21-15751

IN THE 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

No. 1:19-cv-00024-AWI-SKO
Honorable Anthony W. Ishii, Judge

APPELLANT'S REPLY BRIEF

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Governor Gavin Newsom and the State of California (State) (collectively, State Appellants) file this optional reply brief, responding to the Appellees' Joint Answering Brief filed on behalf of the Chicken Ranch Rancheria of Me-Wuk Indians, the Blue Lake Rancheria, the Chemehuevi Indian Tribe, the Hopland Band of Pomo Indians, and the Robinson Rancheria (collectively, Tribes).

INTRODUCTION

This appeal arises from the inability of State Appellants and the Tribes to negotiate tribal-state class III gaming compacts to succeed their existing compacts (1999 Compacts). In its negotiations with the Tribes, the State sought compact provisions on the following topics: (1) worker protections for Gaming Facility employees, such as state minimum wage and federal anti-discrimination requirements; (2) environmental mitigation for off-reservation impacts on local communities; (3) agreement to the Tribal Nation Grant Fund (TNGF); (4) tort remedies and protections for Gaming Facility patrons; (5) adoption and maintenance of a Tribal Labor Relations Ordinance (TLRO); and (6) recognition and enforcement of spousal and child support orders issued by the State's courts against Gaming Facility employees (collectively, Negotiating Topics). Appellants' Opening Br. (AOB) 16; *see* Appellees' Joint Answering Br. (AB) 3.

Shortly after the Newsom administration took office, the Tribes terminated their participation in multilateral negotiations with the State and presented a take-it-or-leave-it compact demand requiring the State's unconditional acceptance in seven days. That demand contained terms that the State could not legally or practically accept. Rejecting State Appellants' offer to engage in bilateral sovereign-to-sovereign negotiations, the Tribes filed a lawsuit. They alleged the State failed to negotiate in good faith under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721, 18 U.S.C. §§ 1166-1167, by seeking compact provisions involving the Negotiating Topics. *See* AB 6.

After reviewing the Negotiating Topics, the district court found that all of them, except for enforcement of spousal and child support orders, were related to gaming and permitted topics for negotiation under 25 U.S.C. § 2710(d)(3)(C)(vii)—IGRA's catchall provision. 1-ER-009 (worker protections); 1-ER-016 (environmental mitigation); 1-ER-019 (TNGF); 1-ER-012 (tort protections); 1-ER-009 (TLRO). Acknowledging the lack of precedent from this Court, the district court required the State to provide

meaningful concessions in class III gaming compact negotiations regarding the non-revenue-sharing Negotiating Topics.[1] 1-ER-009 n.1.

Additionally and without any precedent from this Court, the district court held that the State failed to tie specific meaningful concessions to specific topics. 1-ER-020—21. The district court concluded State Appellants failed to negotiate in good faith and initiated the remedial process provided in 25 U.S.C. § 2710(d)(7)(B). 1-ER-022. State Appellants appealed.

The appeal presents issues that this Court has not expressly decided. The first is whether, when negotiating class III gaming compacts under IGRA, the State must provide meaningful concessions for non-revenue-sharing topics. AOB 37-44. The second is if the State is required to provide meaningful concessions, whether it may offer a variety of concessions—rather than concessions on a this-for-that basis—in exchange for IGRA-permitted non-revenue-sharing topics.[2] AOB 55-58.

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[1] As to the Negotiating Topics, the Tribes assert that only the TNGF involves revenue sharing, as a form of taxation. As set forth *infra* in Part II, the district court correctly held that the TNGF is not a tax, fee, or new revenue sharing.

[2] The Tribes do not address, and offer no arguments regarding, this issue on appeal. They thus apparently waive any contention contrary to the

Based upon this Court's precedent, State Appellants contend—and the district court held all except one of—the Negotiating Topics are IGRA-permitted topics of negotiation under IGRA's catchall provision. *See* AOB 25, 45-55. That precedent includes *In re Indian Gaming Related Cases*, 331 F.3d 1094 (9th Cir. 2003) (*Coyote Valley II*), *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010) (*Rincon*), and *Chemehuevi Indian Tribe v. Newsom*, 919 F.3d 1148, 1154 (9th Cir. 2019) (*Chemehuevi*). However, the district court expanded this Court's precedent to require the State to tie specific meaningful concessions to specific IGRA-permitted non-revenue-sharing topics, creating a this-for-that approach that disregards the complex dynamics of negotiations for class III gaming compacts.[3]

State Appellants' position. *LN Management, LLC v. JP Morgan Chase Bank, N.A.,* 957 F.3d 943, 950 (9th Cir. 2020).

[3] The Tribes contend that none of the Negotiating Topics is allowed under IGRA. *See* AB 6. The Tribes rely on *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014) (*Bay Mills*), to argue for a substantive narrowing of IGRA's catchall provision to the "roll of the dice and spin of the wheel." *E.g.*, AB 13, 14, 23. As set forth below, this Court expressly rejected that argument in *Chemehuevi*. 919 F.3d at 1153.

This Court should reverse the district court's order granting summary judgment for the Tribes and remand the case to the district court because:[4]

1. State Appellants did not seek taxes, fees, or new revenue sharing from the Tribes. This Court's decisions do not require meaningful concessions outside the context of revenue sharing. 1-ER-009 n.1; *see Rincon*, 602 F.3d at 1029 (percentage of net win payable to the State's general fund); *Coyote Valley II*, 331 F.3d at 1110-15 (contributions to the Special Distribution Fund (SDF) and the Revenue Sharing Trust Fund (RSTF)).
2. Throughout the negotiations, State Appellants acted in good faith. Even though not required, they offered meaningful concessions. Since January 1, 2015, until the district court's March 31, 2021 order, every other class III gaming compact signed in California has included provisions regarding the Negotiating Topics. Every one of those compacts included concessions the same as or similar to those offered to the

[4] On remand, the Court should direct the district court to vacate its order initiating IGRA's remedial process and alternatively, either (a) grant summary judgment for State Appellants or (b) determine whether the State provided sufficient meaningful concessions, if any are required, in accordance with this Court's decision. AOB 64.

Tribes. In such negotiations, State Appellants are not required to tie specific concessions to specific IGRA-permitted non-revenue-sharing topics.

3. Good faith is evaluated objectively based on the record of negotiations as a whole. Courts should not inquire into the sufficiency of consideration offered by the State for non-revenue-sharing topics. *See Rincon*, 602 F.3d at 1040 n.23, 1041. Courts should not substitute their subjective judgments of what constitute fair compact terms or pass judgment on the substance of compact provisions. Good faith requires the parties to negotiate in a manner which lends itself to the possibility of reaching an accord. State Appellants' good faith is not determined merely by what the Tribes wanted in the compact negotiations.

4. Even though it erred with respect to enforcement of spousal and child support orders, the district court correctly determined that all of the other Negotiating Topics relate to gaming and were permitted by IGRA's catchall provision. Support orders too are permitted by IGRA's catchall provision. AOB 52-55; *see infra* Part II.C. No meaningful concessions are required for non-

revenue-sharing topics permitted by IGRA's catchall provision.[5] *See Rincon* at 1031; AB 21.

5. The Tribes terminated negotiations and prevented any further good-faith negotiations. State Appellants actively responded to the Tribes and stated the State's willingness to continue negotiations. Therefore, State Appellants cannot be held to have violated IGRA's good-faith requirement. *See Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation v. Cal.*, 973 F.3d 953, 958, 965-66 (9th Cir. 2020) (*Pauma II*).

ARGUMENT

I. MEANINGFUL CONCESSIONS ARE NOT REQUIRED IN EXCHANGE FOR IGRA-PERMITTED NON-REVENUE-SHARING TOPICS

Neither this Court nor any other federal appellate court has decided expressly whether IGRA requires meaningful concessions where, as here, a state does not seek a tax, fees, or new revenue sharing. Importantly, this

[5] Even though they seek to reverse the district court with respect to the TNGF (AB 59) and change its substantive holdings on IGRA's catchall to enlarge their rights flowing from the judgment (*id*. at 59-60), the Tribes did not file a cross-appeal. Therefore, the Court should deny the relief they seek. *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 479 (1999); *Corbello v. Valli*, 974 F.3d 965, 975 n.3 (9th Cir. 2020).

Court never has required meaningful concessions outside of a case involving a tax or fee component. *Rincon*, 602 F.3d at 1024 (demand for payment to the State's general fund); *Coyote Valley II*, 331 F.3d at 1111-12 (RSTF to benefit non-gaming and limited gaming tribes), 1113-15 (SDF to defray costs of the State's regulation and other impacts of gaming). In keeping with this precedent, the Court should reverse the district court's improper expansion of the requirement for meaningful concessions to non-revenue-sharing topics. 1-ER-009 n.1.

The Tribes, however, disagree. AB 19. Their argument is simple: the State has not offered support for its argument. *Id*. This fails for two reasons. First, the concept of meaningful concessions arises from IGRA's prohibition against a state's attempt to *impose* a tax or fee. *Rincon*, 602 F.3d at 1036 (citing 25 U.S.C. § 2710(d)(4)). A state cannot, and does not, impose something that is "specially authorized by 25 U.S.C. § 2710(d)(3)(C) and [not] contrary to the tribe's sovereign interests." *Id*. at 1031 (quoted at AOB 41). The non-revenue-sharing Negotiating Topics that the Tribes challenge are within IGRA's permitted topics under 25 U.S.C. § 2710(d)(3)(C). *See infra* Part IV; AOB 45-56.

Second, the Tribes do not discuss *Rincon*'s focus on the State's demand for payments to its general fund. The Tribes disregard this Court's

note that "we do not inquire into the adequacy of consideration as a general rule," but do so "when the consideration must necessarily be divided into two parts—that which IGRA contemplates and that which is outside of IGRA." *Rincon*, 602 F.3d at 1040 n. 23 (quoted at AOB 40). The Tribes also disregard this Court's statement that the "consideration in exchange for revenue sharing must be independently meaningful in comparison to the status quo . . . ." *Id*. (quoted at AOB 40). The non-revenue-sharing Negotiating Topics are within IGRA's permitted topics, and inquiry into the adequacy of consideration for such topics is not generally a court's role.

For these reasons, the Court should hold expressly that IGRA does not require a meaningful concession for an IGRA-permitted topic that does not involve a demand for a tax, fee, or new revenue sharing.[6] The Court should reverse the district court's expansion of the meaningful concessions requirement to non-revenue-sharing topics.

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[6] The Tribes refer to a "*Rincon* exception" that they assert applies to both revenue-sharing and non-revenue-sharing demands that are outside of IGRA-permitted topics for negotiation. AB 17. The apparent source for this assertion is this Court's holding: "a state may, without acting in bad faith, request revenue sharing *if* the revenue sharing provision" meets a three-prong test. *Rincon*, 602 F.3d at 1033. Clearly, *Rincon*, which addressed demands that tribal revenues be paid into the State's general fund, announced this test in the context of revenue sharing.

II. THE NEGOTIATING TOPICS ARE NOT DEMANDS FOR TAXES, FEES, OR NEW REVENUE SHARING AND DO NOT REQUIRE MEANINGFUL CONCESSIONS

The record shows that State Appellants did not demand any taxes, fees, or new revenue sharing during the negotiations. The Tribes, however, disagree asserting the TNGF constitutes a tax. AB 44-49. They also assert, for the first time, that intergovernmental agreements "are a hidden tax."[7] *Id*. at 49-50.

The district court expressly held that the TNGF, as well as an "RSTF II" proposed by the Compact Tribes Steering Committee (CTSC) in July 2019, (1) was similar to the RSTF with negotiations over the form that the fund would take, (2) was appropriate under *Coyote Valley II*, and (3) was not a form of taxation. 1-ER-019. The Court should uphold the district court's determination and reject the Tribe's assertion that the TNGF is a tax.

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[7] The Tribes did not raise their self-denominated "hidden tax" claim in the district court. Nor was it mentioned in the district court's order that is the subject of this appeal. The Tribes provide no analysis or record citations to support their argument. Instead, they leave State Appellants—and the Court—to hunt through the record to discern the basis for the argument. *See In re Plant Insulation Co.*, 734 F.3d 900, 908 n.5 (9th Cir. 2013) (citing *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (per curiam)). Therefore, the Court should reject the Tribes' assertions. *Badley v. United States*, 957 F.3d 969, 978-79 (9th Cir. 2020).

The TNGF benefits Non-Gaming and Limited-Gaming Tribes. *See* Cal. Gov't Code § 12019.30(d). This fits within the *Rincon* explanation of the RSTF. *Rincon*, 602 F.3d at 1023; *see also id*. at 1033 (RSTF is a means for the "fair distribution of gaming opportunities and compensation for the negative externalities caused by gaming"). The TNGF promotes tribal economic development, self-sufficiency, and strong tribal governments—IGRA's express purposes. Cal. Gov't Code § 12019.35(a), (b); *see Coyote Valley II*, 331 F.3d at 1111 (citing 25 U.S.C. § 2702(1)); *Rincon*, 602 F.3d at 1034. Contrary to the Tribe's statement (AB 46), a panel of tribal leaders—not the State—governs the TNGF. Cal. Gov't Code § 12019.60(c)(2). Contrary to the Tribe's statement (AB 44), the TNGF does not "unilaterally modify" the RSTF. Rather, the legislation establishing the TNGF governs its funding and use, which must be consistent with the provisions of class III gaming compacts.[8] Cal. Gov't Code §§ 12019.35(a), 12019.90.

[8] The Tribes refer the Court to the June 16, 2016 amendment to the Barona Band of Capitan Grande Mission Indians' compact. AB 52 n.23. That amended compact provides for payments for deposit into the RSTF and the TNGF. Tribal-State Compact Between the State of California and the Barona Band of Mission Indians (Barona 2016 Compact), §§ 4.5(a)(1), 5.2, available at www.cgcc.ca.gov/?pageID=compacts. Like the Barona 2016 Compact, every compact ratified after January 1, 2015, includes a TNGF provision or refers to the TNGF. *See* www.cgcc.ca.gov/?pageID=compacts.

Moreover, contrary to the Tribes' argument, the TNGF is not a tax. It yields no public revenue or monies available to the State for its use. *See* Cal. Gov't Code § 12019.85; *see also Rincon*, 602 F.3d at 1029 (defining "tax"). The negotiations regarding the TNGF also were not for any new revenue sharing. As the Tribes acknowledge, the TNGF is funded by any surplus in the RSTF. AB 46. This Court approved the RSTF in *Coyote Valley II*.

Because the TNGF is not a demand for a tax, fee, or new revenue sharing, no meaningful concessions were required under this Court's precedent. Therefore, the Court should reject the Tribe's assertions and affirm the district court's determination that the TNGF was not a tax or subject to the meaningful concessions requirement.

III. STATE APPELLANTS OFFERED MANY CONCESSIONS, AND SPECIFIC CONCESSIONS ARE NOT REQUIRED TO BE TIED TO SPECIFIC IGRA-PERMITTED NON-REVENUE-SHARING PROVISIONS

If this Court concludes for the first time that concessions are required for IGRA-permitted non-revenue-sharing topics, it still should reverse the district court's summary judgment in favor of the Tribes. Throughout the negotiations with CTSC, State Appellants offered substantial economic and non-economic concessions for a compact more favorable than the Tribes' 1999 Compacts. AOB 58-64. Most of those concessions were significant

enough to be included in the Tribes' take-it-or-leave-it demand compact. Nonetheless, the district court found that the State needs to tie specific concessions with specific topics, including those topics the court held were IGRA-permitted. 1-ER-20-21.

Moreover, the concessions the State offered CTSC were similar, or identical, to those accepted by every other tribe entering into a class III gaming compact with the State after January 1, 2015. Those compacts are available at www.cgcc.ca.gov/?pageID=compacts. Each of those compacts includes provisions regarding the Negotiating Topics.

The Tribes argue that State Appellants failed to raise concessions in the district court and that the concessions offered were not meaningful. State Appellants, however, thoroughly addressed concessions. State Appellants request the Court hold that if required to offer meaningful concessions for IGRA-permitted non-revenue-sharing topics: (1) the State met its obligation by identifying a variety of concessions that was objectively meaningful; and (2) concessions need not be offered on a this-for-that basis.

A. State Appellants Did Not Waive Any Arguments Regarding Concessions

The Tribes assert that State Appellants "waived" any arguments about concessions by failing to raise them in the district court. AB 51. In briefing the cross-motions for summary judgment, State Appellants clearly raised and addressed concessions:

- In response to the Tribes' contention in their motion that meaningful concessions were required only for demands for taxes or fees (1-FER-040, 063—68), State Appellants argued the State was denied the opportunity to offer meaningful concessions by the Tribes' termination of negotiations. 1-SER-0069, 0089.
- In support of their own motion, State Appellants argued "if any topics exceeded IGRA's scope, the State could lawfully negotiate and offer the . . . Tribes meaningful concessions to include them in new compacts." 1-SER-0099. The Tribes' termination of negotiations prevented the State from offering meaningful concessions. 1-SER-0101.
- In reply to the Tribes' argument that the State did not offer meaningful concessions in the negotiations, State Appellants

repeated that the Tribes' conduct foreclosed offering meaningful concessions. 1-FER-006, 021—22. State Appellants also challenged the Tribes' characterization that no concessions beyond the 1999 Compacts were offered; State Appellants provided a listing of improvements. 1-FER-021—24.

The district court ruled on the cross-motions for summary judgment, making findings and conclusions regarding meaningful concessions. That judgment is the subject of this appeal. The parties have briefed extensively in this Court whether meaningful concessions are required. Clearly, the matter was raised sufficiently for the district court to rule on it. *See Yamada v. Nobel Biocare Holding AG*, 825 F.3d 536, 543 (9th Cir. 2016).

B. State Appellants Offered Concessions and Were Not Required To Tie Specific Concessions to Specific Compact Provisions

The record of negotiations shows that State Appellants offered concessions to CTSC. *See* AOB 58-64. That record also shows that the Tribes terminated multilateral negotiations and refused bilateral sovereign-to-sovereign negotiations. *See id*. at 20-21. Citing *Rincon*, the district court held that State Appellants must tie specific concessions to the specific

Negotiating Topics. 1-ER-20. This is contrary to the negotiating process IGRA contemplates. *See Rincon*, 602 F.3d at 1039.

In *Rincon*, the Court considered the State's demand for tribal payments into its general fund to be available for unrestricted use. In rejecting the State's argument that the Court allow a bundle of provisions to be consideration for imposing a tax, the Court departed from its general rule of not inquiring into the adequacy of consideration. *Rincon*, 602 F.3d at 1040 n.23. The Court recognized two types of consideration: "that which IGRA contemplates and that which is outside of IGRA." *Id*.

The district court's requirement for concessions on a this-for-that basis disregards this Court's recognition of two types of consideration. The type which IGRA contemplates is the give-and-take when parties are negotiating IGRA-permitted non-revenue-sharing topics. *See Rincon*, 602 F.3d at 1039.

The dynamics of compact negotiations, which span a range of issues of varying levels of importance to tribes and the State, would be hindered if the State must tie each topic to a specific concession. Instead, the State must be able to offer a full compact that provides a variety of concessions that improve over the status quo in exchange for IGRA-permitted non-revenue-sharing provisions. This approach is consistent with *Rincon* and its general

rule that a court should not inquire into the adequacy of consideration so long as that consideration is divided between that which IGRA contemplates and that which is outside of IGRA. *Rincon*, 602 F.3d at 1040 n.23.

Rather than facilitate negotiations, the district court's requirement for concessions on a this-for-that basis hinders the compacting process IGRA contemplates. Therefore, the Court should reverse this holding by the district court.

C. The Court Should Not Sit in Judgment of Specific Competing Compact Proposals

The Tribes argue that the concessions are not meaningful, but are concessions regarding "routine" gaming activities. AB 52. The Tribes invite the Court to insert itself into the compact negotiations. The Court should not accept that invitation. *Pauma II*, 973 F.3d at 962 ("We abstain from inserting ourselves into incomplete negotiations.").

In addition to departing from *Pauma II*, accepting the Tribes' invitation would require this Court—and other courts in the future—to evaluate good faith subjectively, not objectively. This is contrary to the Court's precedent. *Rincon*, 602 F.3d at 1041 (good faith should be evaluated objectively); *Pauma II*, 973 F.3d at 958 (same). Moreover, what the parties

subjectively believe is not part of the good-faith determination. *See Rincon*, 602 F.3d at 1041.

The Court may look to labor relations cases for guidance. In those cases, courts do not pass judgment on the substance of the parties' proposals. *Int'l Alliance of Theatrical Stage Emp., Loc. 15 v. NLRB*, 957 F.3d 1006, 1016 (9th Cir. 2020). Good faith bargaining requires that the parties negotiate "in a manner which lends itself to the possibility of reaching an accord." *NLRB v. Indus. Wire Prods. Corp*., 455 F.2d 673, 677 (9th Cir. 1972). Good faith is not determined by what a party wants. *NLRB v. Tomco Communications, Inc.*, 567 F.2d 871, 883-84 (9th Cir. 1978); *see Coyote Valley II*, 331 F.3d at 1107 (Coyote Valley Band sought modifications that the State rejected).

Here, State Appellants negotiated in good faith, offered concessions, and actively tried to continue negotiating for class III gaming compacts to succeed the Tribes' 1999 Compacts. The Tribes abruptly terminated the negotiations, offered a compact that included all concessions previously offered by the State while rejecting topics permitted under IGRA, offered a compact that included terms unacceptable for practical and legal reasons, and refused to engage in bilateral sovereign-to-sovereign negotiations. The

Tribes now ask the Court to disregard the objective record and subjectively sit in judgment of substantive proposals. The Court should not do so.

IV. THE NEGOTIATING TOPICS WERE IGRA-PERMITTED TOPICS

In *Coyote Valley II* and *Chemehuevi*, the Court expressly held that the RSTF, a labor relations ordinance, and compact duration were permitted topics of negotiation under 25 U.S.C. § 2710(d)(3)(C)(vii)—IGRA's catchall—as "directly related to the operation of gaming activities." The district court concluded that all of the Negotiating Topics, except one, were permissible under IGRA's catchall. As to the excepted topic—recognition and enforcement of spousal and child support orders against Gaming Facility employees—the district court erred. That topic too was permissible under IGRA's catchall. AOB 52-55.

The Tribes, on the other hand, assert that the district court erred in concluding that *any* of the topics was permissible under IGRA. Even though they did not cross-appeal, the Tribes request that the Court remand and direct the district court to enter a final judgment that all of the Negotiating Topics violated IGRA—*i.e.*, were not permissible topics of negotiation. AB 59-60.

In making their assertion and seeking to change the district court's judgment, the Tribes request the Court restrict IGRA's catchall's coverage

and limit the State's interest in compacting. The Court should reject these restrictions because they are contrary to this Court's precedent and IGRA.

The Court also should conclude that each of the Negotiating Topics was permissible under IGRA's catchall. If a topic is IGRA-permitted and does not seek a tax, fees, or new revenue sharing, no meaningful concessions are required. *See Rincon*, 602 F.3d at 1031. The Tribes agree.[9] AB 21; *see also id.* at 26 ("Meaningful concessions are only offered in exchange for compact provisions beyond the scope of IGRA").

A. IGRA's Catchall Is Not Limited to the "Roll of the Dice and Spin of the Wheel" as the Tribes Advocate

The Tribes argue that *Bay Mills* restricts the phrase "directly related to the operation of gaming activities" in IGRA's catchall to "each roll of the dice and spin of the wheel." *E.g.*, AB 13, 14, 23.[10] This is contrary to the Court's express rejection of the same argument in *Chemehuevi.*

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[9] The Tribes concede: "If a topic falls within the 'directly related to the operation of gaming activities' category, it qualifies as a permissible topic of negotiation. No exception is needed; no other factors or circumstances are necessary." AB 21.

[10] The Tribes do not mention or acknowledge *Chemehuevi*. Two of the Tribes were the appellants in *Chemehuevi*, 919 F.3d at 1150. This Court has held that repeating an argument already rejected without acknowledging the case that rejected it is "not acceptable." *Singh v. Gonzales*, 502 F.3d 1128, 1129 (9th Cir. 2007).

In *Chemehuevi*, this Court rejected the appellant tribes' attempt to set aside the duration provisions of their 1999 Compacts. The Court held that "a durational limit is 'directly related to the operation of gaming activities.'" *Chemehuevi*, 919 F.3d at 1152 (citing 25 U.S.C. § 2710(d)(3)(C)(vii)).

The Court was "unpersuaded by" the appellant tribes' argument that *Bay Mills* made durational limits impermissible "because they are not 'directly related' to dice-rolling and wheel-spinning." *Chemehuevi*, 919 F.3d at 1153. Contrary to that argument, this Court concluded *Bay Mills* appeared to enlarge the scope of IGRA's negotiable topics:

> Second, if anything, *Bay Mills suggests a broad view* of negotiable subjects when it noted that states and tribes "need only bargain" for a term or condition, which in that case was a waiver of tribal sovereign immunity. *See* [*Bay Mills*, 572 U.S.] at 785, 134 S.Ct. 2024 ("[I]f a State really wants to sue a tribe for gaming outside Indian lands, the State need only bargain for a waiver of immunity.").

Id. (emphasis added).[11]

Chemehuevi expressly addressed the definition of "operation of gaming activity" found in IGRA's catchall provision at 25 U.S.C. §

[11] Even though *Chemehuevi* expressly held that *Bay Mills* apparently enlarged the catchall's scope, the Tribes suggest State Appellants should have cited and discussed *Bay Mills* in their opening brief. AB 23.

2710(d)(3)(C)(vii). *Chemehuevi*, 919 F.3d at 1153. *Bay Mills* did not consider—much less decide—the scope of that IGRA provision. Nonetheless, in their answering brief, the Tribes rely on the Supreme Court's statements made in rejecting Michigan's arguments regarding a tribe's sovereign immunity. The Supreme Court did not discuss the concept relevant to this case, the "operation of gaming activity," included in 25 U.S.C. § 2710(d)(3)(C)(vii).

Therefore, as *Chemehuevi* correctly concluded, *Bay Mills* does not limit IGRA's catchall to "each roll of the dice and spin of the wheel." The Court again should reject the Tribes' effort to constrict 25 U.S.C. § 2710(d)(3)(C)(vii) to render its decision in *Chemehuevi* meaningless.

B. The State's Interest in Compacting Is Not Limited to Protecting Against Organized Crime and Ensuring that Gaming Is Conducted Fairly and Honestly as the Tribes Advocate

This Court repeatedly has held in IGRA cases that courts may consider, among other things, the public interest, public safety, financial integrity, and adverse economic impacts on existing gaming activities when evaluating whether a state negotiated in good faith. *Coyote Valley II*, 331 F.3d at 1107-08; *Pauma II*, 973 F.3d at 957-58. In *Coyote Valley II*, the Court held that the "State's concern for the rights of citizens employed at

tribal gaming establishments is clearly a matter within the scope of [the public] interest" in demanding a labor relations provision. *Coyote Valley II*, 331 F.3d at 1116.

Despite these holdings, the Tribes seek to limit the State's interest in negotiating a class III gaming compact to the "**one narrow area**" of protecting against organized crime and ensuring that gaming is conducted fairly and honestly. AB 10 (emphasis in original). The Tribes rely on *Rincon* for this limitation. *Id*. at 12, 23. But *Rincon* does not hold that the State's interest is limited to protecting against organized crime and ensuring that gaming is conducted fairly and honestly. *See Rincon*, 602 F.3d at 1029, 1034. *Rincon* also acknowledges that IGRA allows consideration of, among other things, the State's public interest, public safety, and financial integrity. *Id.* at 1027 (citing 25 U.S.C. § 2710(d)(7)(B)(iii) and *Coyote Valley II*, 331 F.3d at 1108-09).

Therefore, as this Court has acknowledged repeatedly, the State's public interest, its financial integrity, and public safety are proper interests for the State to raise and negotiate over under IGRA. The Court should reject the Tribes' attempt to write those interests out of IGRA and this circuit's precedent.

C. IGRA's Catchall Includes the Negotiating Topics

Under IGRA's catchall, compacts may include "any other subjects that are directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C)(vii). This Court has determined that the catchall allows: duration limits on compacts, *Chemehuevi*, 919 F.3d at 1152; sharing of gaming revenues through the RSTF with non-gaming tribes,[12] *Coyote Valley II*, 331 F.3d at 1110-13; payments to the SDF for use for mitigation payments to local governments, *id*. at 1113-15; and labor relations protections for employees at tribal gaming facilities,[13] *id*. at 1115-16.

Extending those types of topics to worker protections for Gaming Facility employees, mitigation for off-reservation environmental and other impacts on local communities, tort remedies and protections for Gaming Facility patrons, and recognition and enforcement of spousal and child support orders against Gaming Facility employees is fully consistent with

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[12] As set forth in Part II *supra*, the TNGF is an extension of the RSTF and benefits tribal interests. In approving the RSTF in *Coyote Valley II*, this Court held that the RSTF was a topic under the catchall. *Coyote Valley II*, 331 F.3d at 1111. The analysis there applies equally to the TNGF.

[13] *Coyote Valley II*'s holding that a TLRO is a permissible topic under IGRA should be dispositive with respect to the negotiations at issue here. *Coyote Valley II*, 331 F.3d at 1116.

this Court's precedent.[14] The direct relationship of each to the operation of gaming activities is clear. Gaming activities cannot operate without Gaming Facilities, workers, and patrons. Each is essential for "dice-rolling and wheel-spinning." *See Chemehuevi*, 919 F.3d at 1153.

Moreover, as set forth in Part IV.B *supra*, the State's public interest, its financial integrity, and public safety are proper interests for the State to raise and negotiate over under IGRA. These interests support the disputed topics of negotiation. In particular, the State's attempt to negotiate over compact provisions to recover funds from gaming activity employees who owe child or spousal support to Californians is consistent with the State's public interest in supporting family obligations in addition to its economic interests and financial integrity.

Despite the Negotiating Topics' direct relationship to the operation of gaming activities, the Tribes argue for a constricted interpretation of "gaming activities." They explicitly or implicitly oppose each topic by

[14] A provision for each of these topics is included in every tribal-state class III gaming compact entered into after January 1, 2015, and before the district court's decision on March 31, 2021. The compacts are available at www.cgcc.ca.gov/?pageID=compacts. *Coyote Valley II* considered other tribes' compacts in determining the State's good faith. *See Coyote Valley II*, 331 F.3d at 1113, 1116-17.

disregarding *Chemehuevi*'s rejection of the tribes' reliance on *Bay Mills* and by seeking to limit the State's interest to protecting against organized crime and ensuring that gaming is conducted fairly and honestly. *See* AB 27 (support provisions), 29 (patron protections), 32 (environmental mitigation), 35 (minimum wage), 37-38 (anti-discrimination protections). But those limitations and restrictions are contrary to IGRA and this Court's precedent. *See supra* Part IV.A & B.

Therefore, the Court should hold that IGRA's catchall includes the Negotiating Topics.

D. A TLRO Is a Permitted Topic of Negotiation Under IGRA's Catchall

Every class III gaming compact between a tribe and the State of California provides for a TLRO. These compacts are available at www.cgcc.ca.gov/?pageID=compacts. *Coyote Valley II* expressly held that a TLRO was a topic permitted under IGRA's catchall. *Coyote Valley II*, 331 F.3d at 1116.

The Tribes assert that *Coyote Valley II*'s holding does not apply after *Bay Mills*. AB 39-40. *Chemehuevi* effectively disposes of that assertion. *See supra* Part IV.A.

In an apparent effort to avoid *Coyote Valley II* and despite not raising the issue in the district court, the Tribes invite the Court to consider the substance of a "New TLRO." AB 39 n.13. That "New TLRO" or an updated version of the 1999 Compact TLRO is included in every class III gaming compact signed after January 1, 2015. Those compacts are found at www.cgcc.ca.gov/?pageID=compacts. Moreover, the Tribes did not include a complete TLRO—"new" or otherwise—as part of their last, best and final demand. *See* 2-ER-055—158. They simply referenced a "Tribal Labor Relations Ordinance."[15] 2-ER-061, 144. This Court should reject the Tribes' attempt to insert the Court into the negotiations and the specific provisions of a TLRO. *Pauma II*, 973 F.3d at 962; *see supra* Part III.C.

Moreover, despite its having no bearing on whether a TLRO is a permitted topic for negotiation under IGRA, the Tribes summarily assert that the National Labor Relations Act (NLRA) preempts the "New TLRO."[16]

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[15] The Tribes effectively demanded that the State accept a non-negotiable offer blindly. Nothing in IGRA compels blind negotiation. *Pauma II*, 973 F.3d at 963-64.

[16] In contrast to the Tribes' summary briefing, the 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 (UNITE HERE Brief) (Dkt. 29) extensively addresses the issue of the interrelationship between IGRA and the NLRA, as well as

AB 43. No court has made this holding or held that any TLRO is preempted. The National Labor Relations Board has not decided that the NLRA preempts any tribal labor relations ordinance adopted by a California tribe pursuant to a class III gaming compact under IGRA.

Finally, federal courts interpret federal statutes to coexist. *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (cited in UNITE HERE Br. 12). The Tribes do not show any conflict—direct or otherwise—between the NLRA and IGRA or between the NLRA and a TLRO proposed by the State. In *Casino Pauma v. National Labor Relations Board*, 888 F.3d 1066, 1079-80 (9th Cir. 2018), this Court found no conflict. The Court thus gave effect to both the NLRA and IGRA and should do so now. *See California v. Iipay Nation of Santa Ysabel*, 898 F.3d 960, 968 (9th Cir. 2018).

As this Court held in *Coyote Valley II*, a TLRO is a permitted topic for negotiation under IGRA's catchall. Nothing the Tribes assert changes that. Therefore, the Court should affirm the district court's holding that a TLRO was a permitted topic for negotiation.

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the lack of NLRA preemption. UNITE HERE Br. 3-18. State Appellants agree with and join in this argument.

V. STATE APPELLANTS CANNOT BE HELD TO VIOLATE IGRA'S GOOD-FAITH REQUIREMENT WHEN THE TRIBES TERMINATED THE NEGOTIATIONS PREVENTING FURTHER GOOD-FAITH NEGOTIATIONS

The record shows that State Appellants negotiated in good faith. They remained willing to negotiate even after the Tribes withdrew from all negotiations. *Pauma II*, 973 F.3d at 958 (citing *Coyote Valley II*, 331 F.3d at 1110). Before that, State Appellants sought to achieve successor compacts to the 1999 Compacts with the CTSC of which the Tribes were members. AOB 17-20. The Tribes, however, chose litigation over bilateral sovereign-to-sovereign negotiations.[17] AB 57. They now argue: "[T]he State, *not the Tribes*, must negotiate in good faith." AB 57 (emphasis added). But the State must have a negotiation partner that also is acting in good faith. *See United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1302 (9th Cir. 1998) (preliminary injunction by United States for non-compacted class III gaming may be appropriate on "evidence that it was the Tribe that had failed to bargain in good faith"); *NLRB v. Indus. Wire Prods. Corp.*, 455 F.2d 673,

[17] Successor compacts were reached with CTSC tribes that negotiated on a bilateral sovereign-to-sovereign basis with the State. *See* AOB 17 n.8. On August 24, 2021, Governor Newsom announced that the State had entered into additional compacts with former CTSC tribes and others. https://www.gov.ca.gov/2021/08/24/governor-newsom-signs-tribal-compacts-august-2021/.

677 (9th Cir. 1972) ("good faith requires that the parties negotiate in a manner which lends itself to the possibility of reaching an accord").

The record demonstrates that the Tribes terminated negotiations despite the State's willingness to negotiate. The Tribes assert that their last, best and final demand was not a take-it-or-leave offer. The record shows otherwise. *Compare* AB 57 *with* 2-ER-053 ("will not consider any counter-offer"; offer must be "unconditionally accepted"). The Tribes argue their demand "includes an RSTF funding provision." AB 58 (citing 2-ER-070—71). But it does not. The pages and section 4.1 that they cite refer to a non-existent section 5.2. *See* 2-ER-081 (section 5.1 does not provide for the Tribes to contribute to the RSTF). The Tribes also argue that the Governor and the California Legislature can agree in advance to any kind of class III gaming not specifically denominated in that constitution. AB 58; *see also* 25 U.S.C. § 2710(b)(1), (d)(1) (class III gaming requires a compact). That argument simply is incorrect. The California Constitution is clear that the Governor can only negotiate compacts for the enumerated forms of gaming. Cal. Const., art. IV, § 19(f).

While asserting that the Tribes do not have to negotiate in good faith, they attempt to distinguish *Pauma II*. AB 55-56. However, little distinguishes the conduct in *Pauma II* from the Tribes' conduct here. Like

the tribe in *Pauma II*, the Tribes' approach to the incoming Newsom administration was demanding, yet nonresponsive and uncooperative.[18] *See* 2-ER-053 (transmitting last, best and final demand). Like the tribe in *Pauma II*, the Tribes changed their positions on significant issues. *See* AOB 19-20 (describing CTSC's retreat from more than four years of negotiations). Like the tribe in *Pauma II*, the Tribes' demand included provisions that the State could not legally or practically accept. *See* AOB 33-35 (examples of "poison pills" in the Tribes' demand); *Pauma II*, 973 F.3d at 962-63.

Therefore, the Court should conclude that the facts here establish that State Appellants did not fail to negotiate in good faith. *Pauma II*, 973 F.3d at 965-66. Any evaluation of good faith is premature. *Id*. at 962.

CONCLUSION

For the reasons set forth above and in their opening brief, State Appellants respectfully request that the Court reverse the district court's

[18] In fact, in discussing the State's positions, the Tribes repeatedly refer to an October 2018 proposal submitted by the Brown administration. *See e.g.*, AB 27, 29, 31-32, 35. Thus, they further demonstrate their nonresponsive and uncooperative approach by completely ignoring the Newsom administration's proposal in September 2019. 3-ER-164—299.

Order granting summary judgment for the Tribes and remand the case to the district court with directions to:

1. vacate the district court's order initiating IGRA's remedial process; and
2. alternatively, either (a) grant summary judgment for State Appellants or (b) determine whether the State provided sufficient meaningful concessions, if any are required, in accordance with this Court's decision.

Dated: October 1, 2021

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FOR THE NINTH CIRCUIT

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