No. 15-____

In the Supreme Court of the United States

STATE OF CALIFORNIA, *et al.*,

Petitioners,

v.

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

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

KAMALA D. HARRIS
Attorney General of California
JANILL L. RICHARDS
Acting Solicitor General
SARA J. DRAKE
Senior Assistant Attorney General

MICHAEL J. MONGAN*
Deputy Solicitor General
T. MICHELLE LAIRD
NEIL D. HOUSTON
Deputy Attorneys General
SAMUEL P. SIEGEL
Associate Deputy Solicitor General

STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102
(415) 703-2548
Michael.Mongan@doj.ca.gov
**Counsel of Record*

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QUESTION PRESENTED

In *Edelman v. Jordan*, 415 U.S. 651 (1974), this Court held that a waiver of state sovereign immunity must be "stated 'by the most express language or by such overwhelming implication from the text as will leave no room for any other reasonable construction.'" *Id*. at 673 (alteration omitted). This case concerns a gaming compact between the State of California and the Pauma Band of Luiseno Mission Indians of the Pauma and Yuima Reservation. Both parties waived their sovereign immunity from suits arising under the compact, but only to the extent that "[n]either side makes any claim for monetary damages (that is, only injunctive, specific performance, including enforcement of a provision of this Compact requiring payment of money to one or another of the parties, or declaratory relief is sought) . . . ." App. 28a. A divided panel of the Ninth Circuit held that this limited waiver, which also appears in gaming compacts between California and 57 other tribes, waived the State's immunity with respect to an award of $36.2 million in restitution. The question presented is:

Whether, under *Edelman*, the language of the limited waiver—which expressly excludes claims for "monetary damages" and references only injunctive relief, specific performance, and declaratory relief—waived the State's sovereign immunity with respect to the district court's monetary award.

PARTIES TO THE PROCEEDING

Petitioners are the State of California, the California Gambling Control Commission, and Edmund G. Brown Jr., in his capacity as Governor of the State of California. Respondent is the Pauma Band of Luiseno Mission Indians of the Pauma and Yuima Reservation, also known as the Pauma Band of Mission Indians and the Pauma Luiseno Band of Mission Indians.

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of California, on behalf of the State of California, the California Gambling Control Commission, and Edmund G. Brown Jr., in his capacity as Governor of the State of California, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-41a) will be reported at ___ F.3d ____ (9th Cir. 2015), and is also available at 2015 WL 9245245. An earlier version of the court's opinion, before amendment on denial of rehearing and rehearing en banc, was reported at 804 F.3d 1031 (9th Cir. 2015). The relevant orders of the district court (App. 44a-90a) are unpublished.

JURISDICTION

The judgment of the court of appeals was originally entered on October 26, 2015. App. 1a. The court amended its opinion and re-entered judgment on December 18, 2015, in conjunction with the entry of an order denying rehearing and rehearing en banc. *Id.* The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of an-

other State, or by Citizens or Subjects of any Foreign State."

STATEMENT

1. Congress passed the Indian Gaming Regulatory Act (IGRA) to "provide a statutory basis for the operation of gaming by Indian tribes." 25 U.S.C. § 2702(1). IGRA creates three classes of gaming. Class III gaming includes "'the types of high-stakes games usually associated with Nevada-style gambling.'" App. 8a; *see* 25 U.S.C. § 2703(8). Class III gaming activities are lawful on tribal lands only if they are conducted in conformance with a tribal-state compact that has been approved by the Secretary of the Interior. 25 U.S.C. § 2710(d)(1), (3)(B).[1]

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* App. 9a. More than 60 tribes entered compacts with the State in 1999 and 2000, including the Pauma Band of Luiseno Mission Indians of the Pauma and Yuima Reservation (Pauma). *Id.* Among other things, these compacts addressed the allocation of licenses for slot machines; requirements for the conduct of gaming operations (such as a ban on minors in gaming facilities); compliance procedures; and payments into a trust fund for the benefit of other tribes. *See, e.g.*, C.A. Dkt. No. 14-4, at 5-44.

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[1] Class I gaming refers to "social games solely for prizes of minimal value or traditional forms of Indian gaming" associated with "tribal ceremonies or celebrations." 25 U.S.C. § 2703(6). Class II gaming includes bingo and similar games. *See id.* § 2703(7).

The gaming compacts entered in 1999 and 2000 were virtually identical. App. 9a. In particular, all of those compacts, including Pauma's, contained an identical provision regarding sovereign immunity:

> Sec. 9.4. Limited Waiver of Sovereign Immunity.
>
> (a) In the event that a dispute is to be resolved in federal court . . . , the State and the Tribe expressly consent to be sued therein and waive any immunity therefrom that they may have provided that:
>
> (1) The dispute is limited solely to issues arising under this Gaming Compact; [and]
>
> (2) Neither side makes any claim for monetary damages (that is, only injunctive, specific performance, including enforcement of a provision of this Compact requiring payment of money to one or another of the parties, or declaratory relief is sought) . . . .

Id. at 28a.[2]

The compacts authorized tribes like Pauma, that did not operate any slot machines as of 1999, to operate up to 350 slot machines without obtaining any licenses. C.A. Dkt. No. 14-4, at 13. The tribes were required to obtain a license for each additional slot machine beyond 350. *Id.* at 14. They paid no licensing fees so long as they operated fewer than 700 total machines; for additional machines beyond 700, the

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[2] *See generally* California Gambling Control Commission, Ratified Tribal-State Gaming Compacts (New and Amended), http://www.cgcc.ca.gov/?pageID=compacts (last visited Mar. 7, 2016) (collecting compacts).

compacts required the payment of licensing fees. *Id.* at 13-14. The fees went to a revenue-sharing trust fund benefiting other California tribes. *Id.* The compacts also contained detailed rules regarding the allocation of licenses, including a complex formula for determining the maximum number of licenses in the common pool available to all of the tribes that entered gaming compacts. App. 9a-10a; *see* C.A. Dkt. No. 14-4, at 14.

In December 2003, the State informed the tribes that the common pool of licenses had been exhausted. App. 10a. By that time, Pauma had obtained 700 licenses for slot machines, allowing it to operate a total of 1,050 machines. *See id.* at 12a. Pauma was operating those machines out of a casino in a tent facility, but it hoped to enter a contract with a gaming company to construct a "Las Vegas-style casino," and it required at least 2,000 slot machines for that purpose. *Id.* at 11a, 12a.

With that goal in mind, Pauma negotiated and entered an amended compact with the State in 2004. App. 10a-11a.[3] The amended compact allowed Pauma to operate an unlimited number of slot machines, and conferred other benefits on the tribe, in exchange for increasing the fees Pauma paid into the revenue-sharing trust fund and requiring the payment of additional fees to the State. *See id.* at 10a; C.A. Dkt. No. 14-5, at 179-212. As amended, the compact contained the same limited waiver of sovereign immunity as the original compact. App. 13a. The amended compact with Pauma was one of five similar amended

[3] At the time Pauma entered the amended compact, it had not yet secured a deal with a gaming company to construct a Las Vegas-style casino. App. 69a.

gaming compacts entered by the State in 2004 following joint negotiations with Pauma and four other tribes. *Id.* at 65a.

Around the same time, different tribes filed lawsuits challenging the State's calculation, under the terms of the original 1999 and 2000 compacts, of the total number of licenses available in the common pool. *See* App. 11a. The Ninth Circuit eventually held that the State's calculation was mistaken. It concluded that the formula in the original compacts allowed for approximately eight thousand more licenses than the State had calculated. *See Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*, 618 F.3d 1066 (9th Cir. 2010) ("*Colusa II*"); App. 11a-12a.[4] As a result of that decision, many tribes that were still operating under their original compacts were able to obtain additional licenses under the original fee structure. *See* App. 11a-12a.

2. In September 2009, after operating under its amended compact for five years, Pauma sued the State. App. 12a, 69a. In the intervening years, Pauma's plans to build a Las Vegas-style casino "fell through" after the tribe failed to reach a deal with several large gaming companies, including Caesars, Hard Rock, and Foxwoods. *Id.* at 12a; *see also id.* at

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[4] The Ninth Circuit noted that the formula for determining the total number of licenses in the common pool was "opaquely drafted and convoluted," "not a model of clarity," and "ambiguous and reasonably susceptible to more than one interpretation." *Colusa II*, 618 F.3d at 1069, 1075. The court also acknowledged that its own "de novo" interpretation of the formula differed from the interpretations advanced by the parties, as well as the interpretation adopted by the district court. *Id.* at 1070.

11a & n.4. The tribe still operated roughly the same number of slot machines as when it negotiated the amended compact, but it paid substantially higher fees than it would have paid under the original compact. *Id.* at 12a.

Pauma's suit asked the district court to reform or rescind the amended compact, and to award restitution equal to the difference between the fees Pauma paid the State under the amended compact and what it would have paid under the original compact. *See* App. 12a-13a. Pauma advanced 18 claims attacking the formation of the amended compact based on a variety of theories, including mistake and misrepresentation. *Id.* at 12a. The State argued that Pauma's claims failed on the merits, and that the tribe's request for money damages or restitution was barred by the Eleventh Amendment and fell outside the limited waiver of sovereign immunity in the compact. *See, e.g.*, Dist. Ct. Dkt. No. 191 at 73-75, No. 217 at 29.

After an interlocutory appeal regarding preliminary injunctive relief, the district court granted Pauma's motion for summary judgment on its misrepresentation claim. App. 12a-13a.[5] The court noted that "'misrepresentation of material facts may be the basis for the rescission of a contract, even where the misrepresentations are made innocently, without knowledge of their falsity and without fraudulent intent.'" *Id.* at 82a. It observed that the State told Pauma in 2003 that the demand for licenses exceeded

[5] The district court's April 2010 preliminary injunction, which has remained in place throughout this litigation, allowed Pauma to "pay only those payments required under the terms of the original compact." Dist. Ct. Dkt. No. 44 at 1.

the available supply, based on the State's calculation that there were 32,151 licenses in the common pool. *Id.* at 83a. The court reasoned that this statement was "false when made," because of the Ninth Circuit's determination in *Colusa II*—more than six years later—that the correct figure was actually 40,201 licenses. *Id.* at 84a. The court concluded that this misrepresentation was material, that it induced Pauma to enter the amended compact, and that Pauma was justified in relying on it. *Id.* at 84a-86a.

To remedy the misrepresentation, the district court rescinded the amended compact and allowed Pauma to return to the lower fee structure in the original compact. App. 13a. It also ordered the State to pay Pauma $36.2 million, the difference between the amount Pauma had paid the State under the amended compact and the amount it would have paid under the original compact. *Id.* The district court characterized this award as "specific performance." *Id.* at 13a, 47a.

The district court rejected the State's sovereign immunity defense. App. 47a. It held that "[s]pecific performance of the payment terms effectively returns money property wrongfully taken from Pauma and is available to Pauma pursuant to the State's limited contractual waiver of sovereign immunity." *Id.*

3. A divided panel of the Ninth Circuit affirmed. App. 36a. [6]

a. In analyzing the sovereign immunity issue, the majority first considered the nature of the district

[6] The panel issued its original opinion on October 26, 2015, and issued an amended opinion on December 18, 2015. App. 1a, 5a. This petition describes the amended opinion.

court's monetary award. App. 22a. It concluded that the "district court erred in awarding Pauma $36.2 million under the guise of 'specific performance,'" because specific performance is a remedy for breach of contract, not for a successful challenge to the formation of a contract. *Id.*; *see id.* at 23a. Despite "the district court's error in mislabeling the remedy," however, the majority affirmed the award "on the alternative grounds of equitable rescission and restitution." *Id.* at 24a.

Next, the majority considered whether the State "had waived its Eleventh Amendment sovereign immunity in this case to permit such relief." App. 27a. The majority noted that the Eleventh Amendment generally bars "'a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury.'" *Id.* It acknowledged that a waiver of sovereign immunity may be found only "'where stated by the most express language or by such overwhelming implication from the text as will leave no room for any other reasonable construction.'" *Id.* at 28a (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)).

The majority concluded that the limited waiver in Pauma's compact "clearly envisions restitution as falling within its purview, and only actions for monetary damages or actions not arising from the Compact itself to be excluded." App. 31a (emphasis omitted). It reached this conclusion by "interpreting the contract as a whole." *Id.* at 29a. The majority noted that the terms of the waiver concerned claims seeking "specific performance, *including enforcement of a provision of this Compact requiring payment of money to one or another of the parties* [which must mean either Pauma or the State]." *Id.* at 30a (em-

phasis and alteration in majority opinion). This language "envisions payment of money to *either* party, and yet the Compact does not contain any provisions requiring payment of money from the State to the Tribe." *Id.* at 30a-31a (emphasis in majority opinion). The majority reasoned that "[e]xcluding restitution as a remedy that the Tribe could seek under this waiver would render this clause null and void," because "the provision would be operative only as to one party, not both." *Id.* at 31a.

b. Chief Judge Jarvey, sitting by designation, dissented. App. 36a. He disagreed "that California committed the tort of misrepresentation by interpreting the Compact differently than a later court decision." *Id.* He noted that the formula for calculating the size of the common pool of licenses was "hopelessly ambiguous," and that the State, the tribes, the district court, and the Ninth Circuit "all interpreted it differently." *Id.* at 36a, 37a. Given that ambiguity, the State's representations in 2003 about the number of available licenses did "not qualify under the common law definition of a material misrepresentation." *Id.* at 38a.

Chief Judge Jarvey also disagreed with the majority's holding on sovereign immunity. App. 39a. He noted that the provision waiving the State's sovereign immunity directs "that neither side can make a claim for monetary damages," and "then defines the waiver, beginning with the words 'that is,'" which are "used to preface a more specific delineation of the preceding contractual language." *Id.* at 39a-40a. In this compact, "to further clarify the limitation of the waiver, the parties stated, 'that is, *only* injunctive, specific performance, including enforcement of a provision of this Compact requiring payment of money to

one or another of the parties, or declaratory relief is sought . . . .'" *Id.* at 40a (emphasis in dissenting opinion). Observing that "the use of the word 'only' is routinely defined to mean alone, solely or exclusively," Chief Judge Jarvey concluded that the "waiver's applicability is therefore explicitly confined to the circumstances listed." *Id.* Because the "monetary damages awarded here do not qualify as injunctive, specific performance or declaratory relief," he concluded that "there can be no waiver found here." *Id.* at 41a.

Chief Judge Jarvey believed that the majority opinion "disregard[ed] the explicit text" of the waiver provision. App. 40a. In particular, he noted that the "majority infers a waiver of sovereign immunity for restitution from a canon of contract interpretation that prefers interpretations that do not render other terms 'superfluous, useless or inexplicable.'" *Id.* In his view, however, the "fact that the waiver includes specific performance of payment provisions does not render it superfluous, useless or inexplicable simply because those particular obligations run only from Pauma to the State." *Id.* at 40a-41a. Rather, the "clause makes clear that the parties intended 'specific performance' to include monetary payments only when the Compact requires them," and it "would be helpful in the event of that kind of breach by Pauma." *Id.*

c. The court denied panel rehearing and rehearing en banc. App. 5a.

REASONS FOR GRANTING CERTIORARI

The Ninth Circuit held that a limited waiver of sovereign immunity, which applies by its terms "only" to injunctive relief, specific performance, and de-

claratory relief, waived California's immunity with respect to an award of $36.2 million in monetary restitution. That holding conflicts with this Court's decisions requiring waivers of sovereign immunity to be strictly construed in favor of the sovereign and forbidding a finding of waiver unless the language permits no other reasonable construction. The importance of this issue extends well beyond the circumstances of the present case. Identical waiver provisions presently appear in gaming compacts between California and 57 other tribes. Moreover, if followed in future cases, the lower court's general approach to construing waivers of immunity could infringe on the prerogatives of sovereigns throughout the Ninth Circuit.

1. The Eleventh Amendment bars suits "seeking to impose a liability which must be paid from public funds in the state treasury." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). It applies to suits brought against a State by a Native American tribe, like this action. *See Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779-782 (1991). It also applies to suits seeking "'equitable restitution'" in the form of a "retroactive award of monetary relief." *Edelman*, 415 U.S. at 668.

Although sovereign immunity may be waived, the test for determining whether a State has waived its immunity from suit "'is a stringent one.'" *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999). Courts must "indulge every reasonable presumption against waiver." *Id.* at 682 (quoting *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937)). A court may find a waiver "only where stated 'by the most express language or by such overwhelming implications from the text as

will leave no room for any other reasonable construction.'" *Edelman*, 415 U.S. at 673 (alteration omitted).

Moreover, any express waiver of sovereign immunity must "'be strictly construed, in terms of its scope, in favor of the sovereign.'" *Sossamon v. Texas*, 563 U.S. 277, 285 (2011). For example, "a waiver of sovereign immunity to other types of relief does not waive immunity to damages: 'The waiver of sovereign immunity must extend unambiguously to such monetary claims.'" *Id.* (alteration omitted).

Here, the Ninth Circuit recited the general standard governing waivers of sovereign immunity (App. 29a), but did not apply it. Instead, the majority treated this as a case calling for routine contractual interpretation. *See id.* at 29a-32a. It construed "the contract as a whole" and referenced conventional tools for parsing contracts, such as the principle that constructions that would render a clause superfluous are disfavored. *Id.* at 30a-31a (citing Restatement (Second) of Contracts § 202(2) and 11 Williston on Contracts § 32:5 (4th ed. 2015)). Relying on these tools, the majority reasoned that the parties "clearly envision[ed]" they were waiving their immunity with respect to an award of monetary restitution following rescission of the compact. App. 31a; *see id.* at 28a.

Even viewing this question as an exercise in ordinary contract interpretation, as the majority did, the majority's analysis of the waiver provision is dubious. The majority relied on a clause waiving immunity with respect to "specific performance, *including enforcement of a provision of this Compact requiring payment of money to one or another of the parties*." App. 30a (emphasis in majority opinion). In the majority's view, the italicized words would be "null and void" unless the clause included monetary

restitution, because the compact did not include any provisions requiring the State to pay money to Pauma. *Id.* at 30a-31a. As Chief Judge Jarvey explained, however, the italicized words are not superfluous; they would be helpful in the event that Pauma breached a provision requiring it to pay money to the State. *See id.* at 40a-41a. Moreover, the majority itself concluded that the monetary restitution at issue here does not qualify as "specific performance." *Id.* at 24a. That conclusion cannot be squared with the majority's construction of the waiver provision, which reads the clause concerning "specific performance" to *include* an award of monetary restitution. *Id.* at 30a-32a.

In any event, the majority never actually confronted the question that governs the Eleventh Amendment analysis: whether there was "'any other reasonable construction'" of the waiver provision that would exclude monetary restitution of the sort awarded here. *Edelman*, 415 U.S. at 673. In particular, the majority never explained why it would be unreasonable to construe the waiver as limited to the forms of relief that are expressly referenced—injunctive relief, specific performance, and declaratory relief.

As Chief Judge Jarvey explained, there is ample room for such a construction. Not only does the limited waiver contain no mention of monetary restitution, it expressly provides that the "only" forms of relief available are "injunctive, specific performance, . . . or declaratory relief." App. 39a. This language can reasonably be construed as "explicitly confined to the circumstances listed." *Id.* at 40a. That reasonable construction excludes the monetary relief awarded by the district court—which all three judges on

the panel agreed does not qualify as "specific performance." *Id.* at 22a, 24a, 39a.

The availability of this reasonable construction means that the district court's $36.2 million award is barred by the Eleventh Amendment. *See, e.g.*, *Edelman*, 415 U.S. at 673. The Ninth Circuit's contrary holding conflicts with numerous decisions of this Court that have strictly construed the scope of waiver provisions in favor of the sovereign. *See, e.g.*, *Sossamon*, 563 U.S. at 285 (collecting cases).

2. The importance of this question extends beyond the present case. As of this year, California has entered gaming compacts with 73 different tribes. The compacts with 57 other tribes, all of which are currently in effect, contain limited waivers of sovereign immunity that are identical to the provision at issue here.[7] While this record does not contain information about aggregate payments to the State under the terms of gaming compacts, the State can represent that tribes have collectively paid more than

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[7] Fifteen additional gaming compacts include waiver provisions featuring language substantially similar to the provision at issue here. For example, the waiver in section 13.4(a) of the State's compact with the Pinoleville Pomo Nation applies provided that "neither side makes any claim for monetary damages (except that payment of any money required by the terms of this Compact may be sought, and injunctive relief, specific performance (including enforcement of a provision of this Compact requiring the payment of money to one or another of the parties), and declaratory relief may be sought)." Those compacts were negotiated more recently, and some do not expire for decades. *See generally* California Gambling Control Commission, Ratified Tribal-State Gaming Compacts (New and Amended), http://www.cgcc.ca.gov/?pageID=compacts (last visited Mar. 7, 2016) (collecting compacts).

two billion dollars into California's general fund. The Ninth Circuit's decision could allow other tribes to attempt to seek monetary restitution from California. And the circumstances in which a request for monetary restitution might arise could extend beyond the circumstances of this case, because, under California law, rescission may be premised on a range of theories in addition to the misrepresentation theory invoked here. *See* Cal. Civil Code § 1689(b)(1)-(7) (grounds for rescission include mistake, undue influence, failure of consideration, and prejudice to "the public interest").

Sovereign immunity "serves the important function of shielding state treasuries and thus preserving 'the States' ability to govern in accordance with the will of their citizens.'" *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 765 (2002). The Ninth Circuit's decision thwarts that function in this context, exposing California's treasury and its citizens to the possibility of demands far exceeding the $36.2 million at issue here.

More broadly, the Ninth Circuit's opinion could undermine the special solicitude owed to sovereigns. *See id.* Immunity from suit is "'central to sovereign dignity,'" *Sossamon*, 563 U.S. at 283, and any decision to waive sovereign immunity must be "'altogether voluntary on the part of the sovereignty.'" *Coll. Sav. Bank*, 527 U.S. at 675. Those principles are served by requiring an express and unambiguous statement before finding a waiver, and by strictly construing the scope of any waiver in favor of the sovereign. That settled approach to analyzing waivers protects sovereign immunity unless the waiver is "so clear[] and unambiguous[]" that "we can 'be cer-

tain that the State in fact consents' to" a particular type of suit. *Sossamon*, 563 U.S. at 285-286.

The approach followed by the Ninth Circuit below is markedly different. It treats the analysis of waiver provisions as a routine exercise in contract interpretation, under which a sovereign's immunity from suit rises or falls based solely on a court's preferred interpretation of the scope of a waiver. If repeated in other cases, the lower court's approach could infringe on the rights of other States within the Ninth Circuit, allowing suits to proceed even where States have not clearly consented to them. It could also threaten the sovereign rights of Native American tribes, who, similar to States, benefit from the rule that waivers of their sovereign immunity "must be unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (internal quotation marks omitted).

3. This case presents a suitable vehicle for plenary review or, alternatively, for summary reversal. The majority and dissenting opinions below squarely confront the Eleventh Amendment question. That question turns on the language of a single compact provision and is not complicated by factual disputes. And there are no jurisdictional impediments to review.

The Ninth Circuit suggested in a footnote that a state statute, California Government Code section 98005, might provide an alternative basis for holding that the State waived its sovereign immunity regarding the monetary restitution at issue here. *See* App. 32a n.12. The Ninth Circuit did not, however, analyze or resolve that issue. *See id.* Before the court of appeals, Pauma relied exclusively on a portion of section 98005 waiving California's sovereign immunity regarding "any cause of action arising from . . . the

state's violation of the terms of any Tribal-State compact to which the state is or may become a party." Cal. Gov't Code § 98005; *see* C.A. Dkt. No. 29-1 at 56. That waiver is inapplicable here because, as the Ninth Circuit acknowledged, "no breach of a contract has been alleged." App. 23a. Pauma's action instead raises "a challenge to [the] formation" of its amended compact. *Id.* Section 98005 therefore provides no basis for viewing this petition as an unsuitable vehicle.[8]

4. Although the Ninth Circuit's decision does not create any direct conflict between the federal courts of appeals, it may engender confusion in the lower courts over how to determine the scope of a waiver of sovereign immunity. Consistent with this Court's directives, lower courts typically find a waiver only

[8] Section 98005 also waives the State's sovereign immunity from claims regarding the State's refusal to enter into negotiations with a tribe about an IGRA compact or amended compact, or the State's refusal to conduct such negotiations "in good faith." Cal. Gov't Code § 98005. Pauma did not invoke these clauses before the court of appeals. *See* C.A. Dkt. No. 29-1 at 56. In any event, they do not apply here. The State negotiated with Pauma on both relevant occasions, culminating in the original compact and the amended compact. Even assuming that the district court properly entered summary judgment on Pauma's misrepresentation claim, that does not establish bad faith under section 98005. Section 98005 tracks IGRA's requirement that States negotiate in good faith with tribes concerning class III gaming. *See Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1026 (9th Cir. 2010); 25 U.S.C. § 2710(d)(7)(B). Here, both the district court and the court of appeals held that Pauma's bad-faith claim under IGRA was "barred by the plain language of the IGRA statute" (App 33a), and the district court noted that "the Court does not find the State to have acted in bad faith in misrepresenting the size of the Pool." *Id.* at 48a n.2.

when the language before them leaves no room for any other reasonable construction.[9] In contrast, the Ninth Circuit's decision suggests that courts have discretion to interpret a waiver provision as they would any other contract, without indulging "'every reasonable presumption against waiver.'" *Coll. Sav. Bank*, 527 U.S. at 682. That approach conflicts with this Court's precedents and undermines the solicitude owed to sovereigns in our federal system.

[9] *See, e.g.*, *Pettigrew v. Oklahoma*, 722 F.3d 1209, 1210 (10th Cir. 2013) (venue provision in settlement agreement waived immunity from suit in federal court because there was "no reasonable construction" of the language other than as a consent to suit in federal court); *Watters v. Wash. Metro. Area Transit Auth.*, 295 F.3d 36, 40 (D.C. Cir. 2002) (compact provision that waived Authority's immunity "for its contracts and for its torts" but did not reference equitable liens "falls far short of a clear and unequivocal waiver of . . . immunity against attorney's charging liens").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
JANILL L. RICHARDS
Acting Solicitor General
SARA J. DRAKE
Senior Assistant Attorney General
MICHAEL J. MONGAN
Deputy Solicitor General
T. MICHELLE LAIRD
NEIL D. HOUSTON
Deputy Attorneys General
SAMUEL P. SIEGEL
Associate Deputy Solicitor General

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