No. 15-1185

In The Supreme Court of the United States

STATE OF CALIFORNIA; CALIFORNIA GAMBLING CONTROL COMMISSION, an agency of the State of California; and EDMUND G. BROWN, JR.; as Governor of the State of California,

Petitioners,

v.

PAUMA BAND OF LUISENO MISSION INDIANS OF THE PAUMA & YUIMA RESERVATION, a/k/a PAUMA LUISENO BAND OF MISSION INDIANS, a/k/a PAUMA BAND OF MISSION INDIANS, a federally-recognized Indian Tribe,

Respondent.

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

BRIEF FOR THE PAUMA BAND OF LUISENO MISSION INDIANS OF THE PAUMA & YUIMA RESERVATION IN OPPOSITION

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QUESTION PRESENTED

Whether a state can invoke Eleventh Amendment immunity to retain "revenue sharing" it acquired through a series of *ultra vires* acts and should have deposited into special, non-public funds for purposes consistent with the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*, where it waived whatever immunity it may have possessed by contract, statute, and its deliberate litigation strategy to withhold the defense for the first eighteen months of the proceeding so it could pursue a massive damages offset that would trump any adverse restitution award.

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BRIEF IN OPPOSITION

STATUTORY PROVISIONS INVOLVED

Section 98005 of the California Government Code provides in relevant part (*see* App. 50a):

> Without limiting the foregoing, the State of California also submits to the jurisdiction of the courts of the United States in any action brought against the state by any federally recognized California Indian tribe asserting any cause of action arising from the state's refusal to enter into negotiations with that tribe for the purpose of entering into a different Tribal-State compact pursuant to IGRA or to conduct those negotiations in good faith, the state's refusal to enter into negotiations concerning the amendment of a Tribal-State compact to which the state is a party, or to negotiate in good faith concerning that amendment, or the state's violation of the terms of any Tribal-State compact to which the state is or may become a party.

INTRODUCTION

At the heart of the petition by the State of California ("State") lies the question of whether the Supreme Court of the United States will sanction gross abuses of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*, and provide states with another

victory in their never-ending quest to tax Indian tribes. The present case rests at the confluence of two previous ones that this Court declined to hear. The first concerned the State grossly misrepresenting contract language it drafted to limit the number of slot machines signatory tribes could operate under their gaming compacts. *See, e.g.*, *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California*, 536 F.3d 1034 (9th Cir. 2008), *cert. denied sub nom. California v. Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty.*, 556 U.S. 1182 (2009) (generally "*Colusa*"). The second dealt with the State trying to resell these licenses in amendment negotiations so it could exact astronomical amounts of tax revenues from the tribes. *See Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010), *cert. denied sub nom. Brown v. Rincon Band of Luiseno Mission Indians of Rincon Reservation*, 564 U.S. 1037 (2011) ("*Rincon II*").

This final entry in the saga looks at the consequences for the State after the Pauma Band of Mission Indians ("Pauma" or "Tribe") took the bait and mistakenly executed an amendment in order to obtain slot machine licenses that it thought were unavailable under its original compact. At this juncture, the State does not contest either the misrepresentation under the original compact or the rescission of the amendment. Rather, the only thing the State challenges is whether it should have to disgorge its ill-gotten gains given the protections afforded by the Eleventh Amendment. The argument in support of this position, however, simply argues that the United States Court of

Appeals for the Ninth Circuit committed an analytical error when interpreting a waiver within the compacts while largely ignoring the four other exceptions to sovereign immunity that either do or should support the decision below.

With alleged errors of this sort generally not providing a compelling reason for review, the State tries to draw attention to its case by engaging in the sort of histrionic fear-mongering that it did in its petition in *Rincon*, suggesting other tribes may file suit to hold the State liable for a misrepresentation disclosed over seven years ago even though not a single one has done so within that time period. Applicable statutes of limitation undermine this argument, but the State is correct in suggesting that sovereigns are owed a "special solicitude" – it is simply that preferential treatment should not apply when a state takes money through a series of *ultra vires* acts in contravention of federal law and then refuses to return the funds despite waiving immunity by contract, statute, and its deliberate litigation conduct.

STATEMENT OF THE CASE

1. IGRA is an embodiment of cooperative federalism that requires an Indian tribe to negotiate a compact with the surrounding state before offering any slot machines, house-banked card games, or other types of "class III" games at its casino. *See* 25 U.S.C. § 2710(d)(1)(C). During the course of negotiations, a state may request that a tribe pay any amounts that

"are necessary to defray the costs of regulating such activity." 25 U.S.C. § 2710(d)(3)(C)(iii). However, Congress preserved the tribes' traditional immunity from state taxation by inserting a provision into the next subsection of IGRA stating that aside from the regulatory assessments mentioned above, "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." 25 U.S.C. § 2710(d)(4). Thus, the only way a state can lawfully obtain additional monies through compact negotiations is by offering the tribe a "meaningful concession" that goes above and beyond the standard gaming rights guaranteed by IGRA. *See Rincon II*, 602 F.3d at 1036-40.

2. The first widespread compact negotiations in California did not occur until more than a decade after the enactment of IGRA, and then only after the voters of the State overwhelmingly approved a proposition that would require the governor to execute a model compact with any interested tribe as a ministerial act within thirty days of receiving a request. *See In re Indian Gaming*, 331 F.3d 1094, 1100-01 (9th Cir. 2003) ("*Coyote Valley II*"). As various interest groups petitioned the California Supreme Court to invalidate the statute created by this proposition, the State began negotiations with more than sixty tribes to devise a compact different from the one recently approved by the voters. *Id.* at 1102. These negotiations soon reached an impasse, however, as the tribes discovered the State was "exploring the concept of an enormous revenue

sharing requirement" that they believed would impose an impermissible tax under IGRA. *Id.* at 1103.

These concerns about taxation caused the State to change its strategy within its final compact proposal, which it provided to the negotiating tribes for the first time at 8:00 p.m. on the evening before the end of the legislative session. *See Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California*, 629 F. Supp. 2d 1091, 1111 (E.D. Cal. 2009) ("*Colusa I*"). The State's negotiating team then informed the assembled tribes that they had until midnight to accept or reject the proposal *en toto*. *Id.* One tribal leader overheard his peers ask the State's lead negotiator to explain the new terms in the offer, which he refused to do. *Id.* Another tribal leader followed the State's negotiator back to the State Capitol to discuss his concerns about the proposal, but was informed "the State's negotiating team was inaccessible" and then escorted from the area. *See Coyote Valley II*, 331 F.3d at 1104.

The final compact offer may have reduced the revenue sharing sought by the State, but it also obscured the total number of slot machines each tribe could operate. Two separate sections of the compact determine this number. The first section (*i.e.*, Section 4.3.1) explains that a signatory tribe is authorized to operate a baseline number of machines equivalent to the greater of 350 or the number the tribe operated immediately before the compact went into effect:

> Sec. 4.3.1 The Tribe may operate no more Gaming Devices than the larger of the following:
>
> (a) A number of terminals equal to the number of Gaming Devices operated by the Tribe on September 1, 1999; or
>
> (b) Three hundred fifty (350) Gaming Devices.

App. 51a. The second section (*i.e.*, Section 4.3.2.2(a)) proceeds to explain that a tribe may operate machines in excess of the baseline entitlement in Section 4.3.1 so long as it obtains slot machine licenses, the total number of which is the output of a complex formula in subsection (a)(1):

> Sec. 4.3.2.2. Allocation of Licenses
>
> (a) The Tribe, along with all other Compact Tribes, may acquire licenses to use Gaming Devices in excess of the number they are authorized to use under Sec. 4.3.1, but in no event may the Tribe operate more than 2,000 Gaming Devices, on the following terms, conditions, and priorities.
>
> (1) The maximum number of machines that all Compact Tribes in the aggregate may license pursuant to this Section shall be a sum equal to 350 multiplied by the number of Non-Compact tribes as of September 1, 1999, plus the difference between 350 and the lesser number authorized under Section 4.3.1.

App. 53a.

The signatory tribes would then compete for these additional slot machine licenses during communal draws structured like a "worst to first" professional sports draft. App. 53a-55a. The first "pick" in each draw goes to the tribe with the smallest preexisting device count, who may then draw a specified number of licenses. App. 54a. From there, a full "round" unfolds, wherein each applicant tribe – in ascending-device-count order – has the opportunity to draw up to a certain number of licenses before a tribe with a higher pick can draw again. App. 54a. At the conclusion of the first round, further "[r]ounds shall continue until tribes cease making draws, at which time draws will be discontinued for one month or until the Trustee is notified that a tribe desires to acquire a license, whichever last occurs." App. 55a.

A week after the execution date of the compacts, the Office of the Governor asked the chairpersons of the signatory tribes to certify the number of machines their tribes had in operation before the compacts went into effect so the State had the necessary data for the Section 4.3.2.2(a)(1) license pool formula. App. 58a-59a. Those certifications appear to have remained within the Office of the Governor, however, as a member of the State Assembly contacted the independent and non-partisan Legislative Analyst's Office ("LAO") approximately a month later to ascertain the number of slot machines the compacts permitted statewide. App. 61a. Explaining that it could not obtain "verifiable information on the number of machines" the signatory tribes operated before the compacts took effect,

the LAO estimated that the compacts created 53,000 baseline entitlements under Section 4.3.1 and another 60,000 licensed machines under Section 4.3.2.2(a)(1). App. 62a-63a. The two-part methodology the LAO employed for calculating the total number of slot machines received a rebuke from the State's negotiator roughly a month after the transmission of the letter, on December 3, 1999. App. 65a-73a. Rather than sum the outputs of both sections, the State's negotiator insisted that the maximum number of machines was "the product of a simple mathematical calculation set forth in Section 4.3.1," and nothing in Section 4.3.2.2(a)(1) modifies this "absolute cap." App. 65a, 68a. Rather, Section 4.3.2.2 was of limited importance. "Except for foreseeing that the California Gambling Control Commission ["CGCC"] may administer the provisions of Section 4.3.2 acting as a neutral Trustee, the State's interests in the statewide cap imposed by Section 4.3.1 are not implicated by Section 4.3.2." App. 70a.

Terminology akin to "neutral trustee" arose again in the procedures for conducting the license draw process. With the CGCC not yet in existence and the compact merely specifying that the "Trustee" would oversee the draws, attorneys for the signatory tribes developed "Gaming Device License Pool Rules" to bring the system designed by the compacts into effect. App. 74a-79a. Paragraph 5 of the Rules indicated that a certified public accounting firm licensed in California with no recent professional ties to any of the compacting parties would serve as the "Pool Trustee." App. 75a.

After the signatory tribes selected the Sacramento-based firm of Sides Accountancy to serve as Pool Trustee, the State's negotiator, acting on behalf of the Office of the Governor, drafted a letter to Sides on May 9, 2000, "commend[ing] the Tribes" on reaching agreement on license draw procedures and advising Sides of his duty as "Pool Trustee" to ensure the distribution of slot machine licenses would comply with the limit set forth in the December 3rd letter. App. 80a-84a.

With the inaugural license draw scheduled for May 15, 2000, Pauma executed an engagement letter with Sides on May 5, 2000 specifying the "terms and conditions of [its] engagement as trustee of the Gaming Device License process set forth in Section 4.3.2.2 of the [c]ompact." App. 85a-87a. Returned along with the signed engagement letter was a letter from Pauma to Sides as "Trustees" that requested five-hundred licenses at the forthcoming draw and attached a $625,000 cashier's check to cover the compact-mandated fee for obtaining those licenses. App. 88a-89a. To ensure compliance with the draw participation requirements, Pauma ended the letter by requesting that Sides send notice "if the trustee finds that any item is missing." App. 89a. No further information was necessary, however, as Sides awarded Pauma five-hundred licenses at the May 15, 2000 draw, which it informed the tribe about in a contemporaneous letter signed by "Sides Accountancy Corporation as trustee under the scope of work document." App. 90a.

More than half a year after this first license draw, the CGCC came into existence and began to demand

information from Sides. In a letter dated January 16, 2001, the CGCC's inaugural chairman John Hensley requested that Sides turn over data obtained from the signatory tribes during the course of its duties, reminding Sides that as "pool trustee" it has a "fiduciary responsibility" to account for the funds it received from the signatory tribes. App. 91a-92a. Alleged complaints about the transparency of the draw process led the CGCC to circulate an issue paper questioning whether the Commission should "immediately assert its authority as Trustee under the Tribal-State Gaming Compacts and take over the machine licensing function and require accountability from the temporary trustee and the compacted tribes." App. 93a-99a. The issue paper suggested that having the CGCC take over the license draw process and prohibit the distribution of any more licenses would enable "[t]he state . . . to control any further machine growth during future compact negotiations where a finite number could be arrived at." App. 97a. The Office of the Governor followed the recommendation in the issue paper, enacting Executive Order D-31-01 and thereby empowering the CGCC to assume the licensing duties under the compacts. *See Colusa I*, 629 F. Supp. 2d at 1098.

After Sides terminated its "engagement as license trustee" in the wake of the executive order (*see* App. 100a), Chairman Hensley sent a letter to the Office of the Governor to remind it of the "great deal of resistance [the Commission received] from both the temporary Trustee, Michael Sides Accountancy, and from many of the tribes" when trying to obtain compact

payment data before taking over the draw process. App. 101a. With that situation now resolved, the letter went on to explain that Hensley intended to follow through on his plan to cap the total number of licenses and was considering utilizing one of two numbers: (1) a reformulation of the number advanced by the State's negotiator in its December 3, 1999 letter to the LAO that accounted for *both* the baseline entitlements in Section 4.3.1 and the licenses in Section 4.3.2.2(a)(2); or (2) a second formulation the LAO devised after receiving this letter that was similar in structure. App. 102a-103a.

Though Hensley informed the Office of the Governor in his letter that he would "ask for input from tribal leaders [on the issue] so that they can buy into the process and solution" (*see* App. 102a), the CGCC ultimately interpreted the license pool formula unilaterally through a two-step process. The first step involved laying out the guiding principles of compact interpretation, with the CGCC explaining that it would not employ a canon of interpretation related to its trusteeship because "[t]he Commission cannot be regarded as a trustee in the traditional sense, but rather as an administrative agency with responsibilities under the Compacts for administration of a public program in the nature of a quasi-trust." App. 107a-108a. With any restraining trust principles out of the way, the CGCC then considered three different interpretations of the license pool and chose the smallest option. *See Colusa I*, 629 F. Supp. 2d at 1112. When commenting upon the decision, Commissioner Palmer stated that the CGCC

picked the "conservative" and "low-end interpretation" simply because the license pool provision was "imprecise, [and] subject to varying interpretations." App. 110a. As for Hensley, he explained that the selected figure was not an "absolute number," but simply an "arbitrarily" chosen one that would work in the "interim" until the signatory tribes could renegotiate their compacts with the State. App. 109a-110a.

The first of those renegotiations began only days after the CGCC denied Pauma five-hundred licenses at a December 18, 2003 license draw and explained the license pool was exhausted. Pet. App. 10a. Along with four other tribes, Pauma entered into renegotiations with the State and ultimately executed an amendment that increased the annual revenue sharing fees on its pre-existing 1,050 machines by 2,460% – turning $315,000 in judicially-sanctioned regulatory fees into $7,750,000 of payments, the majority of which the State contends it simply dumped into the General Fund. Pet. App. 12a.

Over three months after the execution of Pauma's amendment, a signatory tribe to the original compact named the Cachil Dehe Band of Wintun Indians filed suit in the United States District Court for the Eastern District of California requesting declaratory relief about the total number of licenses created by the Section 4.3.2.2(a)(1) formula. *See Colusa*, No. 04-2265 FCD KJM, Dkt. No. 1 (E.D. Cal. Oct. 25, 2004). The case did not make it out of the pleading stage initially, as the district court accepted the State's argument that a court determination on the size of the license pool

could potentially harm the sixty-plus signatory tribes who were not involved in the suit and could not be joined for sovereign immunity reasons. *See Colusa*, 2006 U.S. Dist. LEXIS 29931 (E.D. Cal. May 16, 2006). After the Ninth Circuit revived the case, the district court issued a dispositive order on April 22, 2009 – four-and-a-half years after the filing of the suit – holding that the Section 4.3.2.2(a)(1) license pool formula allows for 10,549 more licenses than the CGCC maintained. *See Colusa I*, 629 F. Supp. 2d at 1113.

3. Approximately two weeks after the issuance of the opinion in *Colusa I*, Pauma conveyed a settlement letter to the Office of the Governor raising the supervening decision and arguing that it showed the amendment resulted from mistake and was subject to judicial rescission. App. 120a-123a. Nearly seven weeks later, on June 22, 2009, the Office of the Governor responded, disagreeing with Pauma's assessment of the impact of *Colusa I* and stating that "even if rescission were granted, it is possible that Pauma may not benefit from such a determination given that rescission of the Band's compact could leave it with no compact at all." App. 122a. Moreover, "assuming Pauma's suit for rescission could overcome the State's sovereign immunity," the Office of the Governor threatened that "any financial restoration obligation [arising from a lawsuit] would not rest solely upon the State, but could require the band to disgorge all benefits it has received from the ability to operate class III gaming under its compact." App. 122a. After posing this deterrent to

suit, the Office of the Governor terminated the discussion by explaining that it "did not believe it would be fruitful to continue the meet and confer process to discuss the matter further." App. 122a-123a.

After trying in vain to revive the settlement talks over the next two months, Pauma filed its original complaint with the United States District Court for the Southern District of California on September 4, 2009. Dist. Ct. Dkt. No. 1. Amongst other remedies, the prayer for relief in the complaint requested rescission of the amendment and "restitution of unlawful or inequitable compact fees or other such compact fees Pauma paid to the State that constitute unjust enrichment." Dist. Ct. Dkt. No. 1 at p. 22. In keeping with its pre-suit plan to transform an adverse restitution award into an even larger damages remedy for itself, the State refrained from raising a sovereign immunity defense in its first motion to dismiss that it filed on October 9, 2009. Dist. Ct. Dkt. No. 11-1. Similarly, the State also said nothing about sovereign immunity in its opposition to Pauma's motion for preliminary injunction that it filed more than five months later on March 22, 2010. Dist. Ct. Dkt. No. 30.

The preliminary injunction motion filed by Pauma sought to reduce the revenue sharing fees of the amendment to the prior rates of the original compact for the duration of the suit. Dist. Ct. Dkt. No. 34. Just weeks before the hearing, the presiding district judge – Judge Larry Alan Burns – issued a dispositive order in a second case questioning the number of slot machine licenses created by the original compacts. *See*

San Pasqual Band of Mission Indians v. California, No. 06-0988, Dkt. No. 97 (S.D. Cal. Mar. 29, 2010) ("*San Pasqual*"). Mirroring the decision in *Colusa I*, Judge Burns interpreted the Section 4.3.2.2(a)(1) license pool formula as authorizing another 10,549 licenses after finding the State's interpretation of the contract provision was "unreasonable" on multiple grounds. *See San Pasqual*, Dkt. No. 97 at pp. 8-10.

When the hearing on Pauma's motion for preliminary injunction began, Judge Burns referenced his recent decision in *San Pasqual* and explained that the "handwriting's on the wall" for the State, as Pauma was "entitled" to both 2,000 machines under its original compact and the right to rescind the amendment. Dist. Ct. Dkt. No. 56 at pp. 4-5, 17. Since he saw things "so clearly," Judge Burns wanted to dispense with preliminary relief and render a final judgment instead. Dist. Ct. Dkt. No. 56 at pp. 4-5, 11. However, a last-ditch request from the State to conduct discovery persuaded Judge Burns to go to "Plan B" and issue the injunction requested by Pauma. Dist. Ct. Dkt. No. 56 at pp. 9-10. The order on Pauma's motion for preliminary injunction came out the day after the hearing and explained in the discussion therein that "[i]f, as appears likely, Pauma prevails, the [S]tate would be required to make restitution so the larger payments would ultimately not benefit it, resulting in a deadweight loss." App. 48a.

4. The litigation strategy pursued by the State in the wake of the injunction hearing was to forego discovery in favor of filing an interlocutory appeal of the

injunction order. Dist. Ct. Dkt. No. 50. During the three weeks between the injunction hearing and the filing of the notice of appeal, the Ninth Circuit issued its opinion in *Rincon II*, a suit by another tribe alleging that the State negotiated in bad faith by demanding copious amounts of revenue sharing within a compact the State admitted was "similar to [that] accepted by [] Pauma." *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 2008 WL 6136699, *6 (S.D. Cal. 2008). In holding that the State negotiated in bad faith, the Ninth Circuit ruled that "[t]he State's demand for 10-15% of Rincon's net win, to be paid into the State's general fund, is simply an impermissible demand for the payment of a tax by the tribe." *Rincon II*, 602 F.3d at 1042 (citing 25 U.S.C. §§ 2710(d)(3)(C)(iii), (d)(4)).

Believing the decisions in *Colusa I* and *Rincon II* removed any doubt about the outcome of the case, Pauma asked the Ninth Circuit to address the merits of the claims – and not just its likelihood of success on the merits – by applying the legal holdings in the aforesaid cases and awarding the tribe, amongst other remedies, rescission of the amendment and restitution of the heightened revenue sharing fees paid thereunder. *See Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California*, No. 10-5571, Dkt. No. 34-1 at p. 3 (9th Cir. July 13, 2010) ("*Pauma*"). Faced with this request, the State once again said nothing about immunity from restitution during the entire interlocutory appeal. Ultimately, the Ninth Circuit resolved the appeal on November 30, 2010 – days

before the fifteen-month anniversary of the suit – with an order that kept the injunction in place subject to further proceedings before the district court. *See Pauma*, Dkt. No. 64 (9th Cir. Nov. 30, 2010).

5. Once the case returned to the district court, the first event after remand was not a motion for summary adjudication on the sovereign immunity issue by the State, but a series of telephonic status conferences in which the court directed Pauma to file a lone motion for summary judgment. Dist. Ct. Dkt. Nos. 64, 114-1 at p. 4-5. During the second conference call that occurred on December 15, 2010, Judge Burns explained that he saw the merits of Pauma's case even more clearly than he had at the injunction hearing, again indicating that "the writing was on the wall" for the State. Dist. Ct. Dkt. No. 114-1 at p. 5. Given that, Judge Burns ordered Pauma to file a summary judgment motion as soon as possible, a date that turned out to be January 24, 2011. Dist. Ct. Dkt. No. 114-1 at p. 5. After Pauma filed its motion on the deadline and again sought remedies that included restitution (*see* Dist. Ct. Dkt. No. 66 at p. 1-2), the State submitted its opposition on March 7, 2011 and for the very first time mentioned sovereign immunity – raising the argument just days into the nineteenth month of the case. Dist. Ct. Dkt. No. 92 at pp. 24-25. Accompanying this argument was a reiteration of the State's pre-suit position that any restitution award successfully circumventing Eleventh Amendment immunity would still require Pauma "to restore to the State everything of value it received under the 2004 Compact." Dist. Ct. Dkt. No. 92 at p. 25.

One thing Pauma's motion for summary judgment did differently than prior briefs was to detail all the evidence on the trustee issue that the Tribe had obtained up until that point. Dist. Ct. Dkt. No. 66 at pp. 3-4. And yet, with the briefing on the motion complete and the hearing a mere five days away, Judge Burns filed a minute order vacating the hearing "[b]ecause the case [was] being reassigned to Judge Anthony Battaglia." Dist. Ct. Dkt. No. 101. Proceedings after the transfer took on a decidedly different tone, with Judge Battaglia taking Pauma's motion for summary judgment off-calendar and setting a hearing for the State's first motion to dismiss instead – one that would only take place after the parties re-briefed the motion in order to make it current. Dist. Ct. Dkt. Nos. 109, 110.

6. With the suit appearing to start over, the State reverted to its earlier practice of staying mum on sovereign immunity, withholding the defense from a succession of briefs that included the revised iteration of its first motion to dismiss, its answer, and a second motion to dismiss. Dist. Ct. Dkt. Nos. 111-1, 129, 142-1. Harkening back to its practice before Judge Burns, the State's only invocation of sovereign immunity during the second stage of the district court proceeding arose in opposition to summary judgment on December 15, 2011, months after Judge Battaglia granted Pauma (and Pauma alone) leave to refile its prior motion. Dist. Ct. Dkt. Nos. 141, 168. Thus, only one invocation of sovereign immunity occurred during the first twenty-seven months of the suit and that arose after the first district judge ordered Pauma to file a singular motion

for summary judgment and explained that the State would have to pay restitution if it lost.

7. Following a second transfer of the case on the cusp of Pauma's summary judgment hearing, the third district judge – Judge Cathy Ann Bencivengo – would ultimately address the State's sovereign immunity argument after granting Pauma rescission of the amendment on the basis of a single misrepresentation claim. Dist. Ct. Dkt. No. 227. At the restitution hearing on May 29, 2012, Judge Bencivengo raised three different ways in which she thought the State waived its sovereign immunity from repaying the heightened revenue sharing it received under the rescinded amendment. App. 3a-5a. First, there was the waiver in Section 9.4(a)(2) of the compacts, which provides that the parties waive whatever immunity from suit in federal court that they may have so long as "[n]either side makes any claim for monetary damages (that is, only injunctive, specific performance, including enforcement or a provision of this Compact requiring payment of money to one or another of the parties, or declaratory relief is sought)." Pet. App. 28a. According to Judge Bencivengo, "the Tribe has overpaid and is entitled to get the property back . . . [a]nd I don't think [the overpayments are] money damages in the sense that they're outside of the enforcement of the compact." App. 4a.

The second waiver was the one within Section 98005 of the Government Code that provides in pertinent part that the State "submits to the jurisdiction of the courts of the United States in any action brought

against the state by any federally-recognized Indian tribe asserting any cause of action arising from . . . the state's violation of the terms of any Tribal-State compact to which the state is or may become a party." App. 50a. After referencing this language, Judge Bencivengo explained, "That's exactly what happened here. The State did not properly determine the number of licenses. They were entitled to licenses under the '99 Compact. There was [sic] licenses available. They should have gotten them under the terms of that compact. It was a violation, and the money should be returned." App. 4a-5a.

As for a potential third waiver, Judge Bencivengo also raised the State's litigation conduct, remarking that it was "kind of odd" that the State appeared to be raising a sovereign immunity defense "now for the first time" when it was not "even in [its] answer." App. 5a. Ultimately, Judge Bencivengo issued an order on June 11, 2013, finding that the State "contractually waived any immunity to contest the remedy of specific performance [under Section 9.4(a)(2) of the compacts], which here results in the State having to return money belonging to Pauma." Pet. App. 48a. Along with this, the language of the order also tracks the text of Section 98005 of the Government Code by explaining that "[t]he State violated the terms of the 1999 Compact when . . . it misrepresented the Pool to be exhausted of licenses and refused to issue 550 licenses to Pauma on that basis." Pet. App. 47a.

8. On appeal, the Ninth Circuit denied the State's sovereign immunity defense similarly to Judge

Bencivengo. First, the opinion explains that the return of a revenue sharing overpayment falls within the portion of the Section 9.4(a)(2) waiver covering the "enforcement of a provision of this Compact requiring payment of money to one or another of the parties," even though the appellate court phrased the remedy as restitution rather than specific performance. Pet. App. 30a-31a. Then, the panel bolstered its decision by indicating that its ruling "is supported by the California Supreme Court, which upheld . . . the waiver" in Section 98005 of the Government Code. Pet. App. 32a.

REASONS FOR DENYING THE PETITION

A. The first waiver of sovereign immunity in Section 9.4(a)(2) of the compacts permits no other construction than one recognizing that the return of an overpayment is not "monetary damages," but a specific remedy resulting from the "enforcement of a provision of the Compact requiring payment of money to one or another of the parties"

1. The crux of the State's argument is that the Ninth Circuit misapplied the sovereign immunity rules in *Edelman v. Jordan*, 415 U.S. 651 (1974), by interpreting the waiver in Section 9.4(a)(2) of the compacts to require restitution of a contractual overpayment without considering whether there is another reasonable construction of the provision that would protect the State from disgorging its ill-gotten gains. Pet. 11. In fact, the interpretations issued by the Ninth

Circuit and the district court in this action are the only ones that give effect to all the terms within the waiver, and thus the only reasonable constructions of the provision. To explain, the waiver in Section 9.4(a) of the compacts states in material part that the parties waive whatever immunity from suit in federal court they may have provided that

> (2) Neither side makes any claim for monetary damages (that is, only injunctive, specific performance, including enforcement of a provision of this Compact requiring payment of money to one or another of the parties, or declaratory relief is sought)[.]

Pet. App. 28a.

Reviewing this language in a case involving the rescission of an amendment to an earlier contract means there are different ways to frame a monetary remedy designed to restore the *status quo ante*. Though the terminology used by the Ninth Circuit and the district court is dissimilar, the remedies are actually one and the same. The Ninth Circuit simply chose to conduct the analysis in one step, classifying the specific monetary remedy at issue as restitution and tying it to the rescission of the amendment. Pet. App. 22a-23a. Whereas the district court engaged in a two-step process, first rescinding the amendment and then granting Pauma specific performance of the original compact. Pet. App. 46a-47a.

2. Both courts agreed on two things, however. The first is that the remedy – whether labeled as restitution or specific performance – was not "monetary damages" (*see* Pet. App. 29a, 48a), a conclusion that aligns with the universally-held perception of the terms throughout the federal court system. *See, e.g.*, *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988) ("Our cases have long recognized the distinction between an action at law for damages . . . and an equitable action for specific relief – which may include an order providing for . . . 'the recovery of specific property or monies. . . .'" (citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 699 (1949))); *United States v. Balistrieri*, 981 F.2d 916, 928 (7th Cir. 1993) ("The word 'damages' has a commonly understood meaning: it generally connotes a payment in money for a plaintiff's losses caused by a defendant's breach of duty and is something different from equitable restitution.").

The second is that the restitutionary remedy, however classified, fits within the clause in the waiver allowing for the "enforcement of a provision of this Compact requiring payment of money to one or another of the parties." Pet. App. 30a-31a, 48a. The only provisions under either the original compact or the amendment that require the payment of monies are those obligating Pauma to pay the State revenue sharing in exchange for the right to operate slot machines within its gaming facility. App. 53a, 56a, 112a-116a. The revenue sharing fee attached to a particular slot machine is a concrete sum, irrespective of whether it is

a flat fee or a certain percentage of the revenues generated by the machine. App. 53a, 56a. Given this, either party has the ability to enforce the revenue sharing terms of the operative compact if the amount paid somehow deviates from the specified total: the State can file an action in the event of an underpayment while a tribe like Pauma can conversely seek to recoup an overpayment if it mistakenly paid too much into the system. With rescission being the preparatory step for other remedies, the restitution award in this case is simply the Ninth Circuit voiding the amendment and enforcing the appropriate amount of revenue sharing that Pauma should have paid under the original compact while the amendment was in effect.

3. Thus, the analyses conducted by the Ninth Circuit and the district court both conclude that the specific monetary remedy at issue in this case avoids the prohibition on "monetary damages" *and* fits within a clause permitting the enforcement of a provision of a compact requiring the payment of monies. The State contends, however, there is another "reasonable construction" of this waiver that involves deleting the aforementioned clause and limiting the provision to seemingly prospective forms of "injunctive, specific performance . . . or declaratory relief." Pet. 13. Reading terms out of a contract does not yield a reasonable construction of the affected provision, though. *See, e.g.*, *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California*, 618 F.3d 1066, 1080 (9th Cir. 2010) ("*Colusa II*") (stating an interpretation that disregards the text of the compact is not reasonable).

Assuming, *arguendo*, that the conclusion reached by the Ninth Circuit is incorrect, the error would still relate to nothing more than the misapplication of a correctly-stated rule of law to the text of a waiver that the State has already phased out of the most recent tribal/State compacts. *See* Office of Governor Edmund G. Brown, Jr., *Tribal-State Compact between the State of California and the Pala Band of Mission Indians* § 13.4(a) (indicating the new waiver precludes claims for either monetary damages *or* restitution), *available at* https://www.gov.ca.gov/docs/5.9.16_Compact.pdf (last visited May 12, 2016). Petitions raising analytical errors of this sort are "rarely granted" according to the Court's own rules. *See* Sup. Ct. R. 10. Further, the rare grant of review presumably arises in cases with prejudicial errors and not situations like this one where upwards of four additional grounds support the remedy being challenged. This fact alone warrants denying the State's petition.

B. A second waiver of sovereign immunity in Section 98005 of the California Government Code supports the Ninth Circuit's decision despite the State's cursory treatment of the issue

1. Buried largely within a footnote at the end of the petition is a passing mention of a waiver of sovereign immunity in Section 98005 of the Government Code that was allegedly never raised on appeal and only repeals the State's immunity for claims alleging bad faith negotiation under IGRA. Pet. 17. Only the

second contention holds a kernel of truth, as Section 98005 does indeed enable tribes to sue the State in federal court to pursue the IGRA statutory remedy. *See Rincon II*, 602 F.3d at 1026. The waiver does not stop there, though, as it says in relevant part that the State of California

> submits to the jurisdiction of the courts of the United States in any action brought against the state by any federally recognized California Indian tribe asserting any cause of action arising from the state's refusal to enter into negotiations with that tribe for the purpose of entering into a different Tribal-State compact pursuant to IGRA or to conduct those negotiations in good faith, the state's refusal to enter into negotiations concerning the amendment of a Tribal-State compact to which the state is a party, or to negotiate in good faith concerning that amendment, or the state's violation of the terms of any Tribal-State compact to which the state is or may become a party.

App. 50a. The California Supreme Court had the opportunity to analyze the constitutionality of this provision in 1999, and in so doing interpreted the scope of the waiver as covering any claims brought by a tribe "concerning the negotiation, amendment, and performance of compacts." *Hotel Employees & Rest. Employees Int'l Union v. Davis*, 21 Cal. 4th 585, 614 (1999).

Shifting away from the bad faith negotiation clause and to the "violation of the terms of any Tribal-State compact" language reveals the reason why the

State discussed an abridgement of the statute. A violation of a contract is synonymous with a breach (*see* Black's Law Dictionary 200 (8th ed. 2004)), and a breach is "a pure and simple question of contract interpretation . . . whether you are on the sunny shores of California or enjoying a sweet autumn breeze in New Jersey." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1262-63 (11th Cir. 2004), *cert. denied sub nom. UnitedHealth Group, Inc. v. Klay*, 543 U.S. 1081 (2005) (citation omitted). In other words, the failure to properly interpret the license pool formula in Section 4.3.2.2(a)(1) of the original compact was a breach of the agreement (as the final decision in *Colusa II* proves), and the revenue sharing Pauma improperly paid the State under the amendment *arose* therefrom. These two indisputable facts are all that Pauma has to prove under the violations clause, which means the restitution award falls squarely within the statutory waiver.

In fact, Judge Bencivengo made this clear when she discussed the merits of the State's sovereign immunity defense at the restitution hearing on May 29, 2013. App. 4a-5a. After explaining the return of an overpayment falls within the waiver in Section 9.4(a)(2) of the compacts, Judge Bencivengo turned her attention to the violations clause in Section 98005 of the Government Code and stated rather emphatically, "That's exactly what happened here. The State did not properly determine the number of licenses available. They were entitled to licenses under the '99 Compact. There was licenses available. They should have gotten

them under the terms of that compact. It was a violation, and the money should be returned." App. 4a-5a. These sentiments then found their way into the order waiving the State's sovereign immunity, with Judge Bencivengo reiterating that "[t]he State violated the terms of the 1999 Compact when . . . it misrepresented the Pool to be exhausted of licenses and refused to issue 550 licenses to Pauma on that basis." Pet. App. 47a.

The Ninth Circuit may have been hesitant to draw unnecessary attention to the applicability of Section 98005 of the Government Code after already finding the restitution award fell within the waiver in Section 9.4(a)(2) of the compacts, but it nevertheless indicated that the California Supreme Court's interpretation of the statutory provision "supported" its decision. Pet. App. 32a. How much support it provides, again, was made clear by the district court when it indicated both orally and in writing that the State's unreasonable calculation of the license pool formula that has been *res judicata* for nearly six years now suffices to satisfy the elements for establishing a waiver under the violations clause of Section 98005. As such, this statutory waiver serves as an alternate basis for the restitution award, and the State's failure to meaningfully contest the applicability of the provision is additional reason to deny the petition.

C. A third waiver of sovereign immunity that the Ninth Circuit did not address but Pauma will continue to pursue on remand if the judgment is overturned arises from the State's tactical decision to refrain from asserting sovereign immunity for the first eighteen months of the suit so it could pursue a massive damages award

1. The two waivers discussed by the Ninth Circuit are just a portion of those raised by Pauma on appeal. One of the other waivers pertained to the State withholding the defense during the litigation until it had a clear indication that it was going to lose, but the Ninth Circuit deflected consideration of the waiver at oral argument by incorrectly suggesting that this Court has disallowed waivers in the litigation context under one of its most recent opinions on the subject. *See* United States Court of Appeals for the Ninth Circuit, Video Recording of Oral Argument in *Pauma Band of Luiseno Mission Indians v. State of California* at 31:11, *available at* http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000007990 (last visited May 13, 2016).

In actuality, members of this Court have been concerned for some time with the unfair advantage a state can derive by litigating a case and then belatedly raising a sovereign immunity defense in order to avoid an adverse decision. For instance, Justice Kennedy articulated this concern nearly twenty years ago when he explained the Court should adopt a rule that a state

defendant should raise an Eleventh Amendment immunity defense at the outset of the proceeding. *See Wisconsin Dep't of Corr. v. Schacht*, 524 U.S. 381, 395 (1998) (Kennedy, J., concurring). The sentiments behind this standard soon took hold, as the Court found that permitting waiver in the litigation context comported with the twin aims of the Eleventh Amendment to promote consistency and prevent unfairness, attributes that would be undermined if a state entity was able to "selective[ly] use" immunity to achieve tactical "litigation advantages." *Lapides v. Bd. of Regents*, 535 U.S. 613, 620-21 (2002). This standard mirrors the one used by the Ninth Circuit that precludes a state from engaging in litigation conduct that is "incompatible with an intent to preserve [Eleventh Amendment] immunity," such as by making a "tactical decision to delay asserting the sovereign immunity defense." *Johnson v. Rancho Santiago Cmty. College Dist.*, 623 F.3d 1011, 1021-22 (9th Cir. 2011), *cert. denied sub nom. Bertalan v. Rancho Santiago Cmty. College Dist.*, 563 U.S. 936 (2011).

"Tactical" is the only way to describe the State's decision to keep its sovereign immunity defense in reserve in this case. Three months before the inception of the suit, the Office of the Governor tried to deter Pauma from filing a complaint by explaining that a favorable outcome could actually harm the Tribe by requiring it "to disgorge *all* benefits it has received from the ability to operate class III gaming under its compact." App. 122a. Pursuing a damages offset that would

actually swallow the underlying restitution award necessitates withholding an Eleventh Amendment immunity defense. And this is exactly what the State did throughout the first twenty-seven months of the litigation in three rounds of motion to dismiss briefing, an answer, an opposition to preliminary injunctive relief, and all of its briefing in an interlocutory appeal that concerned Pauma's likelihood of success on the merits. *See, e.g.*, Dist. Ct. Dkt. Nos. 11-1, 30, 111-1, 129, 142-1. The *only* time during this initial twenty-seven-month period that the State mentioned sovereign immunity was at the eighteen-month mark in opposition to Pauma's motion for summary judgment. Dist. Ct. Dkt. No. 92 at p. 24-25. However, even then, the defense was simply a last minute effort to stave off an adverse judgment after Judge Burns ordered Pauma to file a lone motion for summary judgment following his earlier explanation that the State would have to pay restitution if it lost. App. 48a; Dist. Ct. Dkt. No. 64.

A declaration of intent to be sued hardly comes any clearer, and this is the antithesis of the situation where a state entity preserved its immunity from a certain remedy by raising the defense in its answer a month after the inception of the suit. *See Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 546-47 (2002). Though the Ninth Circuit may have avoided discussing waiver by litigation conduct, the State's deliberate strategy in this case easily satisfies the standard test and provides yet another reason for denying the petition for certiorari.

D. Two additional exceptions to sovereign immunity apply because the State committed a series of *ultra vires* acts to obtain exponentially more "revenue sharing" from Pauma, all of which was earmarked to go into non-public funds for uses consistent with IGRA

1. A discussion of waivers of sovereign immunity assumes the defense applies in the first place, which is not the case when a party does something it cannot legally do to acquire monies it cannot legally obtain. One of the enduring principles of Eleventh Amendment law is that a suit for the return of specific property does not offend the sovereign immunity of a state if the plaintiff claims that a public official acted beyond its authority or in an unconstitutional manner. *See Florida Dep't of State v. Treasure Salvors*, 458 U.S. 670, 696-97 (1982) (citing *Larson*, 337 U.S. at 701). The history of this dispute involves the CGCC forcibly taking over administration of the license pool under the original compacts, and then unilaterally interpreting the meaning of this contract provision. Taking this second action was a step too far according to the court in *Colusa I*, which explained that

> [t]he authority to administer the draw process does not give the Commission concomitant authority to interpret the Compact. While interpretation issues may and have arisen throughout the draw process, the Commission's role as Trustee does not grant deferential review to its interpretation.

Colusa I, 629 F. Supp. 2d at 1108 n.15.

This conclusion that the CGCC lacked the authority to interpret the compact is sound under both contract and trust law. As to the former, contract interpretation is a judicial function (*see Colusa II*, 618 F.3d at 1073 (citation omitted)), and as such the "meaning of a contract is ordinarily decided by the court, rather than by a party to the contract, let alone the party that drafted it." *Herzberger v. Standard Ins. Co.*, 205 F.3d 327, 330 (7th Cir. 2000) (Posner, J.). A trustee does not inherently possess interpretive powers above and beyond a normal contracting party, and as a consequence may only construe disputed or doubtful terms if the trust instrument expressly provides as much. *See Firestone Tire & Rubber v. Bruch*, 489 U.S. 101, 111 (1989). Given these rules, the instigating event in the negotiation of Pauma's amendment was an *ultra vires* act by a named State defendant in this suit. Everything thereafter occurred outside the bounds of lawful authority, as the Office of the Governor leveraged its statutorily-conferred ability to negotiate under IGRA to resell preexisting rights. On top of which, if one takes the State's word at face value, the negotiation process ended with another clear-cut *ultra vires* act when the State took the bulk of the regulatory payments that Pauma made under the amendment and funneled them directly into the General Fund (*see, e.g.*, Pet. App. 14-15), even though doing so is an act that is "neither authorized by IGRA nor reconcilable with its purposes." *Rincon II*, 602 F.3d at 1036.

2. The talk of general fund revenue sharing should not detract from the fact that the payments

Pauma made under the amendment were anything but discretionary revenues for the State. The original compacts created two different funds into which signatory tribes would make payments. Certain baseline machine entitlements under Section 4.3.1 carried a revenue sharing obligation, and those payments went into the Special Distribution Fund ("SDF") to cover the expenses incurred by the State in regulating Indian gaming. App. 56a. Conversely, all licensed machines under Section 4.3.2.2(a)(1) carried a specified annual fee ranging from $0 to $4,350 that would go into the Revenue Sharing Trust Fund ("RSTF") to provide each of the non-gaming tribes in the State with $1.1 million of annual financial support. App. 52a-53a.

This arrangement remained in place under the 2004 Amendment with Pauma making annual payments of $2,000,000 into the RSTF and $5,750,000 into an undisclosed SDF-like account, the corpus of which the State was supposed to use as security for the issuance of regulatory bonds. App. 115a-116a. The identity of these accounts is significant because the limitation on monetary remedies in *Edelman* only pertains to liabilities which must be paid from "public funds" in the state treasury. *See Edelman*, 415 U.S. at 663. What we have here, however, are two "special funds" devoted to purposes that are "consistent" with IGRA and from which the State is not supposed to derive "general tax" revenues. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 840-41 (1995) (explaining a student activity fee did not constitute "public funds" since it went into a special account for uses consistent

with the University's educational mission rather than to provide general tax revenue).

With the State simply acting as an intermediary for the payments flowing through the compact scheme, the accounts into which Pauma should have paid – and can recover – its monies do not contain public funds as that term is understood in *Edelman* and *Rosenberger*. With that said, the invalidation of all five waivers and exceptions to Eleventh Amendment immunity discussed above would still not prevent Pauma from arguing on remand that it can use the $36.2 million restitution award as a credit against future revenue sharing obligations. *See Elephant Butte Irrigation Dist. v. Dep't of Interior*, 160 F.3d 602, 612 (10th Cir. 1998), *cert. denied sub nom. Salisbury v. Elephant Butte Irrigation Dist.*, 526 U.S. 1019 (1999) (explaining the loss of future revenues under a contract does not offend a state's sovereign immunity).

E. The supposed harms created by the decision below ring hollow and are just like the ones the State raised in its petition for writ of certiorari in *Rincon* that proved to be wildly inaccurate

1. Before ending the petition, the State raises the specter that the decision below could expose the California treasury to liabilities far exceeding $36.2 million on account of copycat suits filed by some of the other fifty-six signatory tribes that executed the original compacts in 1999. Pet. 14-15. This parade of horribles argument sounds just like the one the State

raised in its *Rincon* petition in an attempt to convince this Court to overturn the Ninth Circuit's holding that general fund revenue sharing is "not an authorized subject of negotiation under" IGRA. App. 126a-141a; *see Rincon II*, 602 F.3d at 1034. Within this prior petition, the State detailed how general fund revenue sharing provisions are found within compacts from California to Connecticut. App. 127a. The ubiquity of these compacts meant that the consequences flowing from the Ninth Circuit decision were "difficult to exaggerate" and quite easy to predict in the view of the State. App. 135a. The perceived reality was that "[l]iterally hundreds of millions of dollars in general fund revenues [was] at stake" because "litigation will likely be filed in the Second, Sixth, Tenth, and Eleventh Circuits to unsettle dozens" of compacts that the opinion in *Rincon II* called into question. App. 135a, 140a-141a.

This grandiose claim that *Rincon II* would produce an unprecedented and uncontrollable domino effect was the epitome of hyperbole, as not a single tribe filed suit to rescind or reform a compact requiring general fund revenue sharing in the aftermath of the Ninth Circuit's decision. As for this case, the key fact to remember is that the dispositive order in *Colusa I* disclosing that the State had grossly misrepresented contract rights came out on April 22, 2009 – or more than seven years ago. *See Colusa I*, 629 F. Supp. 2d 1091. The final appellate opinion issued just a year after that. *Colusa II*, 618 F.3d 1066. Thus, if another tribe were to file suit to hold the State liable for its misrepresentations after all of this time, it would

undoubtedly run into a grave statute of limitations problem under either federal or state law. *See, e.g.*, Cal. Civ. Proc. Code § 337 (specifying a four-year statute of limitations for an action upon any contract, including one for rescission). Raising this defense in future suits against presently nonexistent plaintiffs is a much more equitable way to quell concerns about spillover effects than to deprive an actual victim of redress. And even if the State fails to raise the defense in a future hypothetical suit, it can rest assured knowing that the district court may well raise the defense on its behalf, just as it did in this suit when the State withheld the defense because it conflicted with its theory of the case. Pet. App. 52a.

CONCLUSION

The petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED this 20th day of May, 2016

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Pauma Band of Luiseno
Mission Indians of the
Pauma & Yuima Reservation

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