15-1291
No.

In The
Supreme Court of the United States

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,

Petitioner,

v.

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;

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

One of the statutory elements for establishing a *prima facie* case of bad faith negotiation against a state under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*, is that "a Tribal-State compact has not been entered into." 25 U.S.C. § 2710(d)(7)(B)(ii)(I). In this case, the United States Court of Appeals for the Ninth Circuit interpreted this language according to the *status quo ante*, holding that an Indian tribe who sought and obtained a declaration rescinding a compact could not pursue a claim for latent bad faith negotiation against a state that induced the compact through material misrepresentations in order to increase its tax receipts (*i.e.*, "revenue sharing") by 2,460%. With this holding seeming to violate deep-rooted principles of retroactivity and interpretive norms for the Indian Gaming Regulatory Act set forth within this Court's precedent, the question presented is:

Whether an Indian tribe can pursue a bad faith negotiation claim against a state under Section 2710(d)(7)(A)(i) of the Indian Gaming Regulatory Act after rescinding a compact induced by misrepresentation or other latent bad faith conduct, and thus bringing its circumstances into compliance with the statutory requirement that "a Tribal-State compact has not been entered into."

PARTIES TO THE PROCEEDING

Petitioner is the Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation, a federally-recognized Indian tribe. Respondents are the State of California, the California Gambling Control Commission, and Edmund G. Brown, Jr., as Governor of the State of California.

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PETITION FOR WRIT OF CERTIORARI

The Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation ("Pauma" or "Tribe") respectfully petitions for a writ of certiorari to review the portion of the judgment of the United States Court of Appeals for the Ninth Circuit in this case pertaining to the interpretation of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq*.

OPINIONS BELOW

The amended opinion of the Ninth Circuit (*see* App. 1a-43a) awaits publication in the Federal Reporter, but is presently found at 2015 U.S. App. LEXIS 22633 (9th Cir. 2015). The original opinion issued by the Ninth Circuit is reported at 804 F.3d 1031 (9th Cir. 2015). The dispositive order of the district court (*see* App. 44a-57a) is unpublished and unavailable on either major legal research service.

JURISDICTION

The Ninth Circuit entered judgment on October 26, 2015. App. 1a. The court of appeals subsequently reentered judgment on December 18, 2015 after amending its original opinion and denying the petitions for panel rehearing and rehearing *en banc* filed by the parties. App. 1a. On March 10, 2016, Justice Kennedy granted Pauma an extension of time in which to file a petition for writ of certiorari, extending the deadline

to April 18, 2016. The jurisdiction of this Court arises under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2710(d)(7) of IGRA provides in relevant part (*see* App. 70a-72a):

> (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,
>
> (ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and
>
> (iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).
>
> (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 when 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.

INTRODUCTION

This case involves the State of California ("State") misrepresenting the central term of a gaming compact under IGRA and inducing Pauma to execute an amendment that increased its revenue sharing payments to the State by 2,460%. In the opinion below, the Ninth Circuit rescinded the amendment and thereby returned Pauma to a compact that now only has four years remaining on its term. However, the Ninth Circuit sheltered the State from a finding of bad faith negotiation under Section 2710(d)(7) of IGRA that would have enabled the parties to sit down under court supervision and negotiate a successor

compact. *See* 25 U.S.C. § 2710(d)(7)(B)(iii)-(vii) (explaining the remedy for bad faith negotiation involves renewed negotiations or baseball-style arbitration should those fail).

The stated basis for denying Pauma this statutory remedy is that one of the two elements for making out a *prima facie* case of bad faith negotiation under Section 2710(d)(7)(B)(ii) requires that a "Tribal-State compact has not been entered into." 25 U.S.C. § 2710(d)(7)(B)(ii)(I). With rescission universally understood to void a contract from its very inception, the Ninth Circuit simply elected to interpret this statutory language in light of the *status quo ante*. The decision to do this means the prevailing method for interpreting IGRA in the Ninth Circuit conflicts with the one recently used by this Court in *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. ___, 134 S. Ct. 2024 (2014) ("*Bay Mills*"), as well as the inveterate principles regarding the retroactivity of civil holdings articulated in *Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993). Not to mention, this method of interpretation has huge practical consequences for tribes – forcing Pauma to re-approach the misrepresenting party to obtain a compact even though the State has accumulated four bad faith findings in the past six years (*see* Reasons § B(2), *infra*), and ensuring that any tribe without an amended compact will simply have to live with the effects of a state's latent bad faith conduct irrespective of its egregiousness.

As to that last point, the startling evidence of bad faith in this case seems to have been the biggest

detriment for Pauma. What started out as a district judge explaining the "writing [was] on the wall" for the State and ordering Pauma to file a motion for summary judgment as soon as possible turned into two transfers and three years of additional litigation when the Tribe began to detail its supporting evidence. Throughout the circuitous path of this lawsuit, neither the district court nor the Ninth Circuit would discuss Pauma's evidence in any of their opinions. As the State admits in its own petition for writ of certiorari (*see California v. Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation*, No. 15-1185, Dkt. No. 1 at p. 15 (U.S. Mar. 17, 2016)), everyone is in agreement about the evidence at this point; rather, it is simply a matter of no one wanting to talk about it. With that said, the evidence *is* crucial for understanding the impact of the Ninth Circuit's interpretation of IGRA, and, thus, this petition will detail key pieces of it below.

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 agree to 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 except for 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 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"*).

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 pm on the evening before the end of the legislative session *See Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California* ("*Colusa*"), 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. 75a. The second section (*i.e.*, Section 4.3.2.2(a)) goes on 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):

> Sect. 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. 77a.

The signatory tribes would compete for these additional slot machine licenses during communal draws structured like a "worst to first" professional sports draft. App. 77a-79a. 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. 78a. 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 better pick can draw again. App. 78a. At the conclusion of the first round, "[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. 79a (emphasis added).

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. 82a-83a. 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. 85a. 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. 86a-87a.

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. 89a. 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. 89a, 92a. 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. 94a (emphasis added).

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. 98a-103a. Paragraph 5 of the Rules indicated that a certified public accounting firm licensed in California with no recent professional ties to any party to the compact would serve as the "Pool Trustee." App. 99a. After the signatory tribes selected the Sacramento-based firm of Sides Accountancy to act as Pool Trustee, the State's negotiator drafted a letter on behalf of the Office of the Governor 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. 104a-108a.

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. 109a-111a. 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. 112a-113a. 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. 113a. 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. 114a.

Months after this first license draw, the CGCC would come into existence and begin 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. 115a-116a. 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. 117a-123a. 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. 121a. 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. 124a), 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. 125a. With that situation now resolved, the letter proceeded 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 his 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. 126a-127a.

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. 126a), 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. 131a-132a.

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 Michael 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. 134a. As for Hensley, he explained that the selected figure was not an "absolute number," but simply one picked "arbitrarily" by the CGCC that would work in the "interim" until the signatory tribes could renegotiate their compacts with the State. App. 133a-134a.

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 that the corpus of the license pool had been exhausted. 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 overwhelmingly General Fund payments. App. 12a.

More than 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 initially make it out *of the pleading stage, 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 because of their sovereign immunity. *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 complaint – 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 district court in *Colusa* entered judgment on the declaratory relief claim (*see Colusa*, 2009 U.S. Dist. LEXIS 77757 (E.D. Cal. Aug. 19, 2009)), Pauma filed its original complaint with the United States District Court for the Southern District of California seeking a declaration that its amendment was void and rescinded, restitution of the heightened fees the Tribe paid under the agreement, and the right to pursue two claims for bad faith negotiation after rescission when the Tribe's circumstances complied with the statutory requirements of IGRA. *See* Dist. Ct. Dkt. No. 1 at pp. 20-23. The Clerk of the Court assigned the case to District Judge Larry Burns, who was presiding over a second case questioning the number of licenses

created under Section 4.3.2.2(a)(1) of the compacts. *See San Pasqual Band of Mission Indians v. California*, No. 06-0988 LAB AJB (S.D. Cal. filed on May 3, 2006) ("*San Pasqual*"). Mirroring the outcome in *Colusa I*, Judge Burns also ruled that the Section 4.3.2.2(a)(1) license pool formula permitted an additional 10,549 licenses above the CGCC's total. *See San Pasqual*, Dkt. No. 97 at pp. 8-10 (S.D. Cal. Mar. 29, 2010).

After the release of the dispositive order in *San Pasqual*, Judge Burns held a status conference with the parties on December 15, 2010, whereat he explained the "writing [was] on the wall" for the State and ordered Pauma to file a lone motion for summary judgment as soon as possible. Dist. Ct. Dkt. Nos. 64, 114-1 at ¶¶ 14-17. The supporting memorandum filed by Pauma would detail evidence on the trustee issue obtained from the plaintiff tribe in *Colusa* and argue that the State acted in bad faith during the negotiations for the amendment. *See* Dist. Ct. Dkt. No. 66 at pp. 3-4, 14 & 19. Five days before the scheduled summary judgment hearing, Judge Burns posted a minute order vacating the hearing "[b]ecause the case [was] being reassigned to Judge Anthony Battaglia." Dist. Ct. Dkt. No. 101.

4. The first act by Judge Battaglia was to take Pauma's pending motion for summary judgment off-calendar and schedule a hearing on a motion to dismiss by the State. Dist. Ct. Dkt. No. 109. That motion challenged the bad faith claims by setting forth the statutory elements in Section 2710(d)(7)(B)(ii) of

IGRA for proving a *prima facie* case of bad faith negotiation and then arguing that Pauma could not satisfy these requirements as a matter of law because "*federal courts only have jurisdiction to rule upon a* 'bad faith' claim under 25 U.S.C. § 2710(d)(7)(A)(i) where a 'Tribal-State compact has not been entered into' (25 U.S.C. § 2710(d)(7)(B)(ii)(I))." Dist. Ct. Dkt. No. 111-1 at pp. 16-17. When the matter came on for hearing, Judge Battaglia began the discussion of bad faith negotiation by laying out the parties competing positions: Pauma "allege[d] that the [amendment] is therefore illegal and void and negotiated in bad faith," while the State contended that "a bad faith claim predicated on IGRA cannot be alleged after a class III gaming compact has been negotiated." App. 60a. After discussing the issue in depth, Judge Battaglia rejected the State's argument, stating that "[t]o say the parties are simply left to fend for themselves [after the conclusion of a compact], I think, defeats the purpose of the law and the spirit." App. 65a-67a.

Prevailing on the bad faith negotiation argument was but a short lived victory for Pauma, as Judge Battaglia concluded the hearing by explaining that he was "not bound by what Judge Burn's instincts were at whatever times" and planned to "call [the case] as he [saw] it." Dist. Ct. Dkt. No. 132 at pp. 47-50. Fearing Judge Battaglia was starting the case anew after more than two years of litigation, Pauma filed an eighty-one page amended complaint with the court, one that set forth in allegation form all of the trustee

evidence acquired up until that point. Dist. Ct. Dkt. No. 130. Shortly thereafter, the clerk for Judge Battaglia called counsel for Pauma and asked that they file some document so the court could address the pending motion for summary judgment as to the First Amended Complaint – a request the district court later confirmed by written order granting Pauma (and Pauma alone) leave to refile a summary judgment motion by November 15, 2011. Dist. Ct. Dkt. No. 141. In succession, Pauma filed its second motion for summary judgment and the district court then denied the State's motion to continue the hearing on the matter since it had "failed to show good cause for yet another delay." Dist. Ct. Dkt. Nos. 144, 171. Yet, just like what occurred a year earlier, Judge Battaglia transferred the case on the cusp of the summary judgment hearing, this time to Judge Cathy Ann Bencivengo. Dist. Ct. Dkt. No. 176.

5. Though nearing the third anniversary of the filing date for the suit, the initial proceedings before the third district judge mirrored those in the second, with Judge Bencivengo taking Pauma's motion for summary judgment off-calendar and scheduling a hearing on a second motion to dismiss by the State instead. Dist. Ct. Dkt. No. 180. The outcome of the hearing was an order denying all eight arguments raised by the State, including one positing that "[t]he use of the term 'trustee' in the 1999 Compact is for a limited purpose and nothing in the 1999 Compact nor any statute supports the conclusion that a trust was created." Dist. Ct. Dkt. No. 142-1 at p. 15. The order

on the State's second motion to dismiss considered this argument meritless, explaining "[t]he 1999 Compact and Gaming Device Pool Rules expressly state that a 'Trustee' is responsible for administering the distribution of gaming device licenses to applicant gaming tribes" and, "[t]hus, [Pauma] sufficiently pleads a trust relationship with the CGCC." Dist. Ct. Dkt. No. 188 at pp. 5-6.

The apparent trustee status of the CGCC would guide the next stage of the proceedings, as Judge Bencivengo set up an expedited discovery period during which the parties would exchange evidence on the trustee topic and one other issue, after which she would hear cross-motions for summary judgment. Dist. Ct. Dkt. No. 182 at pp. 40-43. The first motion in the summary judgment process came from Pauma and included whatever documents the State was voluntarily willing to turn over on the trustee issue (*see* Dist. Ct. Dkt. No. 193), which largely consisted of the CGCC communications detailed herein. Dist. Ct. Dkt. No. 197 at pp. 2-21.

Despite all of the extrinsic evidence on the trustee issue coming from Pauma, the summary judgment hearing began with Judge Bencivengo indicating that she wanted to revisit her prior trustee ruling because she felt that she might have "skipped over" some things during the pleading stage and "assumed a [fiduciary relationship] without a lot of factual support." Dist. Ct. Dkt. No. 225 at p. 4. Along with this, Judge Bencivengo also raised an overarching statute of limitations defense on the State's behalf *sua sponte*

that the State had not raised in any of its summary judgment briefing. Dist. Ct. Dkt. No. 225 at pp. 17-21.

The summary judgment order issued by Judge Bencivengo on March 18, 2013 not only addressed the statute of limitations argument and thus provided the State with an overarching defense to pursue on appeal, but also reached a contrary conclusion on the trustee issue. Dist. Ct. Dkt. No. 227. All the evidence Pauma submitted on the trustee issue disappeared from sight, as the statement of facts simply explained in a footnote that "[t]he background context for the 1999 Compact is set out in the Ninth Circuit's opinion in *Colusa II*." Dist. Ct. Dkt. No. 227 at p. 4. Similarly, the only mention of Pauma's evidence in the analysis section of the order is a sentence that summarily dismisses it by stating "exhibits 1-2, 8-10, 14-16, 26-29, 34-38, 40, 43 and 45 . . . do not meet the standard set out by the Court for the imposition of fiduciary liability on the State." Dist. Ct. Dkt. No. 227 at pp. 23-24. With the extrinsic evidence out of the way, Judge Bencivengo ruled on the trustee issue according to the plain language of the compact, this time taking the exact opposite position after adopting the State's previously-rejected argument that the compact's "reference to 'Trustee' is limited in scope and does not impose trust duties on the State concerning its administration of the Pool." Dist. Ct. Dkt. No. 227 at p. 23.

In terms of remedies, the summary judgment order concluded by awarding Pauma rescission of the amendment on the basis of a single misrepresentation claim and then "declin[ing] to address the

remaining Claims in the cross-motions for summary judgment at this time." Dist. Ct. Dkt. No. 227 at p. 30. Over the next nine months, Judge Benecivengo would issue two related summary judgment orders to address the other remedies flowing from the misrepresentation claim (*see* Dist. Ct. Dkt. Nos. 238, 245), the last of which ordered the State to return the heightened revenue sharing payments it received under the amendment, and then directed the clerk of the court to enter judgment and close the case. Dist. Ct. Dkt. No. 245.

With rescission of the amendment seeming to satisfy the statutory requirement in IGRA that "a Tribal-State compact has not been entered into," counsel for Pauma asked Judge Bencivengo during a subsequent conference call to reopen the case so the Tribe could file a fourth summary judgment motion dealing with its bad faith claims. Dist. Ct. Dkt. No. 248. The district court agreed, vacating the clerk's judgment and setting the hearing date for Pauma's fourth motion for summary judgment as February 6, 2014. Dist. Ct. Dkt. No. 248. The hearing would never take place, though, as Judge Bencivengo took it off-calendar shortly after the filing of Pauma's motion and simply issued a written order denying the motion on three separate technical grounds before directing the clerk of the court to once again close the case. App. 44a-57a. Chief among the three reasons for denying the motion was that "a plain reading of the statute indicates that the procedures do not apply in circumstances where the State and a Tribe actually reach a

compact" – the very argument Judge Battaglia rejected nearly three years earlier when the State raised it in its first motion to dismiss. App. 55a.

6. Seeing the case forcibly closed for a second time led Pauma to file a petition for writ of mandamus with the Ninth Circuit requesting the appellate court to order Judge Bencivengo to decide Pauma's outstanding claims in light of the evidence submitted by both of the parties on summary judgment. *See In re Pauma Band of Luiseno of Pauma & Yuima Reservation*, No. 14-71981, Dkt. No. 1-1 (9th Cir. July 3, 2014) ("*In re Pauma*"). On October 21, 2014, the Ninth Circuit issued an order indicating that "[t]his petition for a writ of mandamus . . . raises issues that warrant a response" and inviting the district court to explain its position within twenty-one days of the date of the order. *In re Pauma*, Dkt. No. 10 (9th Cir. Oct. 2, 2014). With no response from the district court forthcoming, the Ninth Circuit issued a dispositive order on November 7, 2014 dismissing the petition, but permitting Pauma to raise the claims through the direct appeal process. *See In re Pauma*, Dkt. No. 15 (9th Cir. Nov. 7, 2014); App. 14a.

7. Pauma's opening brief on appeal once again argued the merits of the bad faith negotiation claims (C.A. Dkt. No. 29-1 at pp. 63-75), but the Ninth Circuit disposed of them in its October 26, 2015 opinion in precisely the same manner as Judge Bencivengo. First, the panel "refuse[d] to consider any of Pauma's assertions that the State knowingly acted in bad faith or with any kind of evil intent" (*see* App. 17a), instead

limiting the factual recitation to a "quick overview of the weathered past between Native American tribes and the State of California." App. 6a. Against this muted evidentiary backdrop, the Ninth Circuit held that the "IGRA procedures . . . simply do not apply when the State and the Tribe have *actually reached a Compact.*" *See* App. 36a (citing 25 U.S.C. § 2710(d)(7)(B)(ii)(I)). This holding arose even though the opinion failed to address Pauma's argument that the recissionary remedy brought the prevailing circumstances of the case into compliance with the express text of the bad-faith-negotiation claim requirements in IGRA. C.A. Dkt. No. 47-1, pp. 2-8.

REASONS FOR GRANTING THE PETITION

A. The opinion below decides the issue of whether an Indian tribe may pursue a claim for latent bad faith negotiation under IGRA after rescinding the resultant compact in a way that conflicts with this Court's precedent regarding the interpretation of the statute and the retroactivity of civil holdings, as well as universal principles of contract law

1. The opinion by the Ninth Circuit is completely unmoored from fundamental legal concepts and principles of interpretation set out in this Court's precedent. It achieves this by treating Pauma's bad faith negotiation claims as if they existed in a separate universe from all of the others, "refus[ing] to consider

any of Pauma's assertions that the State knowingly acted in bad faith or with any kind of evil intent" when analyzing the availability of rescission and then similarly refusing to consider the effect of rescission when determining the issue of bad faith. As explained, one of the two elements for making out a *prima facie* case of bad faith negotiation under Section 2710(d)(7)(B)(ii)(I) is that "a Tribal-State compact has not been entered into." *See* 25 U.S.C. § 2710(d)(7)(B)(ii)(I). The circumstances of the case should color the interpretation of this provision, but the Ninth Circuit construed the language as precluding a claim for bad faith negotiation as a matter of law if a tribe actually enters into a compact with the State irrespective of what happens afterwards. App. 36a-37a. Yet, at the same time it was taking this position, the Ninth Circuit was also suggesting that rescission is so complete that it even erases the negotiations that precipitated the contract. App. 37a.

The correct answer actually lies in the middle, however. The universally-accepted rule of contract law is that rescission neither leaves the contract in place nor erases the prior discussions about the agreement, but simply "void[s] a contract from its inception, *i.e.*, as if it never existed." *Dow Chem. Co. v. United States*, 226 F.3d 1334, 1346 (Fed. Cir. 2000) (citing 17B C.J.S. Contracts § 456 (1999)). *See, e.g.*, *Griggs v. E. I. DuPont de Nemours & Co.*, 385 F.3d 440, 446 (4th Cir. 2004) ("[A] court of equity grants rescission or cancellation, and its decree wipes out the instrument, and renders it as though it does not exist.");

Monex Int'l, Ltd. v. CFTC, 83 F.3d 1130, 1135 (9th Cir. 1996) (indicating rescission extinguishes a contract "as effectually as if it had never been made" (citing *Williams v. Agribank FCB*, 972 F.2d 962, 966 (8th Cir. 1992))). Both the principal briefing on appeal and the petition for rehearing filed by Pauma raised these authorities, but the opinion simply resolves the issue head-on without accounting for the arguments or the prevailing circumstances of the case.

2. Treating rescission as if it has no external significance actually makes the bad faith negotiation portion of the Ninth Circuit's opinion incompatible with what came before. To explain, the analysis section of the opinion opens by addressing the State's argument that the Section 4.3.2.2(a)(1) license pool formula had the meaning the State ascribed to it until the time the district court in *Colusa I* issued its dispositive order. In other words, the meaning of a contact term can change sporadically over time, shifting with the sentiments of the parties and the reviewing courts no matter how preliminary those impressions might be. In keeping with the declaratory nature of the claim that produced an answer on the license pool issue, the Ninth Circuit explains that the interpretation of an ambiguous contract provision "is and has always been the correct interpretation from its formation." App. 18a; *cf. James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535 (1991) (explaining the declaratory theory of the law involves a court finding the law, not making it). Thus, the principle the Ninth Circuit articulates is that if a

contract means something, then it has had that meaning since the very beginning. A natural corollary of this rule is that if a contract means nothing, it also lacked any meaning from the outset as well. This state of affairs is precisely what Pauma requested in the prayer for relief of its original complaint when it asked that "the Court declare the [amendment] void and rescinded." Dist. Ct. Dkt. No. 1 at p. 26.

3. The internal inconsistency of the opinion resulting from the failure to afford rescission full retroactive effect brings the Ninth Circuit's interpretation of Section 2710(d)(7)(B)(ii)(I) of IGRA into conflict with multiple precedents from this Court. The first of these is *Harper*, 509 U.S. 86 (1993), a leading case on the effect of judicial decrees that explains a "fundamental rule of 'retrospective operation' . . . has governed 'judicial decisions . . . for near a thousand years.'" *Id.* at 94 (quoting *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting)). One notable exception where a court may depart from the realm of retroactivity and engage in the sort of "prospective decisionmaking [that] is incompatible with the judicial role," *see American Trucking Assns., Inc. v. Smith*, 496 U.S. 167, 201 (1990), is when it expressly "reserve[s] the question whether its holding should be applied to the parties before it." *Beam*, 501 U.S. at 539. Yet, the Ninth Circuit did no such thing in the present case, as the opinion explains that the State's misrepresentation about the total number of licenses available under the compacts "entitled [Pauma] to rescission of the amendment." App. 38a.

With this preparatory step complete, the retroactivity principles set forth in *Harper* should have led the Ninth Circuit to interpret the "Tribal-State compact has not been entered into" language of Section 2710(d)(7)(B)(ii)(I) of IGRA such that a tribe who successfully rescinded a compact on account of some latent wrongdoing that impaired the integrity of the bargaining process could pursue a bad faith negotiation claim against the State.

4. In fact, retroactively applying a legally significant decision to satisfy one of the statutory requirements of IGRA is the only possible outcome in light of *Bay Mills*, 134 S. Ct. 2024. As background, the section of IGRA that details the grounds for federal jurisdiction and establishing statutory rights includes a number of terms that are actually distinct legal concepts. *See* 25 U.S.C. § 2710(d)(7)(A), (B)(ii). For instance, the second jurisdictional basis listed in Section 2710(d)(7)(A) explains that a district court may only hear a suit brought by a state to enjoin a class III gaming operation conducted by a tribe if such operation is located on "Indian lands." 25 U.S.C. § 2710(d)(7)(A)(ii). Whether or not a parcel of land qualifies as "Indian lands" is a complex legal question, the answer for which traditionally comes from the National Indian Gaming Commission ("NIGC") in an "Indian Lands Opinion" after applying the facts of the matter to the multipronged definitions of the term in IGRA and the Code of Federal Regulations. *See* 25 U.S.C. § 2703(4); 25 C.F.R. § 502.12; *see also* National Indian Gaming Commission, *Indian Lands*

Opinions, http://www.nigc.gov/general-counsel/indian-lands-opinions (last visited Apr. 10, 2016).

Yet, sometimes an Indian Lands Opinion will not issue before the commencement of a suit, possibly because the administrative agency took an inordinate amount of time to render its decision or a tribe simply began constructing a class III gaming facility without obtaining the protective decision beforehand. And that leads into *Bay Mills*, a case in which a tribe from the Upper Peninsula of Michigan surreptitiously opened a casino on a distant parcel of land in the Lower Peninsula of the State that it had purchased using trust funds from a land claim settlement act. *See Bay Mills*, 134 S. Ct. at 2029 (citing Michigan Indian Land Claims Settlement Act, 111 Stat. 2652 *et seq.*)). One of the reasons the opening of the facility was clandestine, and came as a surprise to the State of Michigan, is because Bay Mills circumvented the NIGC process and unilaterally determined that the Lower Peninsula property fell within the codified definitions of Indian lands due to a provision in the settlement act explaining that any land acquired thereunder "shall be held as Indian lands are held." *Bay Mills*, 134 S. Ct. at 2029.

As one would expect, the State of Michigan sued Bay Mills in federal district court shortly thereafter to enjoin the operation of the gaming facility, invoking jurisdiction under the aforementioned Section 2710(d)(7)(A)(ii) of IGRA. *See Bay Mills*, 134 S. Ct. at 2029. However, given the absence of an Indian Lands Opinion, there was an open question at the outset of

the suit whether the Lower Peninsula property on which Bay Mills operated its casino constituted Indian lands under IGRA. Within hours of the filing of the complaint, the NIGC came to the aid of Bay Mills and issued an opinion that the lands in question *did not* constitute Indian lands under IGRA, which seemingly deprived the district court of jurisdiction to hear the case. App. 144a-149a.

When the issue finally reached the apex of the federal court system, this Court agreed with the above assessment and held that "[a] State's suit to enjoin gaming activity *on* Indian lands . . . falls within § 2710(d)(7)(A)(ii); a similar suit to stop gaming activity *off* Indian lands does not." *Bay Mills*, 134 S. Ct. at 2032. The significance of this decision comes from this Court's recognition that a legal decision arising after the filing of a lawsuit can determine whether a plaintiff satisfies the statutory requirements of IGRA. And yet, if the Ninth Circuit panel that authored the opinion below were given the task of ghostwriting *Bay Mills*, the meaning of the term "Indian lands" would have turned upon the *status quo ante*, thus leaving the proceedings in a perpetual state of uncertainty.

5. Hypothesizing about the Ninth Circuit's likely interpretation of Indian lands is unnecessary, though, because the jurisdictional section of IGRA analyzed by this Court in *Bay Mills* also includes terminology influenced by whether or not a tribe has obtained a declaration rescinding its compact. As to that, Indian lands is just one of many elements set forth within

the jurisdictional standard in Section 2710(d)(7)(A)(ii) of IGRA, the full section of which states that the United States district courts shall have jurisdiction over

> any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) *that is in effect*[.]

25 U.S.C. § 2710(d)(7)(A)(ii) (emphasis added).

If history had unfolded in just a slightly different manner, this subsection of IGRA could have served as the basis for the State filing a cross-complaint against Pauma; after all, the revenue sharing fees of the amendment were so exorbitant that the Tribe fell behind in payment by two fiscal quarters before filing suit. Dist. Ct. Dkt. No. 130 at p. 30. Given this, the actual configuration of the parties in the district court proceeding could have been Pauma filing a complaint to rescind the amendment amongst other remedies, and the State cross-complaining to enjoin the Tribe's gaming operations due to its failure to remit revenue sharing payments for half a fiscal year. If one were to replicate the holdings from the opinion below in this hypothetical case, the Ninth Circuit would have rescinded the amendment but nevertheless allowed the State to enjoin Pauma's gaming operation under the newly-revived underlying compact simply because the heightened revenue sharing fees of the amendment were in effect before the inception of the suit. In other

words, once a compact is executed, avoiding the reach of Section 2710(d)(7)(A)(ii) would be an impossible Catch-22 situation where the tribe would have to show that the relevant compact is not in effect, even though a rescinded compact is always in effect for statutory analysis purposes. And, in light of *Bay Mills*, this approach to statutory interpretation would render the text of Section 2710(d)(7)(A)(ii) of IGRA wholly inconsistent – forbidding a state from enjoining an off-reservation tribal gaming facility on one hand, but nevertheless allowing it to enjoin an on-reservation casino for violating the terms of a compact that is no longer in effect on the other.

6. This dichotomy highlights why the opinion below is incompatible with the structure of IGRA. As explained, the statute contains a myriad of terms that are either distinct legal concepts or affected by the decisions made by administrative or judicial authorities. Three of these are detailed within this section, but one final example is the provision that is at the very heart of IGRA: the good faith negotiation requirement. One may assume that Congress drafted the jurisdictional grant to allow the federal district courts to hear any case by a plaintiff tribe that simply *alleged* bad faith negotiation by the surrounding state. Yet, the statutory language is actually much more limited than that, instead only covering "any cause of action initiated by an Indian tribe *arising from* the failure of a State . . . to conduct [] negotiations in good faith." 25 U.S.C. § 2710(d)(7)(A)(i) (emphasis added).

The phrasing of this provision makes it sound as if good faith negotiation is something concrete that a party can itself establish before the outset of a suit, and not a legal determination subsequently issued by the federal court. Simply put, the use of declaratory relief claims is essential for satisfying the statutory requirements of IGRA, as is the case with any other statute. The Ninth Circuit is aware of this, however, seeing that it recently allowed the State of Arizona to pursue a declaratory relief claim to determine whether a parcel of land on the outskirts of Phoenix qualifies as Indian lands – a decision that, if answered in the affirmative, would provide the State of Arizona with the basis for seeking injunctive relief under Section 2710(d)(7)(A)(i) according to this Court's opinion in *Bay Mills*. *See Arizona v. Tohono O'odham Nation*, __ F.3d __, 2016 U.S. App. LEXIS 5766 (9th Cir. 2016). Why the Ninth Circuit took a different analytical approach in this case that forecloses consideration of the existing circumstances will forever be the subject of speculation, but this method for interpreting IGRA indisputably conflicts with multiple precedents from this Court – not to mention other Ninth Circuit case law, the reasoning in other parts of the opinion, and universal principles of contract law.

B. Allowing circuit courts to conduct statutory analysis according to the *status quo ante* will throw IGRA litigation into complete disarray and prevent states and tribes from bringing otherwise legitimate claims against one another

1. The sheer number of legal terms in the text of IGRA means the opinion below will have unintended consequences for both tribes and states. The harms imposed on states by interpreting IGRA according to the Ninth Circuit's methodology in this case are evident from the prior section, but are fleshed out more fully by considering how this interpretive style would affect the disposition in *Bay Mills* if the NIGC issued its Indian Lands Opinion somewhat differently. For starters, imagine if the NIGC had come to the opposite conclusion after the start of the suit, finding the Lower Peninsula property qualified as Indian lands under the codified definitions. It is difficult to picture any court within the Sixth Circuit looking at the *status quo ante* to hold the State of Michigan *could not* bring suit under Section 2710(d)(7)(A)(ii) of IGRA simply because the legal status of the land was uncertain before the filing of the suit. The Ninth Circuit would require such a result according to the opinion in this case, however.

It is also worth remembering that administrative decision-making is an imperfect science that can often take many years and multiple attempts before the tribunal reaches its final decision. Considering this,

what happens then if the NIGC issues an opinion that a parcel of land under consideration – which will soon serve as the situs for a tribal gaming facility – is Indian land before reversing course in an attempt to protect the tribe after the surrounding state has filed suit? The interpretive methodology the Ninth Circuit used in this case would allow the state to continue pursuing an injunction against the off-reservation facility, even though doing so would contravene *Bay Mills*. Consider also the complementary scenario where the NIGC issues a denial letter only to change its position in an act of benevolence after the affected tribe defiantly opens a gaming facility on the parcel in question. If this second opinion arose after the surrounding state filed its complaint, the only appropriate disposition in light of the Ninth Circuit's holding in this case is to pay heed to the first opinion and hold that the state has no recourse because of that mystical Catch-22 that turns voids into compacts and Indian lands into non-tribal property for statutory interpretation purposes.

2. The harms posed by the Ninth Circuit's holding are inconvenient for states, but downright devastating for tribes. The federal government recently clarified that the "foremost goal" of IGRA is to "ensure that tribes would have access to gaming procedures" whether "a [s]tate negotiates in good faith, in bad faith, or not at all." *See New Mexico v. U.S. Dep't of Interior*, No. 14-2219, Dkt. No. 01019393892 at pp. 34 & 36 (10th Cir. Mar. 4, 2015). In other words, "Congress drew a map in which all roads lead to some

kind of gaming procedures." *Id.* at p. 34. The outcome of this case is antithetical to the central purpose of IGRA, however, because it strips a compact away without providing the means to obtain a replacement one. Thus, the bad faith conduct at the heart of this suit that the Ninth Circuit appears intent to let go unaddressed completely transformed Pauma's position – taking a tribe with seventeen years left on the term of its compact before the events giving rise to this suit and turning it into one with only four years of gaming rights remaining and a judicial IOU for $36.2 million in misappropriated income.

A tribe that possessed an amended compact like Pauma at least has the "fortune" of returning to the underlying agreement after rescission, but this does little to alleviate the resultant predicament. For Pauma, this scenario means going back to the state that previously misrepresented contract rights for its own financial benefit and asking that it act more dutifully during a second round of negotiations, even though it has amassed four (and what should be five) bad faith holdings in the past six years. *See Big Lagoon Rancheria v. California*, 789 F.3d 947 (9th Cir. 2015); *Rincon II*, 602 F.3d 1019; *Estom Yumeka Maidu Tribe of Enter. Rancheria v. California*, 2016 U.S. Dist. LEXIS 19330 (E.D. Cal. Feb. 17, 2016); *North Fork Rancheria v. California*, 2015 U.S. Dist. LEXIS 154729 (E.D. Cal. Nov. 13, 2015).

After the state invariably demands tax payments in a creatively different manner than before, Pauma will then face the prospect of litigating a bad faith

negotiation claim in the Ninth Circuit, where the typical lifespan of such a case ranges from six to eight years. *See Brown v. Rincon Band of Luiseno Mission Indians of Rincon Reservation*, 564 U.S. 1037 (2011) (declining to review a finding of bad faith negotiation against the State in a case filed in 2004). Requiring a tribe injured by latent bad faith conduct on the part of a state to run a gauntlet that entails seven years of federal litigation to rescind the compact, two years in renewed negotiations with the State, and another six to eight years litigating the bad faith negotiation issue is a far cry from what Congress intended when it delayed the effective date of IGRA for one year so preexisting gaming tribes could either negotiate a compact or obtain gaming procedures in federal court through the IGRA statutory remedy. *See* 25 U.S.C. § 2703(7)(D).

The biggest losers under the Ninth Circuit's interpretation of IGRA are those tribes who are operating gaming facilities pursuant to un-amended compacts and would face the prospect of shuttering their casinos if a court refused to tie the rescissionary and statutory remedies together in order to redress latent bad faith. It is worth remembering that tribes do not have the statutory right to sue a state for bad faith negotiation under IGRA after *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). For tribes in states like California that have waived their sovereign immunity from suit for bad faith negotiation, *see* Cal. Gov't Code § 98005 (1998), life in the post-rescission world would entail halting operations at its casino from the

point in time the rescission award takes effect until the Secretary of the Interior issues regulations under which the tribe can conduct gaming. *See* 25 U.S.C. § 2710(d)(7)(B)(vii). The case would be much worse for tribes in states that have not enacted a general sovereign immunity waiver, but who can at least make a colorable argument that a bad faith negotiation claim should fall under a declaratory relief waiver within the compact. Not recognizing latent bad faith negotiation claims will leave these tribes with a Hobbesian choice: live with the effects of the bad faith conduct or rescind your compact and accept the fact that your tribe lacks both a compact and the ability to sue to obtain one in light of *Seminole*.

Thus, severing a latent bad faith negotiation claim from an attendant rescission remedy will produce a state of affairs where the best case scenario is that a tribe must capitulate to the first offer the state makes – with no assurance that it will be any better than the one procured by latent bad faith. However, more likely than not the practical effect of the decision by the Ninth Circuit is that it forecloses the ability for tribes with standard compacts to get out of those agreements even if they were induced by the most egregious misrepresentations on the part of a state. The opinion below simply shifts the balance of power even further in the State's favor, giving them every incentive to abuse the negotiation process in an attempt to bolster their bottom lines – just as Congress feared when it enacted the statute. *See Rincon II*, 602 F.3d at 1042 (stating Congress anticipated

that states might abuse the compact negotiations). Bringing the intricate system created under IGRA back into homeostasis requires setting aside the portion of the Ninth Circuit's holding that interprets Section 2710(d)(7)(B)(ii)(I) of IGRA to conflict with *Bay Mills, Harper*, and universal principles of contract law.

CONCLUSION

The petition for writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 18th day of April, 2016.

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