No: 21-15751

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHICKEN RANCH RANCHERIA OF ME-WUK INDIANS; CHEMEHUEVI INDIAN TRIBE; BLUE LAKE RANCHERIA; HOPLAND BAND OF POMO INDIANS; ROBINSON RANCHERIA,

Plaintiffs/Appellees,

v.

STATE OF CALIFORNIA; GAVIN NEWSOM, Governor of California

Defendants/Appellants.

On Appeal from the United States District Court
for the Eastern District of California,
Case No. 1:19-cv-00024-AWI-SKO, Hon. Anthony W. Ishii, Judge

BRIEF OF *AMICUS CURIAE* UNITE HERE INTERNATIONAL UNION IN SUPPORT OF APPELLANTS GOVERNOR GAVIN NEWSOM AND THE STATE OF CALIFORNIA AND REVERSAL OF THE DISTRICT COURT ORDER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1, *Amicus Curiae* UNITE HERE International Union certifies that it has no parent corporations nor any publicly held corporations owning 10% or more of its stock.

Dated: August 9, 2021

Respectfully submitted,

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STATEMENT OF RELATED CASES

Amicus Curiae UNITE HERE International Union discloses that *Unite Here Local 30 v. Sycuan Band*, USCA Case No. 21-55017, raises the closely related issue of whether a gaming compact's requirement that the Indian tribe adopt a tribal labor relations ordinance similar to the ordinance at issue in this case is consistent with federal labor law. Plaintiff is not aware of any other related cases pending in this Court within the meaning of Ninth Circuit Rule 28-2.6.

Dated: August 9, 2021

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Statement of Interest

UNITE HERE has an interest in the labor-relations provisions in tribal gaming compacts because it represents casino employees across the United States, including at tribal casinos in Connecticut and California. In California, UNITE HERE serves as the collective-bargaining representative for employees at nine tribal casinos and seeks to organize additional tribal casino employees who lack union representation. UNITE HERE is presently engaged in organizing over 1,000 employees at the Sycuan Casino & Resort. UNITE HERE's San Diego affiliate has filed suit to compel the Sycuan Band to arbitrate a dispute that stems from the labor-relations provisions in the Sycuan Band's compact with California. The Sycuan Band has taken the same position as the Plaintiff-Appellee Tribes in this case: that federal labor law preempts labor-relations provisions in a tribal-state gaming compact. That case is presently pending before the U.S. Court of Appeals for the Ninth Circuit and is identified in the attached Notice of Related Cases.

All parties have consented to this filing. No person or entity other than UNITE HERE funded the preparation or submission of this brief, and no party's counsel authored it.

Summary of the Argument

This brief addresses legal issues related to the Plaintiff-Appellee Tribes' claim that the State of California negotiated in bad faith when it proposed that the

compact address casino labor relations by requiring that the Tribes adopt a Tribal Labor Relations Ordinance ("TLRO"). In Section A, we explain why the labor-relations proposal is lawful. This argument has three parts. The Ninth Circuit has already held that casino labor relations are a topic about which the parties may negotiate under the Indian Gaming Regulatory Act ("IGRA"). The National Labor Relations Act ("NLRA") cannot preempt labor-relations provisions in an IGRA compact because an IGRA compact is a creation of federal law. When two federal laws touch on the same area, the federal courts must give effect to both. This can be accomplished with respect to the proposed TLRO because its provisions do not conflict with any provision of the NLRA, and federal labor law encourages private agreements between unions and employers of the type that the TLRO promotes.

In Section B, we address that IGRA's requirement of "good faith" negotiations and explain why the District Court erred in requiring California to prove that it offered "meaningful concessions" in exchange for its labor-relations proposal. IGRA identifies seven categories of permissible bargaining subjects. So long as the State's proposal falls within one of those seven categories, which this Court has held that labor-relations protections do, IGRA's good faith mandate requires nothing more a genuine intent to reach agreement. IGRA's good-faith requirement does not invite the courts to evaluate the consideration that a state offers in exchange for such a proposal or provide any standards for doing so.

Argument

A. California's proposal about casino labor relations is lawful.

1. Casino labor relations are a proper subject for IGRA negotiations.

IGRA lists seven subjects which tribes and states may address in a gaming compact. 25 U.S.C. § 2710(d)(3)(C). These are intentionally "broad areas," S. REP. NO. 100-446 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3084; that were "intended to provide a means by which tribal and State governments can realize their unique and individual governmental objectives while at the same time, work together to develop a regulatory and jurisdictional pattern that will foster a consistency and uniformity in the manner in which laws regulating the conduct of gaming activities are applied." *Id.* at 3076. Among the seven subjects is a catchall category of "other subjects that are directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C)(vii). This catchall category encompasses casino labor relations. *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1115-16 (2003) ("*Coyote Valley*"). Labor relations at a tribal casino are "directly related to the operation of gaming activities" because "[w]ithout the 'operation of gaming activities,' the jobs this provision covers would not exist; nor, conversely, could Indian gaming activities operate without someone performing these jobs" and California has a legitimate "concern for the rights of its citizens employed at tribal

gaming establishments." *Id.* at 1116; *see also Chemehuevi Tribe v. Brown*, 919 F.3d 1148, 1154 (9th Cir. 2019) (reaffirming *Coyote Valley*'s holding).

2. Federal labor law does not prevent California from addressing casino labor relations in an IGRA compact.

Both federal labor law (through the NLRA) and federal Indian law (through the IGRA) have a role in regulating labor relations at tribal casinos. California's gaming tribes have approached this as an "either or" problem. The California Nations Indian Gaming Association[1] asserted in an *amicus* brief filed with this Court that IGRA prevents the National Labor Relations Board ("NLRB") from asserting jurisdiction over tribal casinos. *See Casino Pauma v. NLRB*, 888 F.3d 1066, 1079 (9th Cir. 2018). In this case, the Tribes have done an about-face and argue that the NLRA prevents tribes and states from negotiating about labor relations in an IGRA compact. Neither position is correct. In this section, we first demonstrate that the two statutes operate concurrently, and then explain how the TLRO is consistent with federal labor policy.

a. The NLRA and an IGRA compact's labor-relations provisions apply to tribal casinos.

The National Labor Relations Act applies to tribal casinos. Three circuits, including the Ninth Circuit, have so held, and the Supreme Court has denied

[1] The California Nations Indian Gaming Association includes among its members Appellees Chicken Ranch Rancheria and the Blue Lake Rancheria. *See* https://cniga.com/member-tribes/ (last visited on June 24, 2021).

certiorari in cases from two of those circuits. *See Casino Pauma,* 888 F.3d at 1076-79, *cert. denied* 139 U.S. 2614 (2019); *NLRB v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537 (6th Cir. 2015), *cert. denied* 136 S.Ct. 2508 (2016); *Soaring Eagle Casino & Resort v. NLRB*, 791 F.3d 648 (6th Cir. 2015), *cert. denied* 136 S.Ct. 2509 (2016); *San Manuel Indian & Bingo Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007). The Ninth Circuit has also held that IGRA permits tribes and states to agree, in an IGRA compact, about how the tribe will manage labor relations at its casino. *Coyote Valley*, 331 F.3d at 1094. Taken together, *Casino Pauma* and *Coyote Valley* mean that neither the NLRA nor IGRA operates with exclusivity when it comes to labor relations at tribal casinos.

The Tribes might respond that in 2003 when the Ninth Circuit decided *Coyote Valley*, the NLRB had not yet asserted jurisdiction over tribal casinos. That statement is true but incomplete. Five months before the *Coyote Valley* panel issued its decision, the Ninth Circuit held in a subpoena enforcement case that the NLRB's jurisdiction over a tribal employer was not "plainly lacking" (which is the standard applied to such subpoenas). *NLRB v. Chapa de Indian Health Program, Inc.*, 316 F.3d 995, 996-97 (9th Cir. 2003). It did so by following the test developed in *Donovan v. Couer d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985) for determining whether a federal law of general applicability applies to a tribe. *See* 316 F.3d at 998-99. Two other circuits had already applied the *Couer*

d'Alene test in the tribal gaming context, one to a tribal casino and the other to a tribal business engaged in building a casino, and both concluded that federal laws applied because tribal casinos are commercial operations. *See Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1129 (11th Cir. 1999); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 180-81 (2d Cir. 1996). Thus, when the Ninth Circuit decided in *Coyote Valley* that IGRA permits California to negotiate for labor protections, there was reason to believe that the NLRB would assert jurisdiction over tribal casinos when presented with that case.[2] That didn't stop the *Coyote Valley* Court from giving its imprimatur to California's demand in IGRA negotiations for labor-relations protections.

The Tribes might ask this Court to conclude that by upholding the NLRB's assertion of jurisdiction over tribal casinos in *Casino Pauma*, it subverted *Coyote Valley*'s holding that tribes and states can include labor-relations provisions in an IGRA compact. That's not what the Ninth Circuit said in *Casino Pauma*. It cited *Coyote Valley* as background without suggesting in any way that it intended to undermine that decision. *See* 888 F.3d at 1079. We address *Casino Pauma*'s discussion of the TLRO in more detail in subsection A.2.c of this Argument.

[2] In fact, the NLRB did so the following year. *San Manuel Indian Bingo & Casino*, 341 NLRB 1055 (2004), *enfd.* 475 F.3d 1306 (D.C. Cir. 2007).

b. Federal law cannot preempt an IGRA compact's labor-relations provisions because an IGRA compact is a creation of federal law.

There are two NLRA preemption doctrines which operate in different ways. One rule, known as *Garmon* preemption, bars "state interference with the National Labor Relations Board's interpretation and active enforcement of the integrated scheme of regulation established by the NLRA." *Golden State Transit Corp. v. Los Angeles,* 475 U.S. 608, 613 (1986). The other, referred to as *Machinist* preemption "forbids both the National Labor Relations Board and States to regulate conduct that Congress intended 'be unregulated because left to be controlled by the free play of economic forces.'" *Chamber of Commerce v. Brown*, 554 U.S. 60, 65 (2008) (quoting *Machinists v. Wisconsin Employment Relations Comm'n,* 427 U.S. 132, 140 (1976)). In their brief to the District Court, the Tribes did not explain why they think that either preemption doctrine makes the proposed TLRO, or parts of it, invalid.

The breadth of the NLRA preemption doctrines gives the Tribes' argument some surface appeal. It is true, for example, that a state could not enact a law applicable to other private-sector businesses with the TLRO's terms. But federal preemption of state law doesn't matter at all when it comes to IGRA compacts because an IGRA compact is not a state law.

IGRA regulates tribal gaming through a system described as "cooperative federalism" that "seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme.'" *Artichoke Joe's v. Norton,* 353 F.3d 712, 715 (9th Cir. 2003). Federal law infuses the entire process. IGRA directs tribes and states to negotiate about the tribe's operation of Class III gaming, but it specifies the subjects about which they may and may not negotiate. 25 U.S.C. § 2710(d)(3)(C), (d)(4), (d)(5). IGRA also authorizes the federal courts and Department of Interior to step in if the state negotiates in bad faith. 25 U.S.C. § 2710(d)(7). If the tribe and state do reach agreement on a compact, the Interior Secretary must approve that compact before it takes effect. 25 U.S.C. § 2710(d)(3)(B), (d)(8). Thus, IGRA compacts "quite clearly are a creation of federal law." *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997); *see also Confederated Tribes of Siletz Indians of Oregon v. State of Oregon*, 143 F.3d 481, 484-85 (9th Cir. 1998) (characterizing a gaming compact as "a direct result of federal authority granted through IGRA").

Federal law also confers on states civil regulatory authority through IGRA compact negotiations that states would otherwise lack. *Artichoke Joe's*, 353 F.3d at 716. Federal Indian law usually preempts states' normal police powers when it comes to regulating Indian tribes. *White Mountain Apache Tribe v. Bracker*, 448

U.S. 136, 142-45 (1980); *see also New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983). In contrast, IGRA authorizes states to negotiate for state criminal and civil laws to apply to tribal gaming activities, for jurisdiction to enforce such laws against tribes, and for the right to impose assessments on some tribal activities. 25 U.S.C. § 2710(d)(3)(C). This IGRA-conferred authority is reflected in California's existing gaming compacts with the Tribes, which the Interior Secretary approved. *See* 65 Fed. Reg. 31189 (May 16, 2000). For example, the compacts contain provisions requiring the Tribes to share their gaming revenue with non-gaming tribes, to participate in the state unemployment insurance system and to protect the health and safety of casino guests and employees.[3] The California Legislature could not enact legislation compelling tribes to do any of these things. *Nevada v. Hicks*, 533 U.S. 353, 362 (2001); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-16 (1987) (describing limits to states' exercise of civil jurisdiction over tribes). California was able to bargain for these terms and others in its tribal gaming compacts only because IGRA gave it the authority to do so.

The same is true with respect to labor relations. In IGRA, Congress directed states and tribes to enter into compacts, and allowed them to include in the

[3] The compacts are available at http://www.cgcc.ca.gov/?pageID=compacts (last visited on June 24, 2021).

resulting compact rules about how the tribe will conduct its labor relations. *Coyote Valley*, 331 F.3d at 1116. In other words, California has the authority to bargain in IGRA compact negotiations about labor relations at tribal casinos, even though federal labor law preempts the state's authority to legislate about labor relations, because Congress gave it the power to do so. *Cf. Chamber of Commerce*, 554 U.S. at 76 ("Unlike the States, Congress has authority to create tailored exceptions to otherwise applicable federal policies . . . .")

c. *Casino Pauma* does not support the Tribes' NLRA-preemption theory.

The Tribes argued in the District Court that the Ninth Circuit's decision in *Casino Pauma* supports their preemption theory. The reasoning in *Casino Pauma* undermines the Tribes' argument.

The Pauma Band argued before the NLRB and again before the Ninth Circuit that applying the NLRA to its casino would conflict with IGRA and with the labor-relations provisions in its IGRA compact with California. Pauma was consistently unsuccessful in that argument, but it prompted an administrative law judge (the first stage of a case before the NLRB) to announce in *dictum* that the NLRA preempts "the Compact and any other state laws or regulations that govern matters over which the [NLRB] has exclusive jurisdiction." *Casino Pauma*, 363

NLRB No. 60, at slip op. 4 (2015).[4] The Ninth Circuit also rejected Pauma's argument, but did not adopt the ALJ's theory that the compact is a state law which the NLRA preempts. Instead, the Court said that it "ha[d] not uncovered any conflict between the NLRA and IGRA" and pointed out that regulation through an IGRA compact and regulation under the NLRA are both possible: "IGRA certainly permits tribes and states to regulate gaming activities, but it is a considerable leap from that bare fact to the conclusion that Congress intended federal agencies to have no role in regulating employment issues that arise in the context of tribal gaming." *Casino Pauma*, 888 F.3d at 1080 (quoting *San Manuel Indian & Bingo Casino*, 475 F.3d at 1080).

The Ninth Circuit saw no impediment to the NLRA operating concurrently with the IGRA compact's labor-relations provisions.

d. IGRA and the NLRA must be read to operate in harmony.

Since an IGRA compact is a creation of federal law, the Tribes' argument is really not about federal preemption of a state law, but instead about what happens when the NLRA intersects with an IGRA-authorized compact in the arena of labor relations. The Tribes think that this intersection is impermissible.

[4] The NLRB adopted the ALJ's order without commenting on this part of the reasoning.

The opposite is true. When two federal statutes touch the same issue, "[t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *see also Epic Sys. Corp. v. Lewis*, __ U.S. __, 138 S.Ct. 1612, 1624 (2018). Accordingly, courts will not conclude that "two statutes cannot be harmonized, and that one displaces the other" unless the party advocating such result meets a "heavy burden of showing a clearly expressed congressional intention that such result should follow." *Id.* (internal citations and quotation marks omitted). This interpretative rule is grounded in the Constitution:

> Respect for Congress as drafter counsels against too easily finding irreconcilable conflicts in its work. More than that, respect for the separation of powers counsel restraint. Allowing judges to pick and choose between statutes risks transforming them from the expounders of what the law *is* into policymakers choosing what the law *should be*. Our rules for harmony over conflict in statutory interpretation grow from an appreciation that it's the job of Congress by legislation, not this Court by supposition, both to write the laws and to repeal them.

Id. (emphasis in the original).

Following this principle, courts have interpreted both statutes at issue here -- the NLRA and IGRA -- to avoid conflicts with other federal laws. *See, e.g.*, *Epic Sys. Corp.*, 138 S.Ct. at 1624 (interpreting the NLRA to accommodate the Federal Arbitration Act); *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 143-44

(2002) (modifying remedies under the NLRA that "potentially trench upon federal statutes and policies unrelated to the NLRA"); *Stand Up for California v. U.S. Dept. of the Interior*, 959 F.3d 1154, 1163 (9th Cir. 2020) (interpreting IGRA to accommodate a federal environmental statute). In addition, the Supreme Court has rejected that the NLRA preempted a state policy in a case that "may be viewed as presenting a potential conflict between two federal statutes . . . rather than between federal and state regulatory statutes." *New York Telephone Co. v. New York State Dept. of Labor*, 440 U.S. 519, 539-40 n.32 (1979). *Cf. Livadas v. Bradshaw,* 512 U.S. 107, 119 (1994) ("If . . . the [State's] policy were actually compelled by federal law . . ., we could hardly say that it was, simultaneously, pre-empted; at the least, our task would then be one of harmonizing statutory law.")

The "clearly expressed congressional intention" required for displacement does not exist as to either the NLRA or IGRA. As the earlier enacted statute, the NLRA necessarily does not reflect any intent to prevent tribes and states from negotiating over labor relations in an IGRA compact. And the Ninth Circuit (along with two other circuits) has already concluded that Congress, in enacting IGRA, did not express a clear intent to carve tribal casinos out from the NLRB's jurisdiction. *Casino Pauma*, 888 F.3d at 1079 ("There is no IGRA provision stating an intent to displace the NLRA -- or any other federal labor or employment

law, for that matter."); *see also Little River Band*, 788 F.3d at 553-54; *San Manuel*, 475 F.3d at 1318.

It is the courts' duty to interpret the NLRA so that it operates in harmony with IGRA and does not displace IGRA-mandated gaming compact negotiations from the labor-relations field, or vice versa. That is what the Ninth Circuit did in *Casino Pauma* in response to the Pauma Band's argument that IGRA displaced the NLRA from the labor field. *See* 888 F.3d at 1080. It is also what this Court should do in response to the Tribes' argument that the NLRA limits IGRA compacts from addressing casino labor relations.

3. The labor-relations provisions that California proposed do not conflict with the NLRA because, as an employer, a tribe may make an agreement about the labor-organizing process at its casino.

It is easy to harmonize California's labor-relations proposal (the TLRO) with the NLRA. While the TLRO differs the NLRA, it does not conflict with the NLRA. The NLRA has two substantive sections. It creates employee rights in Section 7 (29 U.S.C. § 157), and prohibits conduct by unions and employers in Section 8 (29 U.S.C. § 158). None of the TLRO's provisions impede the exercise of Section 7 rights or require actions that Section 8 prohibits, and the Tribes did not claim in the District Court that such a conflict exists. They simply argued that the TLRO was unnecessary. But the proposed TLRO's central feature – promoting private contracts between tribes and unions – is a favored element of national labor

policy, and courts have enforced union-employer contracts with the same terms as the TLRO proposed by the State.

The TLRO is formally structured as a tribal law but by itself, the TLRO does not bind any union. It contains no mechanism through which the State or the Tribes may enforce its substantive provisions against a union. It provides for disputes under the TLRO to be resolved solely through arbitration, but a "first principle that underscores all . . . arbitration decisions" is that "[a]rbitration is strictly 'a matter of consent.'" *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 298 (2010); *see also Litton Business Systems, Inc. v. NLRB*, 501 U.S. 190, 201 (1991). By entering into a compact requiring its adoption of the TLRO, a tribe effectively offers to resolve disputes under the TLRO with unions through arbitration. A union is not a party to the compact or the TLRO and so therefore must agree to be bound by it. In this sense, the entire TLRO is really just an open-ended offer by the tribe – which is also the employer -- to resolve disputes with a union that seeks to organize its employees though the TLRO's procedures, including arbitration.[5]

[5] The TLRO gives unions two options. A union can make the offer expressly contemplated by Section 7(b) in exchange for the tribe's promises in Section 7(c) and (d) and thereby form a bilateral contract containing all the TLRO's provisions; or a union can forego the provisions of Section 7 but submit to the TLRO's other provisions including arbitration.

This scheme is entirely consistent with federal labor law. The NLRA provides administrative procedures which unions and employers *may* invoke when deciding whether to form a collective-bargaining relationship or when encountering difficulties in that process. *See, e.g.*, 29 U.S.C. § 159(c) (process for certification of a union as the bargaining representative through an NLRB-conducted election); 29 U.S.C. § 160(b) (authorizing administrative adjudication of unfair labor practices by unions and employers only if a charge is filed). But the federal government cannot invoke those procedures, or require unions and employers to do so. Unions and employers may, if they choose, bypass the NLRB entirely, and instead contract to settle their differences privately, including through arbitration, and to enforce those agreements in federal court. *Carey v. Westinghouse*, 375 U.S. 261, 268 (1964). This is true even when the contract, like the one at issue here, addresses the procedures for organizing workers into a union and for recognition of the union as the employees' collective-bargaining representative without a secret-ballot election administered by the NLRB. *See SEIU v. St. Vincent Medical Ctr.*, 344 F.3d 977, 979, 984-86 (9th Cir. 2003); *HERE Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1468 (9th Cir. 1992); *see also United Steel v. TriMas Corp.*, 531 F.3d 531, 533 (7th Cir. 2008); *Int'l Union v. Dana Corp.*, 278 F.3d 548, 558-59 (6th Cir. 2002); *HERE Local 217 v. J.P.*

Morgan Hotel, 996 F.2d 561, 568 (2d Cir. 1993); *Patterson v. Heartland Indus. Partners, LLP*, 428 F.Supp.2d 714, 718-19, 723 (N.D. Ohio 2006).

Such private contracts are the centerpiece of federal labor policy. "The National Labor Relations Act is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers." *NLRB v. American Ins. Co.*, 343 U.S. 395, 401-02 (1952); *see also Montague v. NLRB*, 698 F.3d 307, 312 (6th Cir. 2012). Agreements between employers and unions about establishing a union without the NLRB's oversight, referred to as voluntary recognition, are "a favored element of national labor policy." *NLRB v. Broadmoor Lumber Co.*, 578 F.2d 238, 241 (9th Cir. 1978). "[V]oluntary recognition has been woven into the very fabric of the Act since its inception," *Lamons Gasket Co.*, 357 NLRB 739, 742 (2011); which "long-established Board policy [] promote[s]" because it furthers the "harmony and stability of labor-management relations." *MGM Grand Hotel, Inc.*, 329 NLRB 464, 466 (1999).

The proposed TLRO would not conflict with the NLRA. It would facilitate private dealing between the Tribes and unions that seek to represent the Tribes' employees, which is what federal labor policy favors.

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B. California's good faith in IGRA negotiations does not depend on what concessions it offered in exchange for its labor-relations proposal.

1. The District Court's rationale for finding bad faith in connection with the State's labor-relations proposal conflicts with IGRA as interpreted in *Coyote Valley*.

The District Court concluded that California did not negotiate in good faith over casino labor relations because it offered inadequate consideration in exchange for its labor-relations proposal. The Court said that because the topic of labor relations is "not at the heart of gaming activity and only somewhat connected (they are not directly related to the Class III gaming itself but related to the overall operations of the facilities in which the gaming takes place), the state should also provide 'meaningful concessions' in exchange for making demands on these topics." The problem with that reasoning is that IGRA does not draw a distinction between subjects that are "at the heart of gaming activity" and those that are "only somewhat connected." It treats all subjects that fall within § 2710(d)(3)(C)(vii)'s catchall category the same, and the Ninth Circuit held in *Coyote Valley* that casino labor relations are "directly related to the operation of gaming activities." *Coyote Valley*, 331 F.3d at 1116.

The remainder of this Section B explains why California's good faith does not depend on what consideration it offered in exchange for labor-relations protections for casino employees who are California citizens.

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2. The labor law analogy.

In this discussion of IGRA's good faith requirement, we draw on federal labor law.[6] Labor bargaining is analogous because, just as IGRA requires states to bargain in good faith with tribes but limits that bargaining to subjects listed in the statute, the NLRA requires unions and employer to bargain "in good faith with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d). So long as the tribe desires to operate gaming or the union desire to represent the employer's employees, neither set of bargaining parties (tribes and states, or unions and employers) have the option of abandoning negotiations. The compulsory nature of negotiations in each context makes it necessary that the parties act in good faith. Courts have recognized this. *See Rincon Band*, 602 F.3d at 1030 ("When private parties, or independent sovereign entities, commence contract negotiations, they generally do so because each has something of value the other wants, and each side has the right to accept or reject an offer made, based on the desirability of the terms. If negotiations fail, neither party has a right to

[6] This is not original. Courts, including the Ninth Circuit, have looked to labor law for guidance when interpreting IGRA. *See, e.g.*, *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1039 (9th Cir. 2010); *Id.* at 1060 n.8, 1061, 1066 (dissenting opinion); *In re Indian Gaming Related Cases*, 147 F.Supp.2d 1011, 10-2021 (N.D. Cal. 2001), *affd.* 331 F.3d 1094 (9th Cir. 2003); *Estom Yumeka Maidu Tribe v. California*, 163 F. Supp. 3d 769, 783–84 (E.D. Cal. 2016); *Flandreau Santee Sioux Tribe v. S. Dakota*, 2011 WL 2551379, at *3 (D.S.D. June 27, 2011).

complain. Not so in IGRA negotiations."); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1960) ("When most parties enter into contractual relationship they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties. This is not true of the labor agreement. The choice is generally not between entering or refusing to enter into a relationship, for that in all probability preexists the negotiations.")

3. Good faith in negotiating requires the intent to reach agreement.

Whether the State bargained in good faith or not depends on California's state of mind. That's what "good faith" means. Good faith "is ordinarily used to describe the state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation." *Black's Law Dictionary*, at 693 (6th ed. 1990). In contrast, bad faith is "[t]he opposite of 'good faith,' generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. Term "bad faith' is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the

negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will." *Id.* at 139.

IGRA's litigation provisions and legislative history also demonstrates that this is how Congress intended that the "good faith" requirement be applied. If the plaintiff-tribe makes a *prima facie* case that the state negotiated in bad faith, IGRA shifts the burden to the state to prove that it negotiated in good faith. 25 U.S.C. § 2710(d)(7)(B)(ii)(II). Burden-shifting is often used to flush out the defendant's motive, *see, e.g.*, *Hunter v. Underwood*, 471 U.S. 222, 228 (1985); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1972); *United States v. Spiesz*, 689 F.2d 1326, 1382 (9th Cir. 1982); and Congress chose to require burden-shifting in IGRA good-faith suits because "it is States not tribes that have crucial information in their possession that will prove or disprove tribal allegations of failure to act in good faith." S. REP. NO. 100-446 (1988), *reprinted in* 1988 U.S.C.C.A.N. at 3084-85. States don't have exclusive possession of evidence about the concessions they offered in negotiations. They do know whether they intended to reach agreement.[7]

[7] In *Rincon Band*, the Ninth Circuit rejected that that the State's subjective understanding of what limits IGRA placed on subjects of negotiation (i.e., the State's subjective understanding of the law) allowed that State to escape liability for demanding illegal compact terms. 602 F.3d at 1041. This is akin to the familiar proposition that ignorance of the law is not a defense. The issue in this case – the State's general duty of good faith in IGRA negotiations -- was not before the Court in *Rincon*.

It is also how federal labor law's requirement of good-faith bargaining has been understood. Good faith "presupposes a desire to reach ultimate agreement" and not simply "an attitude of take it or leave it." *NLRB v. Ins. Agents Int'l Union,* 361 U.S. 477, 485 (1960). "The duty to bargain in good faith focuses on the bargaining parties' conduct and attitude during negotiations and is satisfied where the parties make a serious attempt to resolve differences and reach a common ground." *IATSE Local 15 v. NLRB*, 957 F.3d 1006, 1015 (9th Cir. 2020). "[G]oing through the motions of negotiating, without any real intent to reach an agreement [] does not constitute good faith bargaining." *K-Mart Corp. v. NLRB*, 626 F.2d 704, 706 (9th Cir. 1980). "Good faith' means more than merely going through the motions of negotiating; it is inconsistent with a predetermined resolve not to budge from an initial position. . . . A determination of good faith or of want of good faith normally can rest only on an inference based upon more or less persuasive manifestations of another's state of mind." *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 154-55 (1956) (concurring and dissenting opinion of Justice Frankfurter).

The District Court did not apply this intent-based standard when assessing California's labor-relations proposal. That is, it did not consider whether California's conduct reflected a desire to reach agreement, and instead judged the State's proposal as substantively too onerous.

4. IGRA does not authorize courts to judge the bargains that states offer tribes.

IGRA took away tribes' ability to engage in unregulated gaming and compelled tribes to negotiate with states as a condition of offering gaming, but it also regulates what demands a state may make. Most importantly, it confines state's bargaining demands to seven categories. 25 U.S.C. § 2710(d)(3)(C). If a state ventures beyond those seven categories, it risks a finding of bad-faith bargaining (although as explained in the next subsection, that is not always the result). IGRA also identifies five broad areas of concern – public interest, public safety, criminality, financial integrity and adverse economic impacts -- that might justify the state's demands. 25 U.S.C. § 2710(d)(7)(B)(iii)(II). A state may make proposals on any topics within § 2710(d)(3)(C)'s seven categories and in furtherance of legitimate state interests (such as labor relations) no matter how onerous, so long as the state bargains about the proposals:

> [A] "hard line" stance is not inappropriate *so long as* the conditions insisted upon are related to legitimate state interests regarding gaming and the purposes of IGRA. We hold only that a state may not take a "hard line" position in IGRA negotiations when it results in a "take it or leave it offer" to the tribe to either accept nonbeneficial provisions *outside the permissible scope of §§ 2710(d)(3)(C) and 2710(d)(4)*, or go without a compact.

Rincon Band, 602 F.3d at 1039 (emphasis original).

While IGRA regulates what proposals a state may make, IGRA does <u>not</u> say anything about what tribes might seek from states or what states must offer to

tribes. Nothing in IGRA even hints that states must offer some undefined amount of consideration – or any consideration at all -- in exchange for a proposal that is within § 2710(d)(3)(C)'s seven categories.

Without any statutory guideposts, such a court-created requirement would be unworkable. Courts would have no way to assess whether a concession offered by a state is sufficiently "meaningful" to justify what the state has asked of the tribe. If, as the District Court held, California must offer consideration for its labor-relations proposal, what consideration would be adequate? Nothing in IGRA answers that question for the courts or the parties. States would be forced to bargain without knowing what it has offered satisfies an undefined substantive good-faith requirement, and courts would be forced to substitute their subjective judgments of what constitutes fair compact terms for what the bargaining process might otherwise produce.

IGRA's hands-off approach to the parties' substantive proposals is consistent with federal labor law's good-faith standard, under which the courts do not "either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 106 (1970). Unions and employers can make onerous demands because good faith "is not necessarily incompatible with stubbornness or even with what to an outsider may seem unreasonableness." *Truitt Mfg. Co.*, 351

U.S. at 154-55 (concurring and dissenting opinion of Justice Frankfurter). The proposals that a party makes are relevant only to the extent that the proposals are evidence of the party's desire to reach agreement:

> When evaluating whether a specific contract proposal evidences bad faith, the NLRB focuses on whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective-bargaining agreement. Unrealistically harsh or extreme proposals can serve as evidence that the party offering them lacks a serious intent to adjust differences and reach an acceptable common ground. . . . But always, our analysis of the parties' bargaining must bear on their attitude toward, and conduct during, the bargaining process itself rather than pass judgment on the substance of their contract positions separate from what they reveal about the bargaining process.

IATSE Local 15, 957 F.3d at 1115-16 (internal citations and quotation marks omitted).

Since 2015, California has entered into IGRA compacts with other tribes containing the same labor-relations provisions that it offered to the Tribes in this case.[8] That fact alone demonstrates that the labor-relations proposal was not a sham to prevent it from reaching agreement.

5. *Coyote Valley*'s "meaningful concessions" standard applies only when the state seeks to extract money from a tribe.

The District Court did not invent the "meaningful concessions" requirement in this case. It derived it from the decision in *Coyote Valley*, but misapplied it.

[8] These compacts are available on the website identified in footnote 3.

IGRA treats state demands that a tribe pay money to the state differently than other topics listed in § 2710(d)(C)(3). It specifically authorizes states to bargain for assessments to defray the cost of regulating gaming, 25 U.S.C. § 2710(d)(C)(3)(iii); but otherwise deprives states of the power "to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity," 25 U.S.C. § 2710(d)(C)(4) (emphasis added); and deems "any demand by the State for direct taxation of the Indian tribe or of any Indian lands [to be] evidence that the State has not negotiated in good faith." 25 U.S.C. § 2710(d)(7)(B)(iii)(II). That is the statutory backdrop against which the Ninth Circuit judged California's proposal that gaming tribes share revenue with nongaming tribes in *Coyote Valley*.

The Ninth Circuit said that California did not violate § 2710(d)(4) by "impos[ing]" the revenue-sharing requirement because it "offered meaningful concessions in return for its demands." *Coyote Valley*, 331 F.3d at 1111. In other words, while California sought payments from the tribe that IGRA prohibits states from imposing, it escaped a finding of bad faith because it offered meaningful concessions in exchange:

> We do not hold that the State could have, *without offering anything in return*, taken the position that it would conclude a Tribal-State compact with Coyote Valley only if the tribe agreed to pay into the [revenue sharing fund]. Where, as here, however, a State *offers meaningful concessions* in return for fee demands, it does not exercise "authority to impose" anything. Instead, it exercises its authority to

> negotiate, which IGRA clearly permits. . . . Depending on the nature of both the fees demanded and the concessions offered in return, such demands might, of course, amount to an attempt to "impose" a fee, and therefore amount to bad faith on the part of a State. If, however, offered concessions by a State are real, § 2710(d)(4) does not categorically prohibit fee demands. Instead, courts should consider the totality of that State's actions when engaging in the fact-specific good-faith inquiry IGRA generally requires.

Id. at 1112 (emphasis added).[9]

Extending *Coyote Valley*'s meaningful concessions standard to subjects of IGRA negotiations not involving money, as the District Court did, would render § 2710(d)(4)'s prohibition on "impos[ing] any tax, fee, charge or other assessment upon an Indian tribe" superfluous. The Ninth Circuit has not done so. It has reiterated *Coyote Valley*'s "meaningful concessions" rule only in the context of state demands for money payments. *Rincon Band*, 602 F.3d at 1036-37 (§ 2710(d)(4) has been interpreted as "precluding state authority to *impose* taxes, fees, or assessments, but not prohibiting states from *negotiating* for such payments

[9] The scheme laid out in *Coyote Valley* – which sets different rules for assessing the state's good faith in depending on the proposal's subject-matter – also has a parallel in the NLRA. Section 8(d) identifies the subjects of collective bargaining as "wages, hours, and other terms and conditions of employment," 29 U.S.C. § 158(d); and neither party may refuse to bargain over these subjects (in labor-law parlance, "mandatory" subjects). Unions and employers may also bargain over subjects not listed § 8(d) (which are called "permissive" subjects), but neither party may seek to impose these matters on the other by insisting to the point of impasse on a permissive subject. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 348-49 (1958).

where 'meaningful concessions' are offered in return"); *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1101 (9th Cir. 2006) (in *Coyote Valley* "[t]he theory on which such payments were allowed, however, was that the parties *negotiated* a bargain permitting such payments in return for meaningful concessions from the state . . . . Although the state did not have *authority* to exact such payments, it could bargain to receive them in exchange for a quid pro quo conferred in the compact.")

IGRA treats all other proposals, including those within § 2710(d)(C)(3)(vii)'s catchall category, differently from money demands. As to all other topics, IGRA does not prohibit the state from "impos[ing]" its demands on a tribe or deem the state's demands to be categorical evidence of bad faith. It requires only good-faith negotiations.[10]

Conclusion

For all of the foregoing reasons, the State of California did not violate IGRA's requirement that it negotiate in good faith by proposing that the Plaintiff-Appellee Tribes adopt a Tribal Labor Relations Ordinance. The District Court

[10] Concessions that the State offers might provide evidence that the State is trying to reach agreement, such as in *Coyote Valley*, where the Court observed that the State's offer of concessions in exchange for the TLRO demonstrated the State's good faith. 331 F.3d at 1116-17.

erred when it held that California was required to offer meaningful concessions in exchange for its labor-relations proposal. In adjudicating an IGRA bad-faith claim, courts may not judge the consideration that a state offers in exchange for labor relations protections for its citizens who work at tribal casinos.

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