or (2) they opt for a compact and, for whatever reason, a compact is not successfully negotiated.

S. Rep. No. 100-446, at 14 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3071, 3084.

"a sincere, serious effort to adjust differences and to reach an acceptable common ground." *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1187 (D.C. Cir. 1981). An employer engages in bad faith or surface bargaining when it conducts negotiations "as a kind of charade or sham, all the while intending to avoid reaching an agreement. . . ." *Continental Ins. Co. v. NLRB*, 495 F.2d 44, 48 (2nd Cir. 1974).

In this case, the majority did not attempt to determine whether the State's conduct of negotiations was a sincere effort to reach agreement or was a charade, or sham. Instead, after erroneously concluding that the State had demanded direct taxation of the Tribe, the majority looked to the relative value of the concessions the State offered in exchange for general fund revenue sharing. But this inquiry has little relevance to whether the State engaged in a sincere effort to reach agreement. Indeed, nowhere does IGRA's text or legislative history suggest that federal courts were expected to weigh the value of concessions negotiated in the course of tribal-state compact negotiations. To the contrary, this valuation is, in the first instance, left expressly "between [the] two equal sovereigns." § 2710(d)(1)(C); S. Rep. No. 100-446, at 13, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083. This is appropriate, because the concessions made in tribal-state compact negotiations, in the furtherance of the sovereigns' governmental interests, are essentially political in nature.

The majority's intrusion into these negotiations not only impinged upon the sovereignty of the Rincon

Band and the State, but also invaded the province of the Secretary of the Department of Interior, which is responsible for implementing federal Indian policy. IGRA provides that a tribal-state compact may go into effect only following approval by the Secretary. The Secretary may disapprove a compact if it violates federal law, or "the trust obligations of the United States to Indians." § 2710(d)(8)(B). If there is authority in IGRA to intrude upon the political process of compact negotiations, it resides in the Secretary's authority to disapprove a compact for a violation of the federal trust obligation. Moreover, where the Secretary disapproves a compact in an exercise of the federal government's trust obligations, the remedy under IGRA is a *bilateral* determination by the parties to return to compact negotiations. IGRA does not provide an express judicial remedy. Accordingly, under IGRA, any federal intrusion into the compact relationship is very narrow. The federal government has no seat at the table.

Accordingly, the majority decision violates the principle that federal courts, do not engage political questions, a doctrine that arises from the separation of powers and from prudential concerns regarding the respect courts owe the political departments, and restrains courts "from inappropriate interference in the business of the other branches of Government." See *Nixon v. U.S.*, 506 U.S. 224, 252-53 (1993) (Souter, J., concurring) (quoting *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990), and citing *Goldwater v. Carter*, 444 U.S. 996, 1000 (1979) (Powell, J.,

concurring in judgment). Construing IGRA to prohibit federal courts from weighing the value of concessions offered in negotiations would protect courts from incursion into political processes and avoid any resultant separation of powers concern.

The majority's misinterpretation of IGRA already caused mischief in the real world. On August 17, 2010, the United States Department of the Interior disapproved a compact, pursuant to § 2710(d)(8), that had been negotiated between the State of California and the Habemotolel Pomo of the Upper Lake ("Upper Lake Compact") and submitted for Secretarial approval on July 6, 2010. App. 175. Relying on the decision below, the Interior Department concluded that the fifteen percent general fund revenue sharing agreed to by the Tribe, is a tax. App 178-179. It then acknowledged that the exclusive gaming rights provided to Indian tribes under California law, and the cap of 700 slot machines authorized in the Upper Lake compact, were both "meaningful concessions" granted by the State. App. 182-183. Nevertheless, the Interior Department arrived at the inexplicable conclusion that these "meaningful concessions" did not "confer a *substantial* economic benefit on the Tribe *proportional* to the value received by the State." App. 183, 186 (emphasis added). While this decision appears to be an exercise of the Secretary's trust responsibility under § 2710(d)(8), the timing of this decision, its reasoning, and its incompatibility with earlier compact approvals, demonstrate that the majority's erroneous construction of IGRA has led the

Secretary to reach a baseless and far-reaching precedent, and stray from the deference that is due these dual-sovereign negotiations.

Notwithstanding the Secretary's disapproval of the Upper Lake compact, on the same day it was submitted for approval, the Secretary published notice of *approval* of another gaming compact between the Seminole Tribe of Florida and the State of Florida. See Notice of Approved Tribal-State Class III Gaming Compact, 75 Fed. Reg. 38833-02 (Jul. 6, 2010). Significantly, this twenty-year compact provides for general fund revenue sharing under which Florida anticipates receiving at least $1.2 billion from the Tribe for the Florida's public schools. See *Seminole Tribe celebrates new gaming compact with Florida*, Broward News and Entertainment Daily (May 6, 2010) (available at http://browardnetonline.com/2010/05/seminole-tribe-celebrates-new-gaming-compact-with-florida, last viewed Sept. 1, 2010).[8] It is not apparent from the Secretary's notice of approval, or from a review of the two compacts, what meaningful basis there is for the Secretary to approve the Seminole compact on the one hand, but disapprove the Upper Lake compact on the other – in both cases the Tribes have accepted compacts under which they will operate class III gaming free of non-Indian competition. Together, these decisions demonstrate

---

[8] The Seminole compact is available on Governor of Florida's Internet site at the URL, http://www.flgov.com/pdfs/20100824_seminole.pdf, last viewed Sept. 1, 2010.

that as a result of the majority decision, IGRA is no longer being applied uniformly across the nation.

The majority's assumption of responsibility for valuing the parties' proposed concessions offends the dual-sovereign nature of tribal-state compact negotiations under IGRA, and asserts authority more properly exercised by the Secretary. The federal courts are not in a position to know intimately the unique nature of a tribal-state relationship, the course of negotiations, local economic conditions and myriad other factors that may inform the value of concessions. The Secretary, in its role as trustee over Indian tribes, is in a more appropriate position to make such valuations, and to do so in furtherance of federal Indian policy. The decision below has misconstrued the respective roles of the Judicial and Executive Branches in the tribal-state compact process under IGRA. This is an important federal question that implicates important rights and obligations of all three sovereigns, and deserves urgent attention from this Court.

B. The court of appeals finding of bad faith was erroneous, and prudential considerations weigh heavily in favor of granting the petition

As the dissent ably points out, the majority's errors are many, with consequences for states that are difficult to exaggerate. Literally hundreds of

millions of dollars in general fund revenues are at stake, as are stable political relations between dozens of states and the tribes located within their boundaries.

1. Negotiations for revenue sharing do not constitute a demand for direct taxation

IGRA provides that its compacting provisions shall not be interpreted as "conferring upon a State . . . authority to *impose* any tax, fee, charge, or other assessment upon an Indian tribe," and that this lack of authority is not a basis for a State's refusal to enter negotiations. § 2710(d)(4) (emphasis added). Without any consideration of what it would mean for the State to "impose" taxation on a sovereign tribe,[9] the majority concluded that the State's bargaining for revenue sharing violated § 2710(d)(4): "No amount of semantic sophistry can undermine the obvious: a non-negotiable, mandatory payment of 10% of net profits into the State treasury for unrestricted use yields public revenue, and is a 'tax.'" App. 21-22. However, taxation involves three elements: (1) a monetary contribution; (2) imposed by the government; (3) to yield public revenue. Black's Law Dictionary 1594 (9th ed. 2009). The majority ignored the second, most essential, element; it "simply sidesteps the 'imposition'

[9] Indeed, at oral argument the author of the majority opinion characterized as "ludicrous" and "ridiculous" the State's contention that tribes exercise sovereign powers in compact negotiations under IGRA.

requirement by slapping the conclusory labels 'non-negotiable' and 'mandatory' on proposed revenue sharing payments that are neither." App. 77. (Bybee, J., dissenting).

Revenue sharing was certainly contemplated by Congress which recognized that "[a] state's governmental interests with respect to class III gaming on Indian lands include . . . impacts on the State's regulatory system, *including its economic interest in raising revenue for its citizens,*" and encouraged States and tribes "to conduct negotiations *within the context of the mutual benefits that can flow to and from tribe* [sic] and states." S. Rep. No. 100-446, at 13, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083 (emphasis added). More importantly, Congress expressly authorized revenue sharing tied to income from the operation of slot machines, because such revenue is directly related to the operation of gaming. § 2710(d)(3)(C)(vii).

In *Coyote Valley II*, the Ninth Circuit recognized that state authority to negotiate for revenue sharing was expressly provided for in IGRA, provided the revenue stream was "directly related" to the Tribe's class III gaming operations. *Coyote Valley II*, 331 F.3d at 1111 (citing § 2710(d)(3)(C)(vii)). Here, as in *Coyote Valley II*, the State sought revenue sharing derived from, and so directly related to, the operation of the Tribe's class III slot machines. Notwithstanding this clear authority, the majority ruled that the notion the proposed revenue sharing was directly related to the Tribe's gaming operations was "circular," and rejected

it.[10] App. 29. The majority simply erred in ruling that the State sought to "impose" anything; it merely engaged in good faith negotiations, as IGRA requires it to do.

2. The majority's analysis of what constitutes a "meaningful concession" sufficient to justify a demand for direct taxation violates contract law, and usurps the role of the Secretary

Having concluded that the State demanded direct taxation in negotiations with the Rincon Band, the majority applied § 2710(d)(7)(B)(iii)(II) to establish a presumption that the State had negotiated in bad faith. The majority then applied its own subjective valuation of the concessions offered in negotiations to conclude that the State had failed to offer meaningful concessions sufficient to rebut this presumption of bad faith negotiation. This analysis was erroneous in both its approach and its application.

---

[10] To support its construction of § 2710(d)(3)(C)(vii), the majority relied upon the "Indian canon" of statutory construction, which canon requires courts to construe *ambiguous* statutes in the manner most favorable to tribal interests. App. 18-19 n. 9; *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). However, in *Coyote Valley II*, the Ninth Circuit ruled that § 2710(d)(3)(C)(vii) is "unambiguous." *Coyote Valley II*, 331, F.3d at 1111. Again, the majority erred. App. 100 n. 9.

Earlier Ninth Circuit decisions demonstrate an understanding that the federal court's jurisdiction to determine a State's good faith is much narrower than the majority has conceived it. *Coyote Valley II* and *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095 (9th Cir. 2006), both stand for the proposition that a State does not exercise authority to "impose" a tax on a tribe when it engages in negotiations for revenue sharing and offers in exchange a meaningful concession. *Coyote Valley II* concerned a challenge to revenue sharing and other provisions proposed in the 1999 negotiations between California and the Coyote Valley Band of Pomo Indians. In *Coyote Valley II*, the revenue sharing provisions were either to fund tribes with small or no casinos for *general* tribal *uses*, or to fund the State's efforts to mitigate the impacts of, and regulate, tribal gaming. *Coyote Valley II*, 331 F.3d at 1105-06. The Ninth Circuit did not consider whether the revenue sharing sought in those negotiations constituted a direct tax, because "[w]here, as here, . . . a State offers meaningful concessions in return for fee demands, it does not exercise 'authority to impose' anything. Instead, it exercises its authority to negotiate, which IGRA clearly permits." *Coyote Valley II*, 331 F.3d at 1112. Significantly, the *Coyote Valley II* court defined a "meaningful concession" as something merely "real," a conception that comports which the application of the common-law doctrine of consideration. *Id.* See also *Shoshone-Bannock Tribes*, 465 F.3d at 1101 (indicating that while a "state [does] not have authority to exact [revenue sharing] payments, it [may] bargain to receive them in exchange for a *quid*

pro quo conferred in the compact"). These cases indicate that a meaningful concession is nothing more than "consideration" within the meaning of common law contract law.[11] Under the common law, however, courts do not weigh the adequacy of consideration, but will only determine whether putative consideration is nominal or a "sham." App. 92-93 (Bybee, J., citing 4 Joseph M. Perillo, et al., Corbin on Contracts §§ 5.14, 5.17 (2d ed. 1995)). It is for the good reason that the valuation of consideration is left to private action because the parties are "better able than others to evaluate the circumstances of particular transactions. . . ." Restatement (Second) of Contracts § 79 (1981).

The majority departs from *Coyote Valley II*'s sensible construction of IGRA, and denies that the State offers a meaningful concession when it "offers a bundle of rights more valuable than the status quo," as the State certainly did in this case. App 47-48. The dissent appropriately concluded that "[t]he majority's novel conception of 'meaningful concessions' finds no support in IGRA and conflicts with our explanation of 'meaningful concessions' in *Coyote Valley II,* the Department of the Interior's reading of the Act,

---

[11] It is undisputed that the common law of contracts applies to the construction and interpretation of tribal-state gaming compacts. See § 2710(d)(3)(C) (noting that compacts may include "remedies for breach of contract"); see also *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1556 (10th Cir. 1997) (stating that a tribal-state compact "is a form of contract" and citing *Texas v. New Mexico,* 482 U.S. 124, 128 (1987)).

and centuries of contracts jurisprudence as well." App. 91.

The majority also erred in the application of its own conception of what constitutes a meaningful concession, by concluding that neither of the State's two separate compact offers in October 2006, would provide a meaningful concession in exchange for general fund revenue sharing. Even in the majority's cramped view of the State's offers, the State offered a bundle of rights significantly more valuable than the *status quo*. The State's concessions included a five-year extension of the compact's term, an additional layer of protection for tribal gaming exclusivity, and an increase in the number of slot machines the Tribe could offer. These amounted to substantially more than mere consideration necessary for compact formation, and should have satisfied even the majority's conception of a "meaningful concession."

Although the decision below is the first federal court of appeals to consider whether general fund revenue sharing constitutes an impermissible tax under IGRA, it would be a mistake for this Court to await a split between circuit court decisions before considering the questions presented by this petition. The majority decision departs from prior decisions of the Ninth Circuit Court of Appeals, and threatens chaos in tribal-state gaming relations. If the decision below is not reversed, litigation will likely be filed in the Second, Sixth, Tenth, and Eleventh Circuits to "unsettle dozens of mutually beneficial revenue sharing provisions that have fed both tribal coffers

and revenue-hungry state treasuries." App. 127 (Bybee, J., dissenting). Multiple litigation of these questions would consume vast federal, state, and tribal resources, and unnecessarily extend the period of uncertainty in tribal-state gaming relations the decision below has guaranteed. And this uncertainty may not ultimately be resolved in favor of tribal gaming interests.

Notwithstanding the serious implications of the majority's decision, whether general fund revenue sharing constitutes direct taxation under IGRA is a relatively straightforward question of statutory construction that has been amply explored in the lengthy majority and dissenting opinions below. Accordingly, there is no reason for this Court to delay consideration of the important and urgent questions presented here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MARC A. LEFORESTIER
Supervising Attorney General

EDMUND G. BROWN JR.
Attorney General of California
MANUEL MEDEIROS
Solicitor General of California
SARA J. DRAKE
Senior Assistant Attorney General
1300 I St., Suite 125
Sacramento, CA 95818
(916) 322-5452

Blank Page