No. 15-1185

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

REPLY BRIEF FOR THE PETITIONERS

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*

June 3, 2016

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES (continued)

Page

REPLY BRIEF FOR THE PETITIONERS

The Ninth Circuit construed a limited waiver of sovereign immunity—a provision that appears in more than fifty of California's gaming compacts with Indian tribes—to waive the State's immunity regarding an award of $36.2 million in monetary restitution. As the dissenting judge explained below, a proper reading of that provision is that it waives the State's immunity only with respect to injunctive relief, specific performance, and declaratory relief, and excludes monetary restitution. The panel majority's decision contradicts this Court's precedents, which direct that a waiver of sovereign immunity may not be found unless it is "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 v. Jordan*, 415 U.S. 651, 673 (1974) (alteration omitted). This petition should be granted because the decision below improperly exposes the State to substantial monetary liability in this case and in future actions, and creates confusion about this Court's sovereign immunity jurisprudence.

1. Pauma does not dispute that more than two-thirds of the gaming compacts entered by the State contain limited waiver provisions identical to the one at issue here. Pet. 14. It does not dispute the amount of money that tribes have paid into California's general fund under those compacts. Pet. 14-15. Still, Pauma discounts the importance of this petition, arguing that "[a]pplicable statutes of limitation" will protect the State's fisc from suits by other tribes seeking to rescind their compacts and to obtain restitution for payments they have made to the State. Opp. 3. The premise of Pauma's argument is mistaken.

Pauma assumes that the only possible basis for a tribe to seek rescission of its gaming compact (and restitution of the fees it paid under that compact) would be the claim that succeeded in this case—that is, a misrepresentation claim based on the 2003 statement about the number of licenses in the "common pool." *See* Opp. 36-37. It assures the Court that such a claim "would undoubtedly run into a grave statute of limitations problem." Opp. 37. That may be, but Pauma ignores the possibility that tribes might allege different grounds for rescission and restitution. *See* Pet. 15; Cal. Civ. Code § 1689(b)(1)-(7) (authorizing rescission where "the contract is unlawful for causes which do not appear in its terms or conditions," where "the public interest will be prejudiced by permitting the contract to stand," and for mistake, undue influence, failure of consideration, and other reasons). Depending on the nature of the allegations, the statute of limitations for such an action might begin to run long after the gaming compact was executed, as in this case. *See, e.g.*, Cal. Civ. Proc. Code § 337.1. The Ninth Circuit's decision could encourage new litigation against the State, seeking relief not contemplated under the terms of the State's gaming compacts.

2. Like the lower courts, Pauma treats the analysis of the compact's limited waiver provision as an exercise in ordinary contract interpretation. *See* Opp. 22-24. As the State has explained (Pet. 11-12), that approach conflicts with this Court's directive that a waiver of state sovereign immunity may be found only where the text of the waiver leaves "'no room for any other reasonable construction.'" *Edelman*, 415 U.S. at 673.

Pauma fails to establish that the construction of the limited waiver provision advanced by Chief Judge Jarvey in his dissent below is unreasonable. *See* Pet. 9-10, 13-14. That construction limits the scope of the waiver to the three forms of relief that the compact identifies as the "only" relief that may be sought in an action against the State: injunctive relief, specific performance, and declaratory relief. Pet. App. 40a. Pauma offers no persuasive argument that the text forecloses that reading, or that Chief Judge Jarvey was incorrect in concluding that the monetary award at issue here does "not qualify as injunctive, specific performance or declaratory relief." *Id.* at 41a.

Instead, Pauma advances its own interpretation of the provision. Pauma focuses on the clause stating that the parties waive their immunity provided that "[n]either side makes any claim for monetary damages." Opp. 23. It argues that courts have suggested a distinction between monetary restitution and monetary damages. But the question here is not how courts have understood "monetary damages" in isolation. The question is how the term can be reasonably understood in the context of the waiver provision. In that context, the term is followed by a more explicit definition of the scope of the waiver:

> 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*) . . . .

Pet. App. 28a (emphasis added). It is not unreasonable to read the waiver as limited by that explicit definition, instead of focusing on the term "monetary damages" in isolation as Pauma urges.

Pauma also points to the clause defining "specific performance" as including "enforcement of a provision of this Compact requiring payment of money to one or another of the parties." Opp. 23-24. Pauma's assertion that the monetary award in this case "fits within" that clause (Opp. 23) is untenable. Everyone agrees that the gaming compact at issue here contains no provision requiring the State to pay money to Pauma. The Ninth Circuit majority acknowledged that "the Compact does not contain any provisions requiring payment of money from the State to the Tribe." Pet. App. 30a-31a. The dissent recognized that "the Compact's payment provisions run only from Pauma to the State." *Id.* at 40a. And Pauma itself acknowledges that the "only provisions under either the original compact or the amendment that require the payment of monies are those obligating Pauma to pay the State revenue sharing." Opp. 23. Thus, a monetary award requiring the State to pay $36.2 million to Pauma cannot constitute "enforcement of a provision of [the] Compact requiring payment of monies." Pet. App. 28a.

3. Pauma does not argue that there are any jurisdictional defects, factual disputes, or other complications that would cloud this Court's review of the question presented. Instead, Pauma devotes most of its brief in opposition (Opp. 3, 25-35) to arguing that this case is a poor vehicle because of alternative theories Pauma might advance on remand—based on the particular claims and circumstances of this case—to contend that the State waived its sovereign immunity. None of those theories was embraced by the Ninth Circuit below and none has merit. In any event, the broader question presented here warrants review regardless of the prospects for Pauma's alternative arguments on remand.

a. Pauma first argues (Opp. 25-28) that California Government Code section 98005 waived the State's immunity with respect to the district court's monetary award. To the extent Pauma suggests that the lower courts have already resolved this argument in its favor, it is mistaken. Pauma implies that the Ninth Circuit looked to section 98005 as an alternative basis for its judgment. *See* Opp. 21. But the panel majority explicitly stated that "we need not reach whether the statutory waiver would also apply." Pet. App. 32a n.12. Pauma also suggests (Opp. 19-20, 27-28) that the district court held that section 98005 applied here, pointing to comments the court made from the bench at the start of a May 2013 hearing. *See* Opp. App. 4a-5a. Later in that hearing, however, the State explained the reasons why section 98005 does not apply to Pauma's suit. *See id.* at 13a-14a. The district court's written order on the question of sovereign immunity, issued a month later, contained no mention of section 98005 and based its ruling exclusively on the limited waiver provision in the gaming compact. Pet. App. 46a-48a; *see also Logue v. Dore*, 103 F.3d 1040, 1047 (1st Cir. 1997) ("[A]ppellate courts review orders and judgments, not judge's statements.").

Nor is Pauma likely to prevail on this argument on remand. Pauma focuses on a clause in section 98005 that waives the State's immunity from suits "asserting any cause of action arising from . . . the state's violation of the terms of any Tribal-State compact." Cal. Gov't Code § 98005; *see* Opp. 26. But Pauma's suit is not covered by this clause because Pauma did not assert any cause of action for breach of contract. *See* Pet. 16-17; Pet. App. 23a ("[N]o breach of a contract has been alleged.").

Pauma nonetheless contends that "the restitution award falls squarely within the statutory waiver," reasoning that its claims "arose" from a breach of the original gaming compact. Opp. 27. But the district court granted relief on a single cause of action alleging misrepresentation. The event giving rise to that cause of action was a statement by the state Gambling Control Commission—not any breach of contract. *See* Pet. App. 81a-88a; *cf. Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 562-563 (9th Cir. 2016) (claim for "material misrepresentation" is a tort claim that does "not constitute [a] claim[] for a violation of the Compact"). Pauma fails to identify any support for reading section 98005 to encompass a misrepresentation claim with a relationship to a gaming compact.

b. Next, Pauma argues (Opp. 29-31) that the State waived its sovereign immunity by not raising the issue soon enough. Although Pauma pressed this theory before the district court (Opp. App. 24a-25a), that court did not find any waiver by conduct. Instead, it concluded that "[t]he State did not waive any sovereign immunity it may have by virtue of litigating this case." Pet. App. 47a n.1. Pauma briefed the same theory before the Ninth Circuit (C.A. Dkt. No. 29-1 at 58-60), which did not even mention it when ruling on the sovereign immunity issue (Pet. App. 26a-32a).

It is unlikely that this argument would meet with any greater success on remand. Ninth Circuit precedent directs that a "sovereign can assert immunity 'at any time during judicial proceedings.'" *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 724 (9th Cir. 2008). For a court to find waiver, the State must have engaged in "conduct that is incompatible with

an intent to preserve" its immunity. *Hill v. Blind Indus. & Servs.*, 179 F.3d 754, 758 (9th Cir. 1999). Here, the State invoked sovereign immunity in the district court and did so well before the court had ruled on any dispositive motions. In opposing Pauma's first motion for summary judgment, in which Pauma sought "restitution for all previously-paid 2004 Compact fees" (Dist. Ct. Dkt. No. 66 at 10), the State argued that "equitable restitution, like other forms of damages, is barred by a state's sovereign immunity." Dist. Ct. Dkt. No. 92 at 25 (citing *Edelman*).

Pauma criticizes the State for saying "nothing about sovereign immunity in its opposition to Pauma's motion for preliminary injunction" (Opp. 14) or in the interlocutory appeal on that issue (Opp. 16), both of which occurred before Pauma's motion for summary judgment. Sovereign immunity was no basis for opposing the preliminary injunction, however, because the compact expressly waived the State's immunity with respect to claims for "injunctive . . . relief." Pet. App. 28a. Moreover, Pauma's arguments in support of the preliminary injunction indicated that it believed sovereign immunity barred it from recouping the fees it paid to the State. The requested injunction returned Pauma to the lower fees of the original compact, and Pauma told the district court it needed that injunction because "the State enjoys sovereign immunity from suit" for "any claims for damages or compensatory relief." Dist. Ct. Dkt. No. 20 at 5. It argued that, absent a preliminary injunction, its injuries from continuing to pay the higher fees in the amended compact would be "irreparable." *Id.* In light of that apparent concession, the State had no

reason to press any argument based on sovereign immunity.[1]

Pauma also faults the State for not raising sovereign immunity in its motions to dismiss. Opp. 14, 18. There is no requirement, however, that a State must raise its sovereign immunity defense in a motion to dismiss. *See generally Cook*, 548 F.3d at 724. And the State's decision not to do so here is understandable, given Pauma's apparent position, at the outset of the litigation, that sovereign immunity prevented it from recovering payments it made to the State under the amended compact. What is more, the State's sovereign immunity from restitutionary awards could not have been a basis for dismissing any of Pauma's claims, since Pauma also sought declaratory and injunctive relief—forms of relief for which the State had expressly waived its sovereign immunity.[2]

This is not a case where the State made a "tactical decision to delay asserting the sovereign immuni-

---

[1] Pauma emphasizes that eighteen months passed between the start of the litigation and the date when the State advanced its sovereign immunity argument. Opp. 31. It neglects to mention that the district court stayed the entire action for much of that period, during the appeal regarding the preliminary injunction. Dist. Ct. Dkt. No. 55 at 2.

[2] Pauma notes that the State's initial answer did not reference sovereign immunity. Opp. 18, 20. By the time that answer was filed, however, the State had already invoked sovereign immunity in its opposition to Pauma's motion for summary judgment. *See* Dist. Ct. Dkt. No. 92 at 25. Moreover, the initial answer did assert that the district court lacked subject matter jurisdiction over "every claim and request for relief" (Dist. Ct. Dkt. No. 129 at 16), and the State's answer to the first amended complaint expressly invoked sovereign immunity as a defense to Pauma's requests for restitution (Dist. Ct. Dkt. No. 191 at 73-74).

ty defense," *Johnson v. Rancho Santiago Comty. College Dist.*, 623 F.3d 1011, 1021-22 (9th Cir. 2010), or made "selective use of 'immunity' to achieve litigation advantages," *Lapides v. Bd. of Regents*, 535 U.S. 613, 620 (2002). *See* Opp. 30. As soon as Pauma clearly set out its argument that it was entitled to a monetary award equal to all the additional fees it paid under the amended compact, the State advanced its position that such relief was barred by sovereign immunity. *See* Dist. Ct. Dkt. No. 66 at 10, No. 92 at 25. There is no indication on this record that the litigation would have proceeded in a manner more favorable to Pauma if the State had raised this issue earlier.

c. Finally, Pauma contends that sovereign immunity is unavailable here because the restitutionary award will not be paid "from 'public funds' in the state treasury" (Opp. 34) and because the State committed "*ultra vires* acts" (Opp. 32). Pauma did not raise either of these arguments in the district court and the Ninth Circuit did not address them on appeal. Both lack merit. The Eleventh Amendment concerns "the prevention of federal-court judgments that must be paid out of a State's treasury." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994). That concern is squarely implicated here. Pauma has acknowledged that the bulk of the money it paid the State under the amended compact was deposited into "the State's general fund." Dist. Ct. Dkt. No. 130 at 23 (first amended complaint). The district ordered that the "State shall satisfy the $36,235,147.01 judgment." Pet. App. 45a; *see id.* at 42a. And Pauma identifies no basis for concluding

that this judgment would not be paid from the State's treasury.[3]

The case Pauma relies on for its "*ultra vires*" argument, *Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982), is inapposite. Unlike this case, *Treasure Salvors* involved a suit that imposed "no burden on the state treasury." *Id.* at 698. It held that the Eleventh Amendment does not bar an action seeking the return of artifacts seized by state officials, where "[n]o statutory provision . . . even arguably would authorize officials" to hold the property. *Id.* at 696. Here, the State's authority to negotiate and execute gaming compacts under which the State receives payments from tribes is unquestioned. *See* Cal. Const. art. IV, § 19(f).[4]

d. Pauma never argues that the question presented by the State's petition is not a proper subject for this Court's review. It merely suggests that review is unwarranted due to the possibility that it might prevail on remand based on one of its alternative theories. That possibility is remote at best, and does not provide a compelling reason for denying re-

---

[3] In the normal course, state judgment creditors are paid after the California Legislature enacts an appropriations bill, which typically directs that the funds be appropriated from the general fund or from a special fund within the state treasury. *See, e.g.*, Assemb. B. 164, 2015-2016 Reg. Sess. § 1 (Cal. 2015).

[4] There is no merit to Pauma's argument (Opp. 35) that *Elephant Butte Irrigation District v. Department of the Interior*, 160 F.3d 602 (10th Cir. 1998), would allow it to recover the restitutionary award. That case recognized that *Ex parte Young*, 209 U.S. 123 (1908), allows *prospective* relief even if it burdens a State's treasury to some degree; it did not authorize the kind of retrospective relief Pauma seeks here. *See* 160 F.3d at 607-608, 611.

view in any event, because the importance of this question extends well beyond the present controversy. Even in the unlikely event that one of Pauma's case-specific waiver theories prevailed on remand following a reversal by this Court, this Court's resolution of the broader question presented by this petition would be worth the investment of time and resources. Absent review by this Court, California will be exposed to the possibility of substantial monetary awards in any suit seeking rescission of one of more than fifty gaming compacts that contain the same provision at issue here—despite having never expressed its intent to waive its sovereign immunity from such awards. And without this Court's intervention, the Ninth Circuit's published decision in this case will sow confusion regarding important aspects of sovereign immunity jurisprudence.

CONCLUSION

The State's 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

June 3, 2016