DOCKET NOS. 18-56457

In the United States Court of Appeals *for the* Ninth Circuit

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

Plaintiff & Appellant,

v.

STATE OF CALIFORNIA; **EDMUND G. BROWN, JR.**, as Governor of the State of California; **DOES 1 THROUGH 10**;

Defendants & Appellees.

On Appeal from the United States District Court for the Southern District of California

No. 16-01713

The Honorable Cynthia Bashant, United States District Judge

REPLY BRIEF BY APPELLANT PAUMA BAND OF MISSION INDIANS

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A. THE STATE OMITS TO ARGUE THE DISTRICT COURT'S REASONING AS A BASIS TO AFFIRM THE DISTRICT COURT'S ORDER

One omission and one admission in the Answering Brief by the State of California ("State") greatly narrow the analysis necessary to resolve the instant appeal. The omission stems from the State pulling a maneuver that is largely unheard of in federal appellate practice: abandoning the rationale for the district court's order and seeking affirmance on a *different* basis. Whereas the district court pinned its entire fifty-page summary judgment order to the one-sentence legal conclusion that an analysis of good or bad faith under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*, was premature on account of the Pauma Band of Mission Indians' ("Pauma" or "Tribe") supposed failure to negotiate to an "impasse," the State blows right past this legal stopgap and argues the facts in an attempt to carry its burden to prove that it actually negotiated in good faith with respect to each and every claim of bad faith negotiation raised in the complaint below. *See* 134 Cong. Rec. 25377 (1988) (explaining IGRA "imposes the burden of proof on the State in any court test").

To that end, the State first tries to reduce the number of issues presented on appeal from the two set forth within Pauma's opening brief to just one, reframing the prior statements as simply whether "the district court commit[ted] reversible error in

[supposedly] holding that the Record between the State and Pauma showed that the State did not negotiate in bad faith under IGRA." Answering Brief, p. 4; *see* Fed. R. App. P. 28(b) (explaining an appellee need not set forth a statement of the issues unless "dissatisfied with the appellant's statement"). Then, the argument subsections of the Answering Brief devoted to explicating this singular issue clump together claims of bad faith negotiation into supposedly thematic groups and then try to prove from an evidentiary standpoint that the State complied with its duties under IGRA by, *inter alia*, engaging in "individualized negotiations" and "remain[ing] willing to negotiate." Answering Brief, pp. 33-56. The State, in other words, went to extraordinary lengths to avoid discussing the impasse issue in its Answering Brief, which means this Court should hold that the State waived its ability to do so and accordingly accept the invitation to resolve the appeal on the basis of whether or not the State actually *did* negotiate in good faith with Pauma. *See Johnson v. AG of United States,* 605 F. App'x 138, 146 (3d Cir. 2015) (holding the federal appellee waived an argument it failed to raise under its issues presented); *cf. Roth v. United States DOJ,* 642 F.3d 1161, 1181 (D.C. Cir. 2011) ("Even appellees waive arguments by failing to argue them in briefs." (citation omitted)).

On that question, more than one hundred pages of briefing now dissect the State's compliance with its statutory obligations. And yet, page after page of argument may be less adept at addressing this issue than just two interconnected pictures. As to that, the State is the keeper of the compact since the majority of the agreement is simply

boilerplate that gets carried over from one negotiation to the next. Thus, when Pauma commenced renegotiation of its existing compact on November 24, 2014 due to its desire to engage in new forms of Class III gaming, the Office of the Governor should have simply responded on December 15, 2014 by sending a draft compact that took the prevailing language in Section 4.0 of:

> Sec. 4.0. SCOPE OF CLASS III GAMING.
>
> Sec. 4.1. Authorized and Permitted Class III gaming. The Tribe is hereby authorized and permitted to operate the following Gaming Activities under the terms and conditions set forth in this Gaming Compact:
>
> (a) The operation of Gaming Devices.
>
> (b) Any banking or percentage card game.
>
> (c) The operation of any devices or games that are authorized under state law to the California State Lottery, provided that the tribe will not offer such games through the use of the Internet unless others in the state are permitted to do so under state and federal law.
>
> (e) Nothing herein shall be construed to preclude negotiation of a separate compact governing the conduct of off-track wagering at the Tribe's Gaming Facility.

and tweaked it in the following two minor ways, which would have even corrected the existing typographical error therein related to the missing subsection (d):

> Sec. 4.0. SCOPE OF CLASS III GAMING.
>
> Sec. 4.1. Authorized and Permitted Class III gaming. The Tribe is hereby authorized and permitted to operate the following Gaming Activities under the terms and conditions set forth in this Gaming Compact:
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> (c) The operation of any ~~devices or games that are authorized under state law to the California State Lottery~~lottery games, provided that the tribe will not offer such games through the use of the Internet unless others in the state are permitted to do so under state and federal law.
>
> (d) On-track wagering at the Tribe's Gaming Facility.
>
> (e) Nothing herein shall be construed to preclude negotiation of a separate compact governing the conduct of off-track wagering at the Tribe's Gaming Facility.

Making these two changes would have satisfied Pauma's opening request, conferred all three forms of gaming guaranteed by article IV, Section 19(f) of the California Constitution, and enabled the parties to turn their attentions to engaging in substantive discussions about the regulatory terms for the new gaming rights. Yet, the State was unable to put these *nine words* in writing either on December 15, 2014 or even some sixteen-and-a-half months later on April 28, 2016 when it finally transmitted the draft compact that it had long withheld.

B. THE STATE FINALLY ADMITS IT WAS "LEGITIMATELY OPPOSED" TO PAUMA'S REQUEST FOR NEW GAMING RIGHTS FOR THE ENTIRETY OF THE NEGOTIATIONS

This point about chronic inaction leads to the admission in the State's Answering Brief mentioned at the outset, which is that the State never wrote these nine simple words because it was, in reality, "legitimately opposed" to Pauma's request for new gaming rights. Using the State's own language from the Answering Brief to describe its position on Pauma's November 24, 2014 request for new lottery games as of March 30, 2016 (*i.e.*, sixteen-plus months later), **"the State remained legitimately opposed to Pauma's preference for broadly defining the scope of authorized tribal lottery games."** Answering Brief, p. 49. Of course, the State never actually disclosed this during the eighteen months of the negotiations. Rather, every passing month brought with it some sort of deflective response from the State that made the discussions entirely recursive. In fact, one could craft dialogue akin to that in an Absurdist play written by the likes of Samuel Beckett or Eugene Ionesco by just using

the various iterations of the two main pronouncements the State made over and over again during the course of the negotiations: (1) I don't understand you, and (2) let's talk in the opposite manner. Thus, strip away layer upon layer of legal jargon and factual justification for the stagnation in the talks, and the back and forth between Pauma and the State actually looks like a riff on Waiting for Godot:

ACT 1

An empty room. A typewriter.

Evening.

Pauma's counsel, hunched over a desk, is trying to prepare a letter for the State. He hammers at the keys with both hands, sighing.

He gives up, frustrated, rests, tries again.

As before.

And then he puts down his message, clearly, concisely, and prepares to send. Enter the State downstage left.

11/24/2014 (in writing)

Pauma:

> *I'm hoping something can be done. I write to you to renegotiate the gaming compact for new forms of gaming, with these examples of lottery games falling within the eponymous form.*

(cont.)

State:

I'm glad to see you back! I thought you were gone forever! Yes, let's discuss a "Compact which addresses these forms of gaming." But what forms of gaming shall this Compact address? Let's discuss this discussion in person rather than in writing so I can understand you better.

[ER94-100]

12/23/2014 (in writing)

Pauma:

Together again at last! We'll have to celebrate this! But before then, let me clear up any confusion on the new forms of gaming for the renegotiated Compact by repeating the contents of my original request.

State:

I hear what you say; I just don't understand what you say. But we will discuss this in person soon so what I hear I can also understand.

[ER102-106]

1/16/2015 (in person)

Pauma:

And here I am! So hear me out: here, for you, are the forms of gaming desired, and the legal principles that support the request.

(cont.)

State:

I thought I would understand you better in person, but this is "murky," all so murky. Let me respond to you in writing, soon, once you are gone and I can thus finally understand what it is you are saying.

[ER115-117]

5/8/2015 (in writing)

Pauma:

But, alas, where is this writing? Perhaps your confusion persists so let me state my request for the fourth time and ask you to send the promised written response "identifying the games over which the State is and is not willing to negotiate."

State:

A writing? But how can I communicate with you in writing when I cannot understand you in person? But understand you I will, and that will likely happen in person after I send you this letter.

[ER123-127]

8/5/2015 (in writing)

Pauma:

And meet we will, but if you can understand me then, then you can understand me now. And I have to assume you do understand me so we can finally discuss actual terms when we meet in person.

State:

All you should assume from my preference to discuss substantive matters in person is that I prefer to discuss substantive matters in person. As for the substance of those substantive discussions, you say terms, I say we will talk in person, and I will have something to say to you.

[ER129-133]

9/8/2015 (in person)

State:

I have nothing to say to you. Certain things I must avoid, so corresponding in writing is the best way to understand one another.

Pauma:

But what if I say it here, in person, and see whether you understand?

State:

Oh, but you just said it, and therein did the thing I was hoping to avoid!

Pauma:

And what thing did I do?

State:

You did that thing, that thing that is something rather than nothing! Now you must send me a letter so we can start all over again!

[ER149-153]

(cont.)

10/6/2015 (in writing)

Pauma:

Maybe you think we moved too fast and too soon this past year. So let's talk about one thing, the original thing in my original letter, that thing about renegotiating the compact and obtaining new gaming rights.

State:

But I never agreed to renegotiate when I said we would discuss negotiating a "Compact which addresses these forms of gaming." So, here we are discussing, what, I don't know. But whatever it is, you can send it to me in writing so I can try and understand it.

[ER181-192]

11/25/2015 (in writing)

Pauma:

The thing we are discussing is the same thing it's always been – the thing we have been "going in circles about for the past year."

State:

But what thing are you talking about? If it is the lottery games thing, I still don't understand you. And my lack of understanding is directly attributable to you not saying anything in person or writing to help me understand. Perhaps your understanding will aid my understanding and create a mutual understanding, if you just give me something to consider.

[ER215-219]

1/27/2016 (in writing, post-meeting)

Pauma:

Okay, here is something to consider: simple sample language tweaking two parts of the compact and thus conferring the lottery games requested at the outset of these negotiations.

State:

(Silence)

[ER255-257]

3/7/2016 (in writing)

Pauma:

Did you hear what I said? I said I gave you something to consider!

State:

Oh, I can't consider that! I legally can't consider that. And I won't consider that, at least in certain ways. But maybe I'll consider that in other ways!? How about I just send you a "complete draft document" that doesn't consider that in any way, and that way we can consider some of that, in some way, someday?

State (again):

That is, if I can understand you better first. (Silence)

[ER259-263]

Curtain.

(cont.)

C. THE FINAL COMMUNICATION FROM THE STATE VIOLATES AT LEAST THREE CORE PRINCIPLES OF IGRA

To the State, the final multi-layered March 30, 2016 response letter killing any discussion on compact language for lottery games was not an evasion of its statutory obligation, but just an expression of its self-professed "good-faith concerns" with the approach taken by Pauma – the one to which the State was "legitimately opposed" – that would supposedly "not provide the required clarity as to the scope of the authorization for new lottery games." Answering Brief, p. 49. There is a lot to unpack in this letter, and it helps to deconstruct the relevant section of the response into its three constituent parts – (1) the State's general position, (2) what the State would not do, and (3) what the State ostensibly would do. What is truly remarkable is that *all three* components of this response violate some core principle of IGRA if picked apart using the leading legal authorities.

1. LOTTERIES ARE A DISCREET "FORM" OF CLASS III GAMING, AND A STATE MUST NEGOTIATE FOR THIS ENTIRE FORM IF ANY INCIDENT OF IT IS LEGAL (25 U.S.C. § 2703(8) & 25 C.F.R. § 502.4)

For starters, there is the opening comment below that the State refused to prove up despite Pauma requesting as much – the one about the open-ended grant of lottery games to Indian tribes in article IV, Section 19(f) of the California Constitution supposedly having a limited and variable meaning that turns upon what the California State Lottery has regulatively "authorized" itself to put into commercial operation:

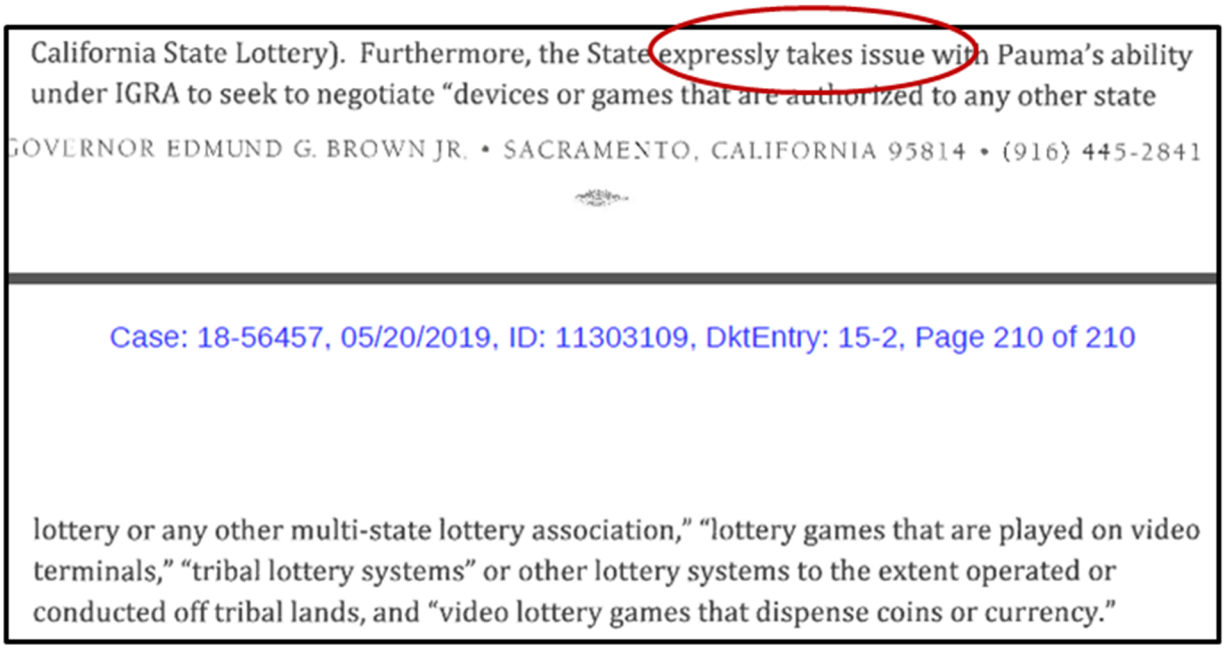
> The grant of authority to the Governor to negotiate for lottery games under article IV, section 19, subdivision (f) of the California Constitution has always been understood to encompass those games authorized for play by the California State Lottery. This was the

What this comment conveys is that the Office of the Governor held a subjective belief about the individual types of lottery games that are or are not legal to tribes under California law. Shoehorn this stance into IGRA and it would be the death knell of negotiations because the general principle is that a tribe can only conduct "that" which is legal in the surrounding state. *See* 25 U.S.C. § 2710(d)(1)(B) (requiring "Class III gaming activities" to occur on Indian lands "located in a State that permits such gaming for any purpose by any person, organization, or entity"). But, what a state subjectively believes is legal under state law is different from what it objectively has to negotiate under federal law. The answer to this latter inquiry is the "that" mentioned two sentences above. The way IGRA works is that "class III gaming activities shall be lawful on Indian lands" if certain conditions are met, two of which are the State "permits such gaming for any purpose by any person, organization, or entity," and the tribe conducts such "in conformance with a Tribal-State compact entered into by the Indian tribe and the State." 25 U.S.C. § 2710(d)(1) & (d)(1)(C). The definition for "class III gaming" is set forth in a prior section of IGRA, the relevant portion of which states that this term means "all *forms* of gaming that are not class I gaming or class II gaming." *See* 25 U.S.C. § 2703(8). Some of these various forms of "class III gaming" are in turn listed in a regulation that the National Indian Gaming Commission prom-

ulgated just a few years after the enactment of IGRA (*see* 57 Fed. Reg. 12392 (Apr. 9, 1992)), which includes amongst these forms "slot machines," "pari-mutuel wagering," and "lotteries." 25 C.F.R. § 502.4. Thus, read these sections of IGRA and the interpretive regulation together and out comes a principle the federal courts have long recognized: that a state has to negotiate for an entire form of class III gaming if any incident of such is legal in the surrounding state. *See Rumsey Indian Rancheria v. Wilson,* 64 F.3d 1250, 1258 (9th Cir. 1994) ("IGRA does not require a state to negotiate over one form of class III gaming simply because it has legalized another, albeit similar form of gaming."). This explains why the State negotiated for slot machines generally under the 1999 Compact, and not just the Wheel of Fortune progressive game. It explains why the State negotiated for percentage and banked card games generally under the 1999 Compact, and not just five-card stud. And it also explains why the State had to negotiate for lottery games generally during the negotiations under review instead of limiting the discussions to, at most, "certain additional lottery games" that the State somehow still could not identify after eighteen months of negotiation. [ER262]

2. IMPOSING STATE LAW LIMITATIONS ON THE NEGOTIATIONS FOR A PARTICULAR FORM OF GAMING IS IMPERMISSIBLE (*NORTHERN ARAPAHO*)

What the State could do, though, is identify the various types of games within the lottery-game form that it would *not* negotiate now that it had framed its obligations as being, at best, permissive under State law rather than mandatory under federal law:



California State Lottery). Furthermore, the State expressly takes issue with Pauma's ability under IGRA to seek to negotiate "devices or games that are authorized to any other state

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lottery or any other multi-state lottery association," "lottery games that are played on video terminals," "tribal lottery systems" or other lottery systems to the extent operated or conducted off tribal lands, and "video lottery games that dispense coins or currency."

One may wonder why these types of games in particular were chosen as being non-negotiable, but the answer to that question becomes clear after looking at the state of State law. The same section of the California Constitution that bestows tribes with the right to operate lottery games also established the "California State Lottery," and did so without imposing any restrictions on the types of lottery games that it can offer to the general public (which is a separate basis for tribes being able to operate lotteries generally under IGRA). *See* Cal. Const. art. IV, § 19(d). That means the only restrictions on what the California State Lottery can offer are set forth within Section 8880.28 of the Government Code, which simply forbids the use of certain themes, certain technologies, and certain methods of payout to winning players. *See* Cal. Gov't Code § 8880.28(a) & (b). Yet, aside from the few "express limitations… contained in Government Code 8880.28" (*see Western Telcon, Inc. v. Cal. State Lottery,* 13 Cal. 4th 475,

482-83 (1996)), the California State Lottery has the discretion to offer *any* lottery game it desires. The traditional way in which the California State Lottery exercises this discretion is by amending its rules and regulations to include a new game – like the Monopoly Millionaires' Club game licensed from the Multi-State Lottery Association – and an "authorization" section that says the "California lottery may conduct [such game]… pursuant to these regulations." [ER081-082] Thus, the present rights of Indian tribes are forever tied to what the California State Lottery first decides to do. If it elects to license another game from the Multi-State Lottery Association, then tribes can do the same. If it stands pat, however, the tribes have no option but to follow suit. There are a myriad of games in the marketplace that the California State Lottery can authorize itself to conduct on a moment's notice, and that is largely the stuff the State would not address in the negotiations through the *ad infinitum* use of hollow statements about its supposed "open[ness]… to discussion regarding the authorization of additional enumerated games." [ER282] But, for the most part, what the State outright refused to negotiate for are the technologies and functionalities that are not within arm's reach for the California State Lottery under Section 8880.28 of the Government Code. In other words, the State refused to negotiate beyond existing state law limitations for its own lottery enterprise.

And yet, "negotiating" a permitted form of class III gaming along state-law lines is something a state fundamentally *cannot* do under IGRA. The United States Court of Appeals for the Tenth Circuit made this clear in *Northern Arapaho Tribe v. Wyoming,* 389

F.3d 1308 (10th Cir. 2004), a case in which the appellate court affirmed a finding of bad faith negotiation against the State of Wyoming using the Ninth Circuit's understanding of IGRA. *See id.* at 1311 (citing *Rumsey*, 54 F.3d at 1257-58). In that case, Northern Arapaho triggered compact negotiations with the State of Wyoming in order to obtain the right to offer numerous forms of class III gaming, including slot machines, casino games like roulette, pari-mutuel wagering, and calcutta wagering. *Id.* at 1310. The State of Wyoming responded to this request by citing its "broad criminal prohibition against gambling," and indicating that it would only negotiate for certain permitted forms of gaming – like calcutta and pari-mutuel wagering – and only then to the extent those games are played in the outside commercial world. *Id.* For instance, calcutta wagering occurred in connection with a number of private-sector competitions like "amateur contests, cutter horse racing, dog sled racing, professional rodeo events, [and] professional golf tournaments," and the State of Wyoming conditioned the negotiations on Northern Arapaho offering this form of gaming in connection with the same events and in the same manner as everyone else. *Id.* at 1311.

As negotiations gave way to litigation, the State of Wyoming tried to deflect the allegations of bad faith negotiation by suggesting that it would be unfair to have to negotiate "without regard to the [existing] limitations of Wyoming law," but both the district court and the Tenth Circuit disagreed with this argument. *Id.* at 1311-12. To them, "the compact process that Congress established as the centerpiece of the IGRA's regulation of Class III gaming would [ ] become a dead letter [if the state's

approach were correct]; there would be nothing to negotiate and no meaningful compact would be possible." *Id.* at 1312. The promise of good faith and individualized negotiations under IGRA, in other words, has to mean something, and to the Tenth Circuit that something was the following two interconnected principles that led directly to the syllogistic holding that the State of Wyoming negotiated in bad faith: (1) if a form of gaming is permitted by a state "for any purpose by any person," then "such gaming is lawful on Indian land without the restrictions otherwise imposed on off-reservation gaming as a matter of state law," and (2) "[w]hen a state refuses to negotiate beyond [these] state law limitations concerning a game that it permits, the state cannot be said to have negotiated in good faith under IGRA given the plain language of the statute." *Id.* at 1312-13. Obviously, these two principles help shine a light on the parallels between *Northern Arapaho* and the instant case. Again, in *Northern Arapaho*, the State of Wyoming earned its bad faith badge by *not* negotiating for the entire form of calcutta wagering, just those particular types that private entities could offer. Here, the State of California is trying to do the impossible and avoid an identical brand even though it tied the negotiations for lottery games to what the California State Lottery currently does – dodging any discussion of new games the State Lottery could similarly choose to offer while outright refusing to negotiate for those it cannot. Thus, bad faith is not only evident from the State's refusal to negotiate for an entire form of permitted class III gaming, but also for feigning a willingness to negotiate for some portion of that form subject to state law limitations.

3. PASSIVELY EXPRESSING A WILLINGNESS TO "DISCUSS" A FORM OF GAMING WITHOUT ACTIVELY NEGOTIATING IS INSUFFICIENT TO SHOW GOOD FAITH (*MASHANTUCKET*)

The oft-repeated response from the State is that none of this can evidence bad faith negotiation, though, because the March 30, 2016 response letter also included that squishy, canned response about the State's willingness to include certain unidentified lottery games in the ultimate compact:

> the voters as they considered the amendment to the California Constitution. However, the State is willing to negotiate to authorize Pauma to offer certain additional lottery games to be enumerated in the compact. Specifying the games provides clarity as to the scope of the

What, pray tell, distinguishes this comment from the one made by the State of Connecticut a commensurate amount of time into its bad faith negotiations about its asserted "readiness to resolve the issue of casino type gambling" for the Mashantucket Pequot tribe? *See Mashantucket Pequot Tribe v. Connecticut,* 913 F.2d 1024 (2d Cir 1990). The factual background of no other case tracks this one quite like *Mashantucket,* the negotiations for which are bookended by statement just like the ones made by the California Office of the Governor to Pauma. The negotiations in *Mashantucket* began on March 30, 1989, when the tribe, through legal counsel, contacted the Governor of Connecticut about its desire to "expand its gaming activities to include class III games of chance, such as those activities permitted by Connecticut law for certain nonprofit organizations during 'Las Vegas nights.'" *See id.* at 1026 (citing Conn. Gen. State. §§ 7-186a to 1-186p (1989)). The response from the Governor of Connecticut came out a

month later, on May 1, 1989, and it too was non-committal on what the State of Connecticut would actually negotiate, just vaguely explaining that the Attorney General's Office was "review[ing] the IGRA and determin[ing] the State's obligations thereunder." *Id.* at 1027. As it happens, the state was *actually* looking into this issue, as it communicated an answer just a few months later – on July 19, 1989 – indicating that it *would not* negotiate for the operation of games of chance or Las Vegas nights but *would* "negotiate, in good faith, with the Tribe concerning other permissible forms of gaming in Connecticut." *Id.* On-and-off debate about the proper scope of the negotiations consumed the ensuing year, during which the State of Connecticut at least did such things as "offer[ ] additional argument for [its] position" on the lawfulness of Las Vegas Nights, and "discuss[ ] [its] amenability to litigation to resolve the issue." *Id.* After just over a full year elapsed from the transmission of its original response letter during the summer of 1989, the State of Connecticut sent one final letter to Mashantucket in which it conveyed its "readiness to resolve the issue of casino type gambling" for the tribe – something it was apparently not really ready to do since it failed to negotiate on the subject in the immediate aftermath. *Id.*

To defend against the bad faith negotiation claims brought by the tribe shortly thereafter, the State of Connecticut cited for the benefit of the court everything it did *aside from* actually negotiating for the requested games – from researching the legality of such games, to expressing its willingness to negotiate in some capacity, to communicating that it was open to resolving the legal issue in a federal action. *See id.* at

1033. But, none of this was actual negotiation for the requested class III games in the opinion of the United States Court of Appeals for the Second Circuit. *Id.* at 1032. Rather, the appellate court believed the State of Connecticut "wholly fail[ed] to negotiate" for those games, and thus could not "meet its burden to prove that it negotiated in good faith." *Id.* (citing *NLRB v. Katz,* 369 U.S. 736, 743 (1962)). As for the litany of "protestations" from the state that sought to justify the inaction, all of them went against the "manifest purpose of the statute… to move negotiations toward a resolution" and none of them could remove the indelible stain of bad faith from failing to actually negotiate. *Id.* at 1032-33.

If anything, the negotiation behavior by the bad-faith actor the State of Connecticut is actually *better* – if not *far* better – than that of the State of California in the instant case. The State of Connecticut was actually willing to give the tribe a concrete response on what it would or would not negotiate right at the outset of the negotiations, and this was despite the fact that the process began not long after the enactment of IGRA when there was an absolute dearth of case law examining a state's good faith negotiation obligation. Not only that, but the State of Connecticut substantiated its legal position on the proper scope of the negotiations with supporting authority and even indicated its willingness to submit the at-the-time "legal issues of first impression" to a federal court for resolution. In stark contrast, the State of California simply steered the negotiations 360° to the left rather than allow any progress – never providing direct answers, rejecting Pauma's request for substantiation, trying to deter

court involvement, and doing all of this against the backdrop of repeated bad-faith findings. *See Big Lagoon Rancheria v. California,* 789 F.3d 947 (9th Cir. 2015) (*en banc*); *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger,* 602 F.3d 1019 (9th Cir. 2010); *Estom Yumeka Maidu Tribe of Enterprise Rancheria v. California,* 163 F. Supp. 3d 769 (E.D. Cal. 2016); *North Fork Rancheria of Mono Indians v. California,* 2015 U.S. Dist. LEXIS 154729 (E.D. Cal. 2015). [ER259-263] Again, nine simple words would have propelled the negotiations forward; but, now, hundreds of thousands of words mar a record of negotiations that failed to ever get off the ground.

4. EVEN THE BAD-FAITH ACTOR THE STATE OF CONNECTICUT IN *MASHANTUCKET* ULTIMATELY GAVE THE TRIBE THE RIGHT TO OPERATE "ALL LOTTERY GAMES"

There is a lot to learn from *Mashantucket*, including how good faith can arise after a state is found to have negotiated in bad faith with an Indian tribe. As a refresher, the remedy for bad faith negotiation is just the triggering of a three-part remedial scheme that tries to complete the negotiations that originally failed. *See* 25 U.S.C. § 2710(d)(7)(B)(iii). The first stage of this process is simply an additional sixty days of negotiation between the parties. *See id.* If the parties cannot voluntarily conclude a compact during these renewed negotiations, then the remedial scheme enters into the second stage, which is baseball-style arbitration before a "mediator" who selects one of the "last best offer[s] for a compact" submitted by the parties to serve as the governing agreement. 25 U.S.C. § 2710(d)(7)(B)(iv). In the event the mediator chooses the tribe's "last best offer" and the State refuses to consent to the proposal, then the

mediator "notif[ies] the Secretary of the Interior," who then prescribes regulatory procedures "under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction." 25 U.S.C. § 2710(d)(7)(B)(vii).

This is the process the State of Connecticut had to go through after the Second Circuit issued its opinion affirming the finding of bad faith negotiation on September 4, 1990. *See Mashantucket,* 913 F.2d at 1024. The remedial process wound up involving all three stages, but the regulations the Secretary ultimately promulgated on April 17, 1991 are simply the implementation of a compact the State of Connecticut offered to Mashantucket during the second stage of the process but declined to voluntarily accept out of fear that another tribe then-seeking federal recognition (*i.e.*, the Mohegan tribe) would expect the same thing one day. *See* 56 Fed. Reg. 15746 (Apr. 17, 1991). As for the terms of that compact, the State of Connecticut gave the tribe the right to operate "*any* lottery game" – just as IGRA requires – amongst numerous other forms of class III gaming, and dealt with any hypothetical concerns about the legality of future lottery games by simply inserting a notification requirement into the compact so the tribe had to inform the state before commercially offering a lottery game that was different from those "operated by the state." *See* 56 Fed. Reg. 24996 (May 31, 1991); United States Department of the Interior – Indian Affairs, *Tribal-State Compact between the Mashantucket Pequot Tribe and the State of Connecticut* §§ 3(a)(iii), 9(e) (May 31, 1991), *available at* https://www.bia.gov/sites/bia.gov/files/assets/as-ia/oig/oig/pdf/idc1-026009.pdf (last visited Jan. 13, 2020). Consider for a moment how the bad faith

finding changed the tenor of these negotiations. Before the lawsuit, the State of Connecticut could not positively identify *anything* it would willingly negotiate for a year and a half. After losing the lawsuit, the State of Connecticut then devised an entire compact that conferred a number of new forms of gaming – including "all lottery games" – within just a few short months. What this shows is that true good faith negotiation should create a game-centric compact in four or five months *tops* – just like the 1999 Compact negotiations (*see* Answering Brief, p. 14) – rather than allow a tribe to languish on the formative issue of identifying the subjects of negotiation for more than eighteen months.

D. THE ON-TRACK BETTING DISCUSSIONS BORE THE SAME CADENCE AS THE LOTTERY GAMES ONES

The on-track betting topic may seem like its playing second fiddle to lottery games, but that is only because explaining the bad faith is much simpler when the subject comes up *after* the foregoing discussion rather than when analyzed in isolation. The reason for this is the State's negotiation strategy for on-track betting followed the same pattern as the one for lottery games. Each and every time Pauma mentioned conducting on-track betting, the State would counter by shifting the discussion to something else. The main way of doing this was to try and talk about *off-track* betting when Pauma mentioned *on-track*. This may seem like a small stylistic change, but, even as the State admitted in its Answering Brief, one type of gaming (*i.e.*, the one sought by Pauma) involves wagering on live horse races at the tribe's reservation while the

other deals with betting on televised broadcasts of horse races at other locations. *See* Answering Brief, p. 1 ("A tribal off-track satellite wagering facility allows… wager[ing] on horse races that take place at licensed horse racing tracks located off the tribe's Indian lands. In contrast, an on-track horse racing facility would authorize horse racing and betting on that horse racing on the tribe's Indian lands."). Thus, on- and off-track betting are totally different animals in the class III world, and one would expect a state to focus upon negotiating the specific gaming right actually requested by the tribe.

And yet, when Pauma raised the prospect of obtaining on-track betting in its initial November 24, 2014 renegotiation request, the State somehow interpreted this as primarily meaning "off-track… betting" in its response one month later. [ER095, 099] Almost immediate written clarification from Pauma that it was focused upon on-track betting and had "no[] interest[] in obtaining off-track betting at this time" did nothing to clear up the State's apparent misapprehension, as it opened the first negotiation session by again raising "off-track wagering" and how the "State has entered into off-track wagering compacts[,] and that those might be used as a starting point for Pauma's proposed facility." [ER103, 120] Further clarification from Pauma ensued, and yet the second negotiation session some eight months later began in the same way, with the State mentioning how "at the first meeting we'd asked [Pauma] about the off-track wagering issue," and "frankly, [how] it just seems [to the State] from a commercial perspective that there was no reason that you wouldn't want to do

that." [SER011-012] This insistence on discussing off-track betting at every turn never waned, and the negotiations ultimately concluded with the State sending the "complete draft [compact]" on April 28, 2016 that said nary a thing about on-track betting but unsurprisingly included a comment bubble that the "State has proposed [an] OTW [*i.e.*, off-track wagering] compact that can be incorporated as an Appendix or negotiated and concluded as a separate class III gaming compact." [ER282] Thus, the beginning, middle, and end of the negotiations were all punctuated with efforts by the State to talk about something *other* than what Pauma requested.

A secondary tactic to forestall this discussion during the dog days of the negotiations went hand in hand with these measured mondegreens, and that was the State insisting on obtaining Pauma's "business plan" for its planned horse track before it would actually begin to negotiate over on-track betting. [ER253] Yet, the relationship between the tribe and the state that Congress created under IGRA is not one of joint ventures or even a financier and lender, but rather of a restricted regulator and the regulated. *See* 25 U.S.C. § 2710(d)(3)(C) (listing the seven permissible subjects of negotiation). Model regulations for horse tracks already exist, they have existed for upwards of sixty years, and they should have served as a starting point for the discussion of on-track betting. *See, e.g.,* Cal. Bus. & Prof. Code § 19400 *et seq*. Yet, obtaining Pauma's business plan became the State's sole focus on this subject even though *no other* state in *no other* compact negotiation has ever conditioned its willingness to negotiate on receiving this sort of information first (not even the State of California when

negotiating for maiden casino gaming under the 1999 Compacts or for lottery games in these very negotiations). There is very good reason for this, after all: only one "condition precedent to negotiation" exists, it is "specified by the IGRA [within Section 2710(d)(1)(B)]," and trying to erect additional preconditions is nothing other than bad faith negotiation. *See Mashantucket,* 913 F.3d at 1028-29 (explaining the State of Connecticut could not refuse to negotiate until it obtained the tribe's gaming ordinance (citing 25 U.S.C. § 2710(d)(1)(B)). Thus, this fallback tactic for obstructing the on-track betting discussions is also bad faith *per se* in the event the on-track/off-track switcheroo does not already constitute as much.

II. PICTURE A HYPOTHETICAL SECOND ACT TO THESE NEGOTIATIONS IN WHICH THE STATE RESTS ON THE DISTRICT COURT'S DECISION AND BELIEVES IT NEED NOT BE FORTHRIGHT WITH INDIAN TRIBES

Serving as the backdrop for this litigation is not a clean slate but one reciting over and over again the good faith requirement, "the function of [which]… is to permit the tribe to process gaming arrangements on an expedited basis." *Rincon,* 602 F.3d at 1041 (citing, *e.g.*, *Mashantucket,* 913 F.3d at 1033). The expectation that negotiations will occur quickly comes from the language of IGRA and Congress' belief stated therein that one-hundred and eighty days of negotiations should be sufficient for a court to determine whether or not a state actually negotiated in good faith. *See* 25 U.S.C. § 2710(d)(7)(B)(i) (allowing bad faith suits "after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations"). Most negotiations complete within that time, like the ones for the

1999 Compact. *See* Answering Brief, p. 14. For those that do not, the obligation inherent in the good faith requirement that a state make "counter-suggestion[s] or proposals" to the "claim[s] or demand[s]" of a tribe means that any uncompleted negotiations should be winding down. *See Flandreau Santee Sioux Tribe v. South Dakota,* 2011 U.S. Dist. LEXIS 68531, *11 (D.S.D. 2011) (citing, *e.g.*, *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 687 (9th Cir. 1943)). But what if these principles did not exist, and a state believed it was completely unmoored from the good faith negotiation requirement and any notion that it has to actually *try* to move in some direction towards the conclusion of a compact? It is easy to picture that playing out in this case again – hypothetically, of course – during a second round of negotiations after the district court issued its opinion holding the parties never reached an impasse. With that opinion coming out late in the fall of Governor Brown's final year in office, these purely hypothetical negotiations would likely unfold as follows:

October-December 2018:	Governor Brown refuses to negotiate as he leaves office
January-March 2019:	Governor Newsom refrains from negotiating as he comes into office
April 2019:	Pauma sends an updated draft compact to again obtain new gaming rights

May-October 2019:	The State, with the assistance of the same attorneys general, insists on talking in person so it can better understand what Pauma wants
June 2019:	Pauma badgers the State for a responsive draft
July 2019:	Pauma badgers the State for a responsive draft
September 2019:	Pauma badgers the State for a responsive draft
October 2019:	Pauma badgers the State for a responsive draft
November 2019:	The State reluctantly sends a revised draft compact that is devoid of counterproposals and just repeats the familiar refrain that it is open to discussions about new games, should it ever understand Pauma's request
December 2019:	Pauma again sends redlines on the new gaming rights
January 2020:	State declines to respond to the redlines and insists that it needs to meet in person to understand Pauma better

A minimum of *another* year and a half will elapse, in other words, as the parties go round and round in circles while the State latches on to the idea that it does not have to negotiate if it just says it does not understand the request. That understanding is always expected to arrive tomorrow, but it never comes. Thus, the second act of this

play is no different than the first depicted above, save for subbing out the final line for the paradoxical "Yes, let's go. *They do not move.*" ending from Waiting for Godot to signify that this futility will continue forever.

CONCLUSION

The decision below should be reversed.

RESPECTFULLY SUBMITTED this 22nd day of January, 2020

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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