No. 15-1291

In the Supreme Court of the United States

PAUMA BAND OF LUISENO MISSION INDIANS OF THE PAUMA & YUIMA RESERVATION,

Petitioner,

v.

STATE OF CALIFORNIA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the remedial procedures in the Indian Gaming Regulatory Act, which may be invoked only if a tribe establishes that a Tribal-State compact governing the conduct of gaming activities "has not been entered into," 25 U.S.C. § 2710(d)(7)(B)(ii)(I), apply where a tribe and a State enter an amended compact that is later rescinded by a court.

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INTRODUCTION

This case concerns gaming compacts between the State of California and the Pauma Band of Luiseno Mission Indians of the Pauma and Yuima Reservation (Pauma). After the State calculated that there were no more slot machine licenses available to Pauma under a formula contained in the parties' original compact, the parties negotiated and entered an amended compact under which Pauma paid higher fees and secured the right to operate an unlimited number of slot machines. The amended compact governed Pauma's gaming operations for five years, until Pauma brought a suit challenging it. The district court ultimately rescinded the amended compact, reasoning that the State had miscalculated the number of licenses available to Pauma under the original compact and that Pauma had relied on that miscalculation when it entered the amended compact. The court also ordered the State to pay Pauma $36.2 million, the total amount of additional fees that Pauma paid the State under the terms of the amended compact.

The State filed a petition for certiorari presenting the question whether the State waived its sovereign immunity with respect to the district court's monetary award. *See* Petition for Certiorari, *California v. Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation*, No. 15-1185.[1]

In the petition at issue here, Pauma asks the Court to decide an unrelated question: whether Pauma is entitled to invoke the remedial procedures

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[1] In this brief, "State Pet." refers to the State's petition for certiorari in No. 15-1185. "Pauma Pet." refers to Pauma's petition for certiorari in No. 15-1291.

of the Indian Gaming Regulatory Act (IGRA) to compel the State to negotiate another amended compact, based on alleged bad-faith by the State in negotiating the amended compact that was rescinded by the district court. The district court and the court of appeals both rejected Pauma's argument on the merits, concluding that IGRA's remedial procedures apply only where a compact "has not been entered into," 25 U.S.C. § 2710(d)(7)(B)(ii)(I), and do not apply in a case like this one, where the parties completed negotiations and entered an amended compact. That conclusion is consistent with the statutory text and Pauma fails to identify any authority supporting a contrary interpretation. Nor is this question sufficiently important to warrant this Court's review. The question could only recur in narrow circumstances. Moreover, Pauma acknowledges that, to seek another amended compact, it need only go "back to the state" and request "a second round of negotiations." Pauma Pet. 35.

This case would also be a particularly poor vehicle for considering the meaning of IGRA's remedial provisions. The district court held, in the alternative, that the argument Pauma raises in its petition was moot and barred by judicial estoppel. This Court would need to address those threshold issues before reaching the merits. As Pauma's lengthy petition indicates, its legal arguments are entwined with fact-intensive contentions never addressed by the courts below. And even if this Court ultimately accepted Pauma's novel interpretation of IGRA's remedial procedures, Pauma is unlikely to satisfy the other statutory requirements for obtaining the relief that it seeks.

STATEMENT

1. Under IGRA, class III gaming is lawful on tribal lands only if it is conducted in conformance with a compact that has been approved by the Secretary of the Interior. 25 U.S.C. § 2710(d)(1), (3)(B); *see* State Pet. 2. IGRA directs that a "tribe having jurisdiction over the Indian lands upon which a class III gaming activity . . . is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities." 25 U.S.C. § 2710(d)(3)(A). When a State receives such a request, "the State shall negotiate with the Indian tribe in good faith to enter into such a compact." *Id.*

IGRA vests federal district courts with jurisdiction over "any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe . . . or to conduct such negotiations in good faith." 25 U.S.C. § 2710(d)(7)(A)(i). A tribe may initiate such an action "only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations." *Id.* § 2710(d)(7)(B)(i).

The statute establishes a burden-shifting regime governing such actions. Initially, the tribe must introduce evidence that "a Tribal-State compact has not been entered into" and that "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." 25 U.S.C. § 2710(d)(7)(B)(ii). Once the tribe makes this showing, "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." *Id.*

Upon a finding by the district court "that the State has failed to negotiate in good faith," the court "shall order the State and the Indian Tribe to conclude [a Tribal-State] compact within a 60-day period." 25 U.S.C. § 2710(d)(7)(B)(iii). If the parties do not meet that 60-day deadline, they must each submit a proposed compact to a mediator, who selects the proposal that best comports with the purposes of IGRA. *See id.* § 2710(d)(7)(B)(iv). If the State does not consent to the proposal selected by the mediator, the Secretary of the Interior must prescribe procedures for class III gaming that are consistent with that proposal. *See id.* § 2710(d)(7)(B)(v)-(vii).

2. In 1999, several dozen tribes began negotiating with the State of California to enter compacts allowing the tribes to conduct class III gaming activities. *See* Pauma Pet. App. 9a. More than 60 tribes entered compacts with the State in 1999 and 2000, including Pauma. *Id.* Among other things, these compacts contained detailed rules regarding the number of slot machines that could be operated by the tribes, and a formula governing the maximum number of licenses for additional slot machines in a "common pool" of licenses available to all the tribes that entered gaming compacts. *See generally* State Pet. 3-4.

In December 2003, the State informed the tribes that the common pool of licenses was exhausted. Pauma Pet. App. 10a.[2] At the time, Pauma hoped to expand its gaming operation by developing a "Las Vegas-style casino," and required thousands of additional slot machines for that purpose. *See id.* With

[2] The California Gambling Control Commission made this statement to the tribes. *See* Pauma Pet. 14; Dist. Ct. Dkt. No. 209 at 11.

that goal in mind, Pauma began negotiations with the State to amend its original compact. *See id.* As a result of those negotiations, Pauma entered an amended gaming compact with the State in 2004. *Id.* The amended compact allowed Pauma to operate an unlimited number of slot machines and conferred other benefits on the tribe in exchange for increased fees. *See id.*; C.A. Dkt. No. 14-5 at 179-212.

3. In 2009, after conducting its gaming operations under the amended compact for five years but having failed to develop a "Las Vegas-style casino," Pauma sued the State. Pauma Pet. App. 10a-11a. Pauma's first amended complaint—the operative complaint in this case—advanced 17 claims attacking the formation of the amended compact based on a variety of theories. Dist. Ct. Dkt. No. 130.[3] Relevant here, the fifth claim alleged that the fee provisions in the amended compact "constitute a State tax on Indian gaming that is prohibited by IGRA." *Id.* at 44. Similarly, the sixth claim alleged that the fees required under the amended compact "are unreasonable and constitute a State tax on Indian gaming that is expressly prohibited by IGRA." *Id.* at 46.[4] The tenth claim alleged that the State made a misrepresentation concerning the number of slot machine licenses available to the tribes in the common pool prior to the negotiation of the amended compact. *Id.* at 53.

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[3] The opinion of the Ninth Circuit below mistakenly describes the first amended complaint as containing 18 claims. *See* Pauma Pet. App. 12a.

[4] The fifth claim was titled "2004 Compact Fees Used for Non-Gaming Purposes are in Bad Faith/Violation of IGRA"; the sixth claim was titled "2004 Compact Fees Constitute an Illegal Tax in Bad Faith/Violation of IGRA." Dist. Ct. Dkt. No. 130 at 43, 44.

Pauma's complaint sought various forms of relief, including that the amended compact be reformed, or rescinded and replaced with the original compact, and that the court award Pauma restitution in the amount of the additional fees Pauma paid under the amended compact. *See* Dist. Ct. Dkt. No. 130 at 77-79. Shortly after filing its suit, Pauma also sought and obtained preliminary injunctive relief, allowing it to "pay only those payments required under the terms of the original compact" throughout the pendency of this action. Dist. Ct. Dkt. No. 44 at 1.

In August 2012, Pauma moved for summary judgment on some of its claims, including all three of the claims described above. The next year, the district court granted summary judgment in favor of Pauma on its tenth claim based on "misrepresentation," reasoning that the State's calculation of the size of the common pool of licenses in 2003 was incorrect in light of a 2010 Ninth Circuit opinion. Pauma Pet. App. 13a. The court rescinded the amended compact, allowed Pauma to return to the terms of the original compact, and ordered the State to pay Pauma $36.2 million, "the difference in payment that Pauma had made as between the higher and lower rates." *Id.* The district court entered final judgment in December 2013. *Id.*

After the district court entered its judgment in favor of Pauma, Pauma asked the court to vacate that judgment so that Pauma could file a motion styled as a second motion for summary judgment on its fifth and sixth claims. Pauma Pet. App. 13a, 47a. In its new motion, Pauma asked the district court "to 'trigger the remedial process set forth in [IGRA] at 25 U.S.C. § 2710(d)(7) so the Tribe can obtain a successor to [the original compact] . . . .'" *Id.* at 47a. The district court vacated its December judgment, but

then denied Pauma's motion and entered the same judgment as before. *Id.* at 47a, 57a.

The district court offered three reasons for denying Pauma's motion. First, the court viewed the fifth and sixth claims as moot. Pauma Pet. App. 13a-14a, 48a-50a. It noted that the only relief that the operative complaint "specifically prays for with respect to claims five and six is '[t]hat the Court reform the 2004 Amendment to limit the application of the unconscionable heightened financial terms,'" *id.* at 45a, and that Pauma's consistent position up until that point had been that the original compact "is the only valid agreement between the parties and that [its] terms should govern the parties' dealings instead of the terms in the" amended compact, *id.* at 48a. Having already awarded Pauma the "exact relief" it sought, the court concluded that "Pauma is whole, rendering claims five and six moot." *Id.* at 50a.

Second, the district court held that Pauma was judicially estopped from asking the court to apply IGRA's remedial procedures because that argument was inconsistent with Pauma's prior litigating positions. Pauma Pet. App. 51a. In particular, Pauma's request to have the amended compact terms "renegotiated to obtain some other payment terms" was inconsistent with the allegations and prayer for relief in its complaint, and with Pauma's repeated "argument that the [original compact] should apply from 2004 onward." *Id.* Indeed, Pauma had told the court that it "would not have sought the 2004 Amendment at all if not for Defendants' misrepresentation that Pauma could not obtain 2,000 licenses under the" original compact. *Id.* at 51a-52a. The district court's judgment put Pauma "in the position it would have been in absent the original misrepresentation," which is "what Pauma wanted from the beginning of this

lawsuit." *Id.* at 53a. The court held that the remaining factors governing the judicial estoppel inquiry also were satisfied. *Id.* at 54a.

Finally, the district court held that the plain language of IGRA did not entitle Pauma to the relief it sought. Pauma Pet. App. 55a. Pauma asked the district court "to trigger the procedures under 25 U.S.C. § 2710(d)(7)(B)(iii)-(vii), which come into play upon a finding by the court that the State did not negotiate in good faith." *Id.* But "a plain reading of the statute indicates that these procedures do not apply in circumstances where the State and a Tribe actually reach a compact." *Id.* In particular, "a prerequisite for shifting the burden to the State to prove that it negotiated in good faith is that 'a Tribal-State compact has not been entered into . . . .'" *Id.* (quoting 25 U.S.C. § 2710(d)(7)(B)(ii)(I)). Because there was no dispute that Pauma and the State had entered into the amended compact, "the burden cannot shift to the State to prove it negotiated the [amended compact] in good faith, and the Court need not make a determination on that issue." *Id.* In short, IGRA "does not allow the Court to turn back the clock and compel renegotiation of an agreement actually reached ten years ago." *Id.* at 56a.

4. The State appealed regarding the district court's rescission of the amended compact and the award of monetary relief to Pauma. Pauma cross-appealed regarding the district court's ruling on Pauma's fifth and sixth claims. The Ninth Circuit affirmed the district court's judgment in its entirety. Pauma Pet. App. 38a.

In relevant part, the court of appeals held that the "relief Pauma seeks in its cross-appeal is not available under the plain statutory language of IGRA." Pauma Pet. App. 37a. The court explained

that the "detailed procedures set forth in IGRA allow for redress by Native American tribes when a State refuses to negotiate or negotiates in bad faith for a gaming compact." *Id.* at 36a. But those "procedures, by their own language, simply do not apply when the State and the Tribe have *actually reached a Compact*." *Id.* (citing 25 U.S.C. § 2710(d)(7)(B)(ii)(I)). Although Pauma "provides a lengthy and fact-intensive explanation why it thinks the State acted in bad faith with respect to the entirety of their course of dealings over the last fifteen years," it "ignores the explicit statutory language of IGRA under which it seeks relief." Pauma Pet. App. 34a.

The court of appeals briefly addressed the district court's two other grounds for denying Pauma's motion. It disagreed with the district court's conclusion that Pauma was judicially estopped from attempting to invoke IGRA's remedial procedures, concluding that Pauma had not taken inconsistent positions, or requested different relief, during different stages of the litigation. Pauma Pet. App. 34a-35a n.14. The court of appeals declined to reach the mootness issue because the parties had not briefed it. *Id.* at 34a n.13. The court noted, however, that the district court's mootness "analysis is supported by our recent en banc decision in *Big Lagoon Rancheria* [*v. California*, 789 F.3d 947, 955 (9th Cir. 2015)]," which held that a "tribe's cross-appeal was moot regarding [a] bad faith claim since the district court had ruled in the tribe's favor on other grounds." Pauma Pet. App. 34a n.13.

ARGUMENT

1. Pauma contends that the lower courts misconstrued the remedial provisions of IGRA, which apply when a State negotiates in bad faith regarding a gaming compact. *See* Pauma Pet. 3-4. In Pauma's view, if a tribe succeeds in persuading a court to rescind a gaming compact, it may invoke IGRA's remedial procedures to force negotiation of another compact based on allegations that the State acted in bad faith when it negotiated the now-rescinded compact. *See id.* That argument finds no support in the text of IGRA or in cases construing the statute.

IGRA "meticulously detailed two separate tracks leading to the institution of a Class III tribal gaming business." *Texas v. United States*, 497 F.3d 491, 494 (5th Cir. 2007). The first applies when the tribe and the State successfully negotiate a gaming compact, which is then approved by the Secretary of the Interior. *Id.* (citing 25 U.S.C. § 2710(d)(3)(B)). The second applies "when no compact has been reached one hundred and eighty days after the tribe requests negotiations." *Id.* In that scenario, IGRA allows the tribe to force the issue by filing suit. *See id.* (citing 25 U.S.C. § 2710(d)(7)). If the court agrees with the tribe that the State failed to negotiate in good faith, the court must order further negotiation followed by mediation, if necessary. *See id.*; 25 U.S.C. § 2710(d)(7)(B)(iii)-(iv). Ultimately, if the State refuses to enter a compact with the tribe, the Secretary must authorize class III gaming to be conducted. 25 U.S.C. § 2710(d)(7)(B)(vii).

Collectively, IGRA's procedures form "an elaborate remedial scheme designed to ensure the formation of a Tribal-State compact," even in circumstances where a recalcitrant State refuses to negotiate in good faith. *Seminole Tribe of Florida v.*

Florida, 517 U.S. 44, 50 (1996). These procedures thus have no application where a tribe and a State have already entered a gaming compact. *See* Pauma Pet. App. 35a-37a, 55a-56a. That is apparent from the text of the statute. To invoke the procedures, a tribe must carry its initial burden by establishing that "a Tribal-State compact has not been entered into." 25 U.S.C. § 2710(d)(7)(B)(ii); *see Seminole Tribe*, 517 U.S. at 49. A tribe that has already concluded negotiations and entered a compact cannot make that showing.

Pauma appears to argue that this *is* a case where "a Tribal-State compact has not been entered into," 25 U.S.C. § 2710(d)(7)(B)(ii)(I), because Pauma succeeded in persuading the district court to rescind the amended compact. *See* Pauma Pet. 21, 24. But Pauma identifies no textual basis for its theory that an amended compact—which was executed by the parties and in force for the better part of a decade—was never "entered into" for purposes of IGRA because it was ultimately rescinded by court order. Nor does Pauma cite any authority supporting this novel interpretation of IGRA.

2. There is no other compelling reason for this Court to review the question presented by Pauma's petition.

a. Pauma asserts that the decision of the court of appeals below conflicts with this Court's decisions in *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), and *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014). Pauma Pet. 4, 26-29. But there is no conflict.

Harper did not involve IGRA. It concerned the retroactive effect of the holding in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), that a

State violates the constitutional doctrine of intergovernmental immunity when it imposes a discriminatory tax on federal retirement benefits. *Harper* held that when "this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." 509 U.S. at 97. Pauma argues that the decision below conflicts with *Harper* because the court of appeals "fail[ed] to afford rescission full retroactive effect." Pauma Pet. 26. But the question whether the amended compact should be rescinded involved general principles of contract law, not any "controlling interpretation of federal law" by this Court. *Harper*, 509 U.S. at 97; *see* Pauma Pet. App. 24a. In any event, the court of appeals *agreed* with Pauma as to rescission, and affirmed the judgment rescinding the amended compact.

In *Bay Mills*, this Court considered whether Congress had abrogated a tribe's sovereign immunity from a suit by the State of Michigan to enjoin gaming activities taking place outside of Indian lands. 134 S. Ct. at 2028. IGRA authorizes a State to sue a tribe to "enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact." 25 U.S.C. § 2710(d)(7)(A)(ii). The Court noted that "the very premise of this suit—the reason Michigan thinks Bay Mills is acting unlawfully—is that the Vanderbilt casino is *outside* Indian lands." 134 S. Ct. at 2032. Given that premise, "a suit to enjoin gaming in Vanderbilt is correspondingly outside § 2710(d)(7)(A)(ii)'s abrogation of immunity." *Id.* Nothing in *Bay Mills* supports Pauma's interpreta-

tion of IGRA's remedial procedures, which were not at issue in that case.[5] If anything, *Bay Mills* underscores the importance of focusing on the plain meaning of IGRA's statutory text, as the district court and the court of appeals did here.

b. Pauma does not appear to argue that its petition implicates any direct conflict between the federal courts of appeals. Nor is the State aware of any such conflict. Like the decision below, other courts of appeals have described IGRA's remedial procedures as applying only "when no compact has been reached." *Texas*, 497 F.3d at 494; *see, e.g.*, *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273, 276 (8th Cir. 1993).

Pauma does, however, suggest that the decision below conflicts with the Ninth Circuit's recent opinion in *Arizona v. Tohono O'odham Nation*, ___ F.3d ____, 2016 WL 1211834 (9th Cir. Mar. 29, 2016). *See* Pauma Pet. 32. Although *Tohono O'odham Nation* involved IGRA, the similarity stops there. The central question in that case was whether building a casino on land that the United States had taken into

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[5] In recounting the history of the case, *Bay Mills* observed that the "same day Michigan filed suit, the federal Department of the Interior issued an opinion concluding (as the State's complaint said) that the Tribe's use of Land Trust earnings to purchase the Vanderbilt property did not convert it into Indian territory." 134 S. Ct. at 2029. From this observation, Pauma reasons that the "significance of [*Bay Mills*] 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." Pauma Pet. 29. In fact, the Court's opinion in *Bay Mills* did not reference the Department of the Interior's opinion again after mentioning it in the background section; the Court's analysis instead relied on Michigan's *own* assertion that the casino at issue "is *outside* Indian lands." 134 S. Ct. at 2032.

trust for the tribe would violate the tribe's compact with Arizona. The court concluded that the land was "taken into trust as part of . . . a settlement of a land claim" under 25 U.S.C. § 2719(b)(1)(B)(i), and that the compact expressly allowed the tribe to conduct class III gaming on such land. 2016 WL 1211834 at *5, *9. The court had no occasion to address IGRA's remedial procedures. But even if there were tension between these two Ninth Circuit decisions, it would not provide a basis for granting certiorari. This Court's typical practice is to "allow the courts of appeals to clean up intra-circuit divisions on their own." *Joseph v. United States*, 135 S. Ct. 705, 707 (2014) (Kagan, J., respecting the denial of certiorari).

c. Pauma also overstates the importance of the question presented by its petition. It contends that this question "has huge practical consequences for tribes." Pauma Pet. 4. But the question could only recur under narrow circumstances—when a tribe enters a compact (or amended compact), successfully sues to rescind that compact, and then attempts to invoke IGRA's remedial procedures based on the State's alleged conduct in negotiating the rescinded compact. Moreover, such a suit could only arise in a State that has waived its sovereign immunity from actions alleging bad-faith negotiations. *See* Pauma Pet. 36-37 (discussing *Seminole Tribe*, 517 U.S. 44).

In any event, Pauma acknowledges that a tribe that succeeds in having its compact rescinded is not without recourse. The tribe need only go "back to the state" and request "a second round of negotiations." Pauma Pet. 35. In Pauma's view, that second round of negotiations would be subject to the protections of IGRA's remedial procedures, allowing the tribe to seek relief in district court if the State refuses to ne-

gotiate or negotiates in bad faith during the second round of negotiations. *See id.* at 35-36.

3. Finally, this case is not a suitable vehicle for considering whether IGRA's remedial procedures may apply when a tribe and a State enter a gaming compact that is subsequently rescinded by court order.

a. The district court held that the two claims at issue here were moot because the court had already awarded Pauma the "exact relief" it sought on those claims—that is, the court rescinded the amended compact and returned the parties to the original compact, including its lower payment terms. Pauma Pet. App. 50a. The court of appeals did not resolve the mootness issue, but noted that the district court's analysis drew some support from recent Ninth Circuit precedent. *Id.* at 34a n.13; *see Big Lagoon Rancheria v. California*, 789 F.3d 947, 955 (9th Cir. 2015). This Court would need to tackle that threshold jurisdictional question before it could consider the merits of Pauma's IGRA arguments. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008) ("[W]e bear an independent obligation to assure ourselves that jurisdiction is proper before proceeding to the merits.").

b. To establish that the merits question is not moot, Pauma would presumably argue that the relief it now seeks is different from the relief granted below. *Cf.* Pauma Pet. 20-21. Even if that argument could succeed in establishing jurisdiction, it would force the Court to resolve another threshold question: whether Pauma is estopped from making its merits argument based on inconsistent prior positions.

Pauma did not ask the court to compel renegotiation of the amended compact under IGRA's remedial

procedures until December 2013—four years after it filed suit and two weeks after the district court entered judgment in its favor. *See* Dist. Ct. Dkt. No. 249-1. As the district court later explained, that request was at odds with Pauma's pleadings and its prior litigating positions. Pauma Pet. App. 50a. The operative complaint did not allege "that Defendants negotiated the 2004 Amendment in bad faith, and Pauma did not pray for relief in the form of court-ordered triggering of the provisions of the IGRA." *Id.* at 53a (emphasis omitted); *see* Dist. Ct. Dkt. No. 130 at 43-46, 77-80. In its initial motion for summary judgment on its fifth and sixth claims, Pauma did not "mention any compelled renegotiation of the" amended compact. Pauma Pet. App. 51a. The only relief Pauma requested regarding those claims was that the original compact terms "should apply from 2004 onward" and that it should receive "restitution of all amounts paid under" the amended compact. *Id.*; *see* Dist. Ct. Dkt. No. 197 at 1. Indeed, Pauma's position throughout the district court litigation was that it "would not have sought the [amended compact] at all if not for Defendant's misrepresentation." Pauma Pet. App. 51a-52a & n.2.

In light of these, and other, prior positions, it was "clearly inconsistent" for Pauma to ask the court to compel renegotiation of another amended compact under IGRA's remedial procedures. Pauma Pet. App. 53a. Judicial estoppel is appropriate because the district court relied on Pauma's prior inconsistent positions and because allowing Pauma to change positions after more than four years of litigation would prejudice the State. *See id.* at 54a; *see generally New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("[J]udicial estoppel[] 'generally prevents a party from prevailing in one phase of a case on an argu-

ment and then relying on a contradictory argument to prevail in another phase.'").

The court of appeals dismissed the State's judicial estoppel argument in a footnote, reasoning that Pauma was not requesting different relief because it "had been requesting 'reformation' based on IGRA claims five and six in the complaint from the beginning." Pauma Pet. App. 34a-35a n.14. As the district court explained, however, the prayer for relief does not undermine the State's estoppel argument. *See id.* at 51a. The prayer does not mention compelled renegotiation under 25 U.S.C. § 2710(d)(7)(B)(iii)-(vii). It merely asks the court to reform the amended compact by "limit[ing] the application" of the heightened payment terms. Dist. Ct. Dkt. No. 130 at 77-78.

c. Granting review of the question presented by Pauma's petition would also risk drawing this Court into factual disputes that were never resolved by the courts below. In litigating this question before the court of appeals, Pauma provided "a lengthy and fact-intensive explanation why it thinks the State acted in bad faith with respect to the entirety of their course of dealings over the last fifteen years." Pauma Pet. App. 34a. The petition frames the question as a legal one (Pauma Pet. i), but then embarks on a similarly lengthy and fact-intensive discussion of the State's alleged bad-faith conduct and the district court proceedings (*id.* at 6-23), which Pauma says is "crucial for understanding the impact of the Ninth Circuit's interpretation of IGRA" (*id.* at 5).

What is more, Pauma's petition contains several misstatements that would further complicate review in this case. For example, Pauma asserts that "everyone is in agreement about the evidence" concerning its allegation that the State negotiated in bad faith. Pauma Pet. 5. That is not so. The Ninth Circuit has

held that the official record of the compact negotiations is the sole basis for evaluating whether a State has acted in good faith for purposes of IGRA. *See Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1041 (9th Cir. 2010). Here, that record was never submitted to the court or even compiled. *See* Dist. Ct. Dkt. No. 254 at 3 & n.2. Pauma also mischaracterizes aspects of the dealings preceding the original and amended compact. It suggests, for example, that the California Gambling Control Commission interpreted the formula governing the number of slot machine licenses in the common pool unilaterally, without any input from the compacting tribes. Pauma Pet. 13. In fact, the Commission held listening sessions with tribes throughout the State on this issue. *See* State Pet. App. 59a.

d. Pauma is also unlikely to obtain the specific relief it seeks even if this Court were to agree with Pauma's interpretation of IGRA. Before a court may order a State to conclude a gaming compact, IGRA requires the court to "find[] that the State has failed to negotiate in good faith." 25 U.S.C. § 2710(d)(7)(B)(iii). That entails an objective analysis, based solely on the official record of negotiations. *See Rincon*, 602 F.3d at 1041. Pauma's bad-faith allegation appears to rest primarily on the 2003 statement that there were no more slot machine licenses available in the common pool. *See* Pauma Pet. i, 8-14. But Pauma acknowledges that this statement preceded its negotiations with the State over the amended compact. *See id.* at 14. Furthermore, the record contains no suggestion that this information was intentionally misleading. In the context of denying Pauma's request for prejudgment interest, the district court stated that it "does not find the State to have acted in bad faith in misrepresenting the size of

the [common-license] Pool." State Pet. App. 48a n.2. Pauma does not address this finding, or explain why the district court would reach any different conclusion if it were to apply § 2710(d)(7)(B)(iii).

CONCLUSION

Pauma's petition for a writ of certiorari should be denied.

Respectfully submitted,

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