IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

STAND UP FOR CALIFORNIA! et al. , Plaintiffs, Cross-Defendants, and Respondents, **v.** **STATE OF CALIFORNIA, et al. ,** Defendants, Cross-Defendants and Respondents; **NORTH FORK RANCHERIA OF MONO INDIANS,** Intervenor-Defendant, Cross-Complainant and Appellant.	Case No. F070327

Madera County Superior Court, Case No. MCV062850
Honorable Michael J. Jurkovich, Judge

RESPONDENTS' BRIEF

KAMALA D. HARRIS
Attorney General of California
SARA J. DRAKE
Senior Assistant Attorney General
WILLIAM P. TORNGREN
Deputy Attorney General

TIMOTHY M. MUSCAT
Deputy Attorney General
State Bar No. 148944
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 322-5184
Fax: (916) 323-2319
E-mail: Timothy.Muscat@doj.ca.gov
Attorneys for Defendants, Cross-Defendants, and Respondents

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Case Name: *Stand Up For California v. State of California* Court of Appeal No.: F070327

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(Cal. Rules of Court, Rule 8.208)

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Attorney Submitting Form

Timothy M. Muscat
Deputy Attorney General
State Bar Number 148944
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
916/322-5184
Timothy.muscat@doj.ca.gov

Party Represented

Attorneys for Defendant and Respondent State of California

/s/ TIMOTHY M. MUSCAT
(Signature of Attorney Submitting Form)

SEPTEMBER 18, 2015
(Date)

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INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal involves appellant North Fork Rancheria of Mono Indians (North Fork or Tribe), and a class III tribal-state gaming compact between the Tribe and the State of California (North Fork Compact). Following successful negotiations between Governor Edmund G. Brown Jr. and the Tribe, the North Fork Compact was ratified by the California Legislature by the passage of Assembly Bill No. 277 (AB 277). But before the ratification statute took effect, it was challenged by a referendum, commonly known as Proposition 48. On November 4, 2014, the People of California voted on Proposition 48, and exercised their right to reject AB 277.

North Fork does not accept the people's popular vote on Proposition 48. In its appellant's brief, the Tribe argues that AB 277 was not a "legislative act" subject to the people's constitutional referendum power. North Fork also claims that this Court should diminish the scope of the people's referendum power to exclude challenges to ratification statutes under the Indian Gaming Regulatory Act (IGRA) (18 U.S.C. §§ 1166-1168; 25 U.S.C. §§ 2701-2721). The Tribe is wrong on both counts.

To protect the people's constitutional right of referendum, respondents Edmund G. Brown Jr., in his official capacity as Governor of the State of California, Kamala D. Harris, in her official capacity as the Attorney General of California, the California Gambling Control Commission, the Bureau of Gambling Control, and the State of California (collectively, State Respondents) request this Court to affirm the superior court's judgment. This judgment in the State Respondents' favor should be affirmed for three reasons. First, AB 277 was subject to the people's reserved power of referendum. Second, AB 277 was a legislative act, also subject to the people's referendum power. Third, IGRA does not require California to sacrifice its principles of direct democracy, and California's

referendum process does not conflict with state or federal law. IGRA itself recognizes that state law determines when a compact is "entered into" under this federal law.

STATEMENT OF THE CASE

I. THE NORTH FORK COMPACT, AB 277, AND THE PEOPLE'S REFERENDUM

North Fork is a federally recognized Indian tribe with approximately 1,900 members. (AA I p. 7.)[1] Following a period of negotiations, North Fork and the State of California entered into a class III tribal-state gaming compact. (AA I p. 8.) On August 31, 2012, Governor Brown announced the signing of the North Fork Compact that would permit class III gaming under IGRA. (AA I p. 12.)

The Legislature passed AB 277 on June 27, 2013. (AA I p. 13.) This statute, which added Government Code section 12012.59, ratified both the North Fork Compact and another compact between the State of California and the Wiyot Tribe (formerly the Table Bluff Reservation-Wiyot Tribe). (*Ibid*.) The Governor signed AB 277 on July 3, 2013, and it was chaptered as chapter 51 of the Statutes of 2013. (*Ibid*.)

On or about July 8, 2013, real party in interest Cheryl Schmit submitted a title and summary request to the California Attorney General's Office for a referendum on AB 277. (AA I p. 13.) On July 19, 2013, the California Attorney General's Office issued a referendum title and summary. (*Ibid*.) On November 20, 2013, former California Secretary of State Bowen (Secretary of State) certified the referendum for the November 2014 general election. (AA I pp. 13-14.)

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[1] The State Respondents' citations to the record are to volumes I through II of the Appellants' Appendix (AA).

After receiving the North Fork Compact, and pursuant to Government Code section 12012.25, subdivision (f), the Secretary of State forwarded a copy of the compact to the United States Secretary of the Department of the Interior (federal Secretary) for "review and approval." (AA I p. 13.) On October 22, 2013, the federal Secretary published notice in the Federal Register that the North Fork Compact "was considered to be approved and that it was therefore 'taking effect.'" (*Ibid*.)

At the November 2014 general election, the people voted in favor of Proposition 48, a referendum initiated by the people of the State of California to overturn the Legislature's ratification of the North Fork Compact.

II. NORTH FORK'S CROSS-COMPLAINT, THE STATE RESPONDENTS' DEMURRER, AND THE SUPERIOR COURT'S JUDGMENT IN STATE RESPONDENTS' FAVOR

North Fork filed its Verified Cross-Complaint of Intervenor-Defendant North Fork Rancheria of Mono Indians for Declaratory Relief (Cross-Complaint) against the State Respondents and Respondent Schmit on February 27, 2014. (AA I pp. 1-18.) The Tribe alleged that the Legislature's statutory ratification of the North Fork Compact was in full force and effect, and that the ratification was not subject to the people's constitutional referendum power. (AA I p. 14.) The State Respondents demurred to North Fork's Cross-Complaint (AA I pp. 237-257), and the superior court issued a ruling sustaining their demurrer on June 26, 2014. (AA II pp. 453-472.)

In ruling in the State Respondents' favor, the superior court held that as a nonexempt statute, AB 277 was subject to the people's referendum power. (AA II pp. 458-461.) The superior court further held that even if AB 277's nonexempt statutory form was not dispositive of the case, AB 277 was also a legislative act subject to the people's referendum power.

(AA II pp. 461-462.) The superior court further found that California's referendum process did not conflict with federal and state law. (AA II pp. 462-467.) The superior court entered judgment in favor of the State Respondents on July 9, 2014 (AA II pp. 475-477), and the notice of entry of judgment was filed on or about July 18, 2014. (AA II pp. 478-506.)

STATEMENT OF APPEALABILITY AND STANDARD OF REVIEW

The State Respondents agree with North Fork that the Tribe timely filed this appeal (AA II pp. 507-509), and that this Court's review of the dismissal following the successful demurrers is de novo (*Jones v. Omnitrans* (2004) 125 Cal.App.4th 273, 277, citing *City of Morgan Hill v. Bay Area Air Quality Mgmt. Dist.* (2004) 118 Cal.App.4th 861, 869).

ARGUMENT

I. THE LEGISLATURE'S STATUTORY RATIFICATION OF THE NORTH FORK COMPACT WAS SUBJECT TO THE PEOPLE'S RESERVED REFERENDUM POWER UNDER THE CALIFORNIA CONSTITUTION

The California Constitution permits voter participation in the legislative process because "[a]ll political power is inherently in the people." (Cal. Const., art. II, § 1.) Specifically, in article IV, section 1, the people of California reserve to themselves the powers of initiative and referendum. (Cal. Const., art. IV, § 1.) The California Constitution defines the referendum as "the power of the electors to approve or reject statutes . . . ." (Cal. Const., art. II, § 9, subd. (a).) Under this section, a "referendum measure may be proposed by presenting to the Secretary of State, within 90 days after the enactment date of the statute, a petition certified to have been signed by [registered voters] equal in number to 5 percent of the votes for all candidates for Governor at the last gubernatorial election, asking that the statute or part of it be submitted" to the voters. (Cal. Const., art. II, § 9,

subd. (b).) These tools of direct democracy are "the sole methods by which the people may constitutionally exercise legislative power." (*Santa Clara County Local Transp. Auth. v. Guardino* (1995) 11 Cal.4th 220, 247.)

Because the initiative and referendum are legislative powers reserved by the people, California courts "apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled." (*Independent Energy Producers Ass'n v. McPherson* (*McPherson*) (2006) 38 Cal.4th 1020, 1032, quoting *Associated Home Builders etc. Inc. v. City of Livermore* (*Associated Home Builders*) (1976) 18 Cal.3d 582, 591.) The California Supreme Court has emphasized the importance of protecting these reserved powers by declaring the "'duty of the courts to jealously guard' the people's right of initiative and referendum." (*American Federation of Labor-Congress of Industries Organizations v. Eu* (1984) 36 Cal.3d 687, 708 (A.F.L.), quoting *Martin v. Smith* (1959) 176 Cal.App.2d 115, 117.)

The California Supreme Court declared that "[i]f doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it." (*McPherson*, *supra*, 38 Cal.4th at p. 1032, quoting *Associated Home Builders*, *supra,* 18 Cal.3d at p. 591.) This rule of construction is also followed because California courts are properly reluctant "to interfere with the legislative process." (*Collins v. City and County of San Francisco* (*Collins*) (1952) 112 Cal.App.2d 719, 729, citing *Santa Clara County v. Superior Court* (1949) 33 Cal.2d 552, 557.)

In accordance with the judicial policy of liberally construing the people's reserved referendum power, exceptions are strictly construed. (See *Collins*, *supra*, 112 Cal.App.2d at p. 731.) "Under the familiar maxim of *expressio unius est exclusio alterius* it is well settled that, when a statute expresses certain exceptions to a general rule, other exceptions are

necessarily excluded." (*Ibid*.) No constitutional exclusion exists for statutes ratifying class III tribal-state gaming compacts.

In light of these significant judicial protections that guard the people's direct democracy, the superior court properly refused to declare void the referendum that challenged AB 277. As the superior court correctly observed, the plain language of Article II, section 9, subdivision (a), "applies to 'statutes and parts of statutes' with the exception of 'urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State." (AA II p. 459, quoting Cal. Const., art. II, § 9, subd. (a).)[2] Given the judicial duty to jealously guard the people's right of referendum, the superior court followed the plain language of this constitutional provision, and held that the people's referendum power extends "to all statutes which do not fall into one of the three specifically enumerated exceptions." (AA II p. 459.)

For this reason alone, this Court should affirm the superior court's judgment in the State Respondents' favor. There is no authority for any court to re-write the California Constitution by judicially creating a new tribal-state compact ratification exception for Article II, section 9, subdivision (a). A contrary ruling would run counter to the judicial mandate to strictly construe exceptions to the people's reserved referendum power. (See *Collins*, *supra*, 112 Cal.App.2d at p. 731.) Accordingly,

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[2] This section of the California Constitution reads as follows:

> The referendum is the power of the electors to approve or reject statutes or parts of statutes except urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State.

(Cal. Const., art. II, § 9, subd. (a).)

because class III tribal-state gaming compact ratification statutes are not exempt under the California Constitution's plain language, they remain subject to the people's right of referendum. As such, the superior court correctly followed well-established principles of California constitutional law in granting the State Respondents' demurrer to North Fork's Cross-Complaint, and its decision should be affirmed.

A. North Fork's proposal to limit the people's referendum power solely to statutes that "truly constitute exercises of legislative power" is not supported by the California Constitution

North Fork attacks the superior court's judgment by arguing that under article II, section 9, subdivision (a), referendum power does not include referendums on class III tribal-state compacts. (AOB, pp. 27-50.) The Tribe contends that this constitutional provision does not cover all nonexempt statutes enacted by the Legislature. Instead, only those statutes that "truly constitute exercises of *legislative* power" (AOB, p. 29, italics in original) are subject to referendum.

North Fork's argument should be rejected. First, this argument is wrong because it advocates a rejection of the California Constitution's plain language granting the people referendum power "to approve or reject statutes or part of statutes . . . ." (Cal. Const., art. II, § 9, subd. (a).) Clearly, the scope of the people's referendum power under California's constitutionally protected direct democracy is not limited in the manner advocated by North Fork. Instead, Article II, section 9, subdivision (a) provides the people with referenda power over all nonexempt statutes. Exemptions are constitutionally limited to "urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State." (Cal. Const., art. II, § 9, subd. (a).) There are no other constitutional exemptions, and as the superior court

correctly noted, the courts strictly construe these existing exemptions. (See *Collins*, *supra*, 112 Cal.App.2d at p. 731.) As a result, from the time California's direct democracy era began in 1911, no published California appellate court decision has held that a nonexempt statute passed by the Legislature was not subject to a referendum. Accordingly, the meaning of California case law in regard to referenda is clear—legislative statutes are statutes. [3]

Second, North Fork's attempt to limit the scope of the people's referendum to only certain statutes that "truly constitute exercises of *legislative* power" (AOB, p. 29, italics in original) is nothing more than an effort to judicially impose an exemption that was already legislatively denied. There is no dispute in this case that the Legislature chose *not* to apply an existing exemption under article II, section 9, subdivision (a) when it enacted AB 277. Certainly, this policy option was present when the Legislature passed AB 277. There is no legal basis for the California courts to second guess the Legislature's policy determination to not grant an exemption when ratifying class III tribal-state gaming compacts. North

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[3] North Fork's reliance on *Barlotti v. Lyons* (*Barlotti*) (1920) 182 Cal. 575 is misplaced. (AOB, p. 35.) *Barlotti* involved the Legislature's then recent ratification by joint resolution of the 18th Amendment to the United States Constitution. (*Id.* at p. 576.) In rejecting the claim that this ratification was subject to the referendum process, the California Supreme Court correctly held that article V of the United States Constitution permitted the only method of state ratification, and that was "*solely and finally through their official representative legislative bodies . . . .*" (*Id.* at p. 583, italics in original.) Based upon that, the court concluded that it need not discuss the question of whether California's referendum provisions were intended to apply to the joint resolution. (*Id.* at p. 584.) In contrast to the process for ratifying proposed amendments to the United States Constitution at issue in *Barlotti*, article V of the United States Constitution does not control the method of California's ratification of the North Fork Compact.

Fork is simply attempting to judicially create an exemption in the absence on any supporting California case law.[4]

Third, North Fork's argument ignores the Legislature's history of passing class III tribal-state gaming compacts containing urgency exemptions under article II, section 9, subdivision (a). As a result, those legislatively approved compact ratification statutes went into immediate effect under California law, and were not subject to the people's referenda power. Previous examples include compact ratification statutes for the Shingle Springs Band of Miwok Indians (Gov. Code, § 12012.53; see Historical and Statutory Notes, 32E Pt.1 West's Ann. Gov. Code (2011 ed.) foll. § 12012.53, p. 36 [stating in section 3 that the act was an "urgency statute"]); the Habematolel Pomo of Upper Lake (Gov. Code, § 12012.54; see Historical and Statutory Notes, 32E Pt. 1 West's Ann. Gov. Code (2015 supp.) foll. § 12012.54, p. 8 [stating in section 4 that the act was an "urgency statute"]); and the Pinoleville Pomo Nation (Gov. Code, § 12012.551; see Historical and Statutory Notes, 32E Pt. 1 West's Ann. Gov.

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[4] Significantly, none of the California cases cited by North Fork specifically hold that a nonexempt state statute passed by the Legislature and signed by the Governor was not subject to the people's referendum power. For example, *A.F.L.* involved the California Supreme Court's analysis of whether a proposed ballot initiative constituted a statute under California law. (*A.F.L.*, *supra*, 36 Cal.3d at pp. 715-716.) In *Hopping v. Council of City of Richmond*, the California Supreme Court considered whether resolutions by a local government were subject to a city referendum. (*Hopping v. Council of City of Richmond* (1915) 170 Cal. 605, 609-615 (*Hopping*).) Also, in *People's Advocate, Inc. v. Superior Court*, the court examined whether portions of a statutory initiative were in fact the subjects of rule-making powers protected by the California Constitution. (*People's Advocate, Inc. v. Superior Court* (1986) 181 Cal.App.3d 316, 324-327.) None of these cases challenged either the Legislature's power to pass a statute under article IV, section 8 of the California Constitution, or the people's reserved authority to challenge a nonexempt statute passed by the Legislature under article II, section 9.

Code (2015 supp.) foll. § 12012.551, p. 9 [same]). Because the Legislature ratified these three compacts as urgency statutes, they were constitutionally exempt from referenda. (Cal. Const., art. II, § 9, subd. (a).)

Finally, North Fork overstates the relevance of a 2007 Legislative Counsel Opinion. (Ops. Cal. Legis. Counsel, No. 0730426 (Nov. 2, 2007) (AOB, pp. 29, fn. 7, 40, and 43, fn. 15.) This Legislative Counsel Opinion indicates that following Proposition 1A's adoption of article IV, section 19, subdivision (f) on March 7, 2000, statutory ratification of class III tribal-state gaming compacts by the Legislature is not required. (AA I pp. 98-99.) Nonetheless, the opinion also stated that the Legislature "may elect to codify" compact ratifications by statute. (AA I p. 98.) This 2007 opinion is otherwise silent on the specific question of whether compacts ratified by statutes are subject to the people's referendum power.

To the extent this Court might rely on any Legislative Counsel Opinion to resolve this constitutional dispute, the Court should focus on the 1998 Legislative Counsel Opinion that directly addresses the question. (AA I pp. 81-91, Ops. Cal. Legis. Counsel, No. 21752 (Sept. 28, 1998) Tribal-State Compacts: Referenda.) Specifically, in 1998, the Legislative Counsel opined that statutory ratification of a tribal-state gaming compact by means of a nonexempt statute "is subject to the people's power of referendum." (AA I p. 83.)

B. North Fork's claim that article IV, section 19, subdivision (f) established a new referendum exemption for tribal-state ratification statutes is inconsistent with the canons of statutory construction and constitutional interpretation

North Fork argues that compact ratification statutes are not subject to the people's referendum power because article IV, section 19, subdivision (f) created a new constitutional exemption. (AOB, pp. 32-41.) Specifically, the Tribe argues that by including the phrase "ratification by

the Legislature" in article IV, section 19, subdivision (f), the drafters of this provision "made clear that the Legislature's action was not subject to the initiative and referendum power *in the first place*." (AOB, p. 39, italics in original.)[5] The Tribe also claims that the term "ratification" has a well-established meaning, and that its inclusion in this constitutional provision shows that class III tribal-state gaming compact ratifications were never intended to be subject to the people's referendum power. (AOB, pp. 33-35.)

North Fork's argument that article IV, section 19, subdivision (f) created a new exemption to the people's referendum power runs counter to California's basic canons of statutory and constitutional interpretation. The principles governing judicial interpretation of initiatives, such as Proposition 1A, which adopted article IV, section 19, subdivision (f), are the same as those used in statutory interpretation. (*Prof. Engineers in Cal. Gov. v. Kempton* (2007) 40 Cal.4th 1016, 1037 (*Prof. Engineers*).) Courts also use those principles to interpret constitutional provisions. (*People v.*

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[5] This section of the California Constitution reads as follows:

> Notwithstanding subdivisions (a) and (e), and any other provision of state law, the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law. Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts.

(Cal. Const., art. IV, § 19, subd. (f).)

Bustamante (1997) 57 Cal.App.4th 693, 699, fn. 5.) When applying the rules of statutory interpretation to a voter initiative, the goal is to determine voter intent in approving the initiative. (*Arden Carmichael, Inc. v. County of Sacramento* (2000) 79 Cal.App.4th 1070, 1075.) To accomplish this goal, courts first give the initiative's words their ordinary meaning, which governs if the language is not ambiguous. (*Ibid.*; *Prof. Engineers*, *supra*, 40 Cal.4th at p. 1037.) Language is construed in the context of both the initiative as a whole and the overall statutory scheme. (*Prof. Engineers*, *supra*, 40 Cal.4th at p. 1037.) Voters who approved the initiative are presumed to be aware of existing law. (*Id.* at p. 1048.)

In this case, the overall statutory scheme regarding legislative ratification of tribal-state gaming compacts includes Government Code section 12012.25, and the voters are presumed to be aware of this statute. (See *Prof. Engineers*, *supra*, 40 Cal.4th at p. 1048.) This Government Code section provides that tribal gaming compacts can be ratified under either a non-statutory (Gov. Code, § 12012.25, subd. (b)) or statutory (Gov. Code, § 12012.25, subd. (c)) process. Nothing in the text of Government Code section 12012.25 indicates that compacts ratified by statutes are not subject to the people's referendum power.

The voters adopted article IV, section 19, subdivision (f) by passing Proposition 1A on March 7, 2000. Proposition 1A's language in subdivision (f) regarding the Legislature's ratification authority is not inconsistent with the Legislature's pre-existing statutory ratification options under Government Code section 12012.25. Nor is there any language in subdivision (f) indicating any voter intent to characterize statutory ratifications as not subject to the people's referendum power. (See Cal. Const., art. IV, § 19, subd. (f).) In short, the meaning of the plain and ordinary words contained in this constitutional provision fail to support the new exemption sought by North Fork.

C. North Fork's claim that article IV, section 19, subdivision (f) established a new referendum exemption for tribal-state ratification statutes is inconsistent with California's history of holding referendum elections on these statutes

North Fork's argument regarding an alleged intent to establish a new constitutional exemption to the people's referendum power by the adoption of article IV, section 19, subdivision (f) is also undermined by California's history of voting on these referendums. For example, when the voters approved Proposition 1A on March 7, 2000, they also voted on Proposition 29, a referendum that challenged a ratification statute that approved eleven compacts that the State of California had entered into with various tribes in 1998. (Gov. Code, § 12012.5, see Historical and Statutory Notes, 32E Pt. 1 West's Ann. Gov. Code (2011 ed.) foll. § 12012.5, p. 18 [stating that the compact ratification statute, S.B. 287, was subject to an approved referendum on March 7, 2000].)

If North Fork's interpretation of Proposition 1A is correct, then the voters intended to simultaneously exercise and limit their referendum rights regarding compact ratification statutes in the same election. The contradiction in this argument is obvious. If the voters truly intended Proposition 1A to limit their referendum rights regarding compacts, while simultaneously voting on the compacts at issue in Proposition 29, then surely Proposition 1A would have contained explicit language describing these supposed new limitations. But such limiting terms are not present in article IV, section 19, subdivision (f). (See Cal. Const., art. IV, § 19, subd. (f).) Instead, the ordinary meaning of Proposition 1A, given both its ordinary terms and California's overall statutory scheme for ratifying tribal-state gaming compacts, shows that voters retained both the Legislature's authority to ratify compacts, as well as their reserved powers to conduct referendum elections on nonexempt statutes ratifying compacts.

Following the adoption of article IV, section 19, subdivision (f) through Proposition 1A on March 7, 2000, voters have continued to hold referendum elections on tribal-state gaming compacts. On February 5, 2008, the electorate voted on Propositions 94, 95, 96 and 97. Proposition 97 challenged Government Code section 12012.46, the ratification statute for the Agua Caliente Band of Cahuilla Indians compact. (Gov. Code, § 12012.46; see Historical and Statutory Notes, 32E Pt. 1 West's Ann. Gov. Code (2011 ed.) foll. § 12012.46, p. 28.) Proposition 95 challenged Government Code section 12012.48, the ratification statute for the Morongo Band of Mission Indians compact. (Gov. Code, § 12012.48; see Historical and Statutory Notes, 32E Pt. 1 West's Ann. Gov. Code (2011 ed.) foll. § 12012.48, p. 31.) Proposition 94 challenged Government Code section 12012.49, the ratification statute for the Pechanga Band of Luiseno Mission Indians compact. (Gov. Code, § 12012.49; see Historical and Statutory Notes, 32E Pt. 1 West's Ann. Gov. Code (2011 ed.) foll. § 12012.49, p. 32.) Proposition 96 challenged Government Code section 12012.51, the ratification statute for the Sycuan Band of Kumeyaay Nation compact. (Gov. Code, § 12012.51; see Historical and Statutory Notes, 32E Pt. 1 West's Ann. Gov. Code (2011 ed.) foll. § 12012.51, p. 34.) All four compact ratification statutes were approved by the voters, and became effective on February 6, 2008, the date after the election on February 5, 2008. (Gov. Code, §§ 12012.46, 12012.48, 12012.49, 12012.51.)

This referenda history regarding class III tribal-state gaming compacts amply demonstrates that there was never any intent in article IV, section 19, subdivision (f) to limit the ability of voters to challenge nonexempt compact ratification statutes through referendums. This is how direct democracy works under article II, section 9 of the California Constitution

for class III tribal-state gaming compacts, and there is no legal basis for this Court to declare otherwise with regard to AB 277.

II. THE LEGISLATURE'S STATUTORY RATIFICATION OF THE NORTH FORK COMPACT WAS A LEGISLATIVE ACT

The superior court noted that because it found the plain language of Article II, section 9, subdivision (a), dispositive of the State Respondents' demurrer to North Fork's Cross-Complaint, it was not required to decide the Tribe's claim that AB 277 was not a legislative act under California law. (AA II p. 461.) Nonetheless, the superior court fully analyzed, and correctly rejected, North Fork's legislative act argument. (AA II pp. 461-462.)

In applying the liberal construction standard to uphold the people's power to legislate through initiatives and referenda, California courts recognize that these "powers apply to acts which are legislative in nature." (*Pacific Rock & Gravel Co. v. City of Upland* (1967) 67 Cal.2d 666, 668-669.) In contrast to legislative acts, "[e]xecutive or administrative acts are not subject to the power of referendum." (*Id*. at p. 669.) The distinction between legislative and administrative power has been described as follows:

> The power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely pursues a plan already adopted by the legislative body itself, or some power superior to it.

(*Southwest Diversified, Inc. v. City of Brisbane et al.* (*Southwest*) (1991) 229 Cal.App.3d 1548, 1555, quoting 5 McQuillin on Municipal Corporations (3d ed. 1989) § 16.55, p. 266.)

In applying this "legislative in nature" test to the Legislature's ratification of the North Fork Compact, AB 277's enactment was clearly a legislative act for the following two reasons.

A. AB 277 was a Statute because the Legislature followed a statutory process for the North Fork Compact's ratification

First, and most important, AB 277 is a statute – the paradigm of a legislative act. The Assembly introduced AB 277; the Legislature passed it; the Governor signed the bill; and it was codified as Government Code section 12012.59. (AA I p. 13.) Pursuant to the facts pled in North Fork's Cross-Complaint, AB 277 followed the Legislature's statutory ratification process for class III tribal-state gaming compacts (Gov. Code, § 12012.25, subd. (c)) under the Legislature's constitutional ratification authority (Cal. Const., art. IV, § 19, subd. (f)).

As previously discussed, California law recognizes two types of compacts, and provides different procedures for their ratification. New compacts that are "identical in all material respects" to any of the 1999 compacts listed in Government Code section 12012.25, subdivision (a), need not be ratified by statute. Cal. Gov't Code, § 12012.25, subd. (b)(1). However, new compacts that are "materially different" from those 1999 compacts "shall be ratified by a statute approved by each house of the Legislature . . . ." Cal. Gov't Code, § 12012.25, subd. (c).

With regard to the North Fork Compact, the Legislature followed the statutory ratification process mandated for "materially different" compacts under Government Code section 12012.25, subdivision (c). As such, the Legislature's ratification (AB 277), codified in Government Code section 12012.59, constituted a "statute" for referendum purposes. (Cal. Const., art. II, § 9.) And because the people retained their reserved constitutional power to challenge statutes through referenda under article II, section 9 of

the California Constitution, AB 277 was a statute subject to the people's referendum power.

B. Even if AB 277 was not a statute, it constituted a legislative act because it would have carried out a new state policy and plan

Second, even if AB 277 was not a statute, it constituted a legislative act because it established a new regulatory "policy or plan" under California law. (*Southwest, supra,* 229 Cal.App.3d at p. 1555.) Indeed, this ratification statute was far more than a mere contract between private parties. Instead, when examined as a whole, AB 277 provided the State with a broad regulatory framework, authorized under IGRA, for controlling the scope of North Fork's proposed class III tribal-state gaming at the Madera site.

For example, if AB 277 had been approved by the voters, sections 4.1 and 4.2 of the North Fork Compact would have limited the number of gaming devices to 2000 at the Madera site. (AA I p. 122.) As a result of this provision, North Fork would have been limited as to the number of gaming devices that it could operate, and the Tribe would have been prevented from opening a gaming facility on its environmentally sensitive Indian lands near the Yosemite National Park. (AA I p. 110.)

Another significant compact regulatory restriction, contained in section 5.2(a) of the North Fork Compact, would have required North Fork to make designated payments to the Wiyot Tribe. (AA I p. 137.) This important provision would have facilitated the Wiyot Tribe to "forgo gaming on its environmentally sensitive and scenic lands adjacent to the Humboldt Bay National Wildlife Refuge . . . ." (*Id.* at p. 110.) These payments to the Wiyot Tribe would have been in addition to the Revenue Sharing Trust Fund or Tribal Nation Grant Fund payments described in compact section 5.2(b). (*Id.* at pp. 137-138.) Significantly, North Fork's

payments to the Wiyot Tribe to forego the construction of its own class III gaming facility on environmentally sensitive lands would have come at no cost to the State's general fund.

Further, the North Fork Compact, if it had been adopted by the voters, would have imposed many compact regulatory provisions addressing numerous subjects important to the State of California. These regulatory provisions would have included requiring possible mitigation payments, under defined conditions, to the Chukchansi Indian Tribe in section 4.5 (AA I pp. 124-127), requiring and setting procedures for licensing of gaming employees, gaming resource suppliers, and financial sources in section 6.4 (*id*. at pp. 140-157), establishing minimum procedures for resolving patron disputes in section 10.0 (*id.* at pp. 187-189), and setting forth various requirements regarding public and workplace health, safety, and liability in section 12.0 (*id.* at pp. 198-212).

The regulatory nature of the above compact provisions demonstrates that the North Fork Compact would have provided for meaningful State regulatory involvement regarding the scope, location, and operation of the North Fork's proposed class III gaming facility at the Madera site. The superior court appropriately recognized that "the compact itself contains language indicating its intent to 'prescribe a new policy or plan.'" (AA II p. 462.) Accordingly, the statute ratifying this compact was a legislative act that was subject to the people's referendum power.

North Fork's contrary arguments about why AB 277 was not a legislative act should be rejected because they largely ignore the North Fork Compact's broad regulatory scope, as well as the compact's very unique policy provisions in regard to the Wiyot Tribe and the Chukchansi Indian Tribe. Furthermore, in addition to providing for meaningful and on-going control over the scope, location, and operation of North Fork's gaming facility, AB 277 would have also bound the rights of third parties. As a

statute, if AB 277 was approved by the voters, then it would have provided for the rights of gaming employees, gaming resource suppliers, and financial sources regarding licensing (AA I pp. 140-157), casino patrons regarding player disputes at the casino (*id.* at pp. 187-189), and the rights of the public at-large regarding health, safety, and liability (*id.* at pp. 198-212).

These regulatory provisions further demonstrate why North Fork's reliance on *Worthington v. City Council of the City of Rohnert Park* (*Worthington*) (2005) 130 Cal.App.4th 1132 (AOB, pp. 44-45) is without merit. *Worthington* involved a memorandum of understanding (MOU) between the Rohnert Park City Council (City Council) and the Federated Indians of the Graton Rancheria. (*Worthington, supra,* 130 Cal.App.4th at p. 1138.) The MOU provided for the Tribe "to make contributions and community investments to mitigate impacts of the casino project." (*Ibid*.) *Worthington* held that an MOU that "addresses mitigation of potential impacts of the future casino project" was not subject to a local referendum because the City Council's action was not a legislative act. (*Id*. at p. 1143.) Instead, the MOU was merely a contract that established no law or regulatory authority by the City Council. (*Ibid*.) As such, because the MOU in *Worthington* constituted only a contractual or administrative action, and not legislation, it was not subject to the local referendum. (*Ibid*.)

Given its limited context, *Worthington*'s holding that the City Council's MOU was not a legislative act is inapplicable to AB 277. The MOU in *Worthington* is not a class III tribal-state gaming compact under IGRA. Unlike a state, which possesses some regulatory authority over class III gaming through negotiated compacts (25 U.S.C. § 2710(d)(3)(C)), a city council exercises no similar authority though an MOU. These types of narrow, non-statutory agreements by local governments do not "decide

whether or how the casino project should proceed." (*Worthington, supra*, 130 Cal.App.4th at p. 1143.) Nor does an MOU contain any rules or regulatory provisions. (*Ibid*.) Thus, the City Council's approval of the MOU was not legislation.

In sharp contrast to *Worthington*'s local MOU, AB 277's ratification of the North Fork Compact would provide the State with the regulatory authority permitted by IGRA. As previously discussed, the State negotiated for the North Fork Compact to include regulatory provisions permitting some State regulatory authority over the proposed gaming facility. (AA I pp. 124-212.) The regulatory nature of these compact provisions demonstrates that, unlike the MOU in *Worthington*, the North Fork Compact would have provided for meaningful State regulatory involvement regarding the scope, location, and operation of North Fork's proposed gaming facility. If AB 277 had gone into effect, then it would have provided broad regulatory benefits and bound the rights of third parties who worked at, provided business to, and visited the Tribe's gaming facility. Therefore, even if only certain statutes under California law qualify as legislative acts subject to the people's referendum power under article II, section 9, subdivision (a), AB 277 passes any applicable standard.

III. THE REFERENDUM CHALLENGING AB 277 DID NOT CONFLICT WITH FEDERAL OR STATE LAW

In addition to finding that AB 277 was subject to the people's referendum power under the California Constitution, the superior court also held that California's referendum process did not conflict with IGRA. (AA II pp. 462-467.) The superior court's holding was correct because under IGRA, state law determines when a compact is validly entered into.

The requirement that a state must comply with its own laws when entering into a tribal-state gaming compact was decided by the Tenth

Circuit Court of Appeals in *Pueblo of Santa Ana v. Kelley* (*Pueblo of Santa Ana*) (10th Cir. 1997) 104 F.3d 1546. IGRA "provides a 'comprehensive regulatory framework for gaming activities on Indian lands' which 'seeks to balance the interests of tribal governments, the states, and the federal government.' [Citation.]" (*Id.* at p. 1548.) This framework includes the requirements for when gaming compacts are validly entered into. In reviewing this component of IGRA, *Pueblo of Santa Ana* held that federal law mandates "two separate requirements" under 25 U.S.C. section 2710(d)(1)(C) for determining if a compact is validly formed. (*Id.* at p. 1553.)

Under *Pueblo of Santa Ana's* first federal requirement, "the State and the Tribe must have 'entered into' a compact." (*Pueblo of Santa Ana*, *supra*, 104 F.3d at p. 1553.) The second federal requirement is that "the compact must be 'in effect' pursuant to Secretarial approval . . . ." (*Ibid.*) With regard to the first requirement, *Pueblo of Santa Ana* held that "state law determines the procedures by which a state may validly enter into a compact" with a tribe. (*Ibid.*) Because New Mexico's governor lacked authority under New Mexico law to bind his state to the compacts, they were "never validly 'entered into' by the state . . . ." (*Id.* at p. 1559.) As a result, the Tenth Circuit held that the compacts did "not comply with IGRA." (*Ibid.*)

The Tenth Circuit's holding in *Pueblo of Santa Ana* demonstrates why California's direct democracy does not conflict with federal law. Pursuant to the "entered into" requirement contained in 25 U.S.C. section 2710(d)(1)(C), IGRA incorporates a federal mandate that a compact must be validly entered into under state law "before it can go into effect . . . ." (*Pueblo of Santa Ana*, *supra*, 104 F.3d at p. 1555.) In this case, ratification of the North Fork Compact pursuant to AB 277 never went into effect due to the passage of Proposition 48.

A statute enacted during a regular legislative session generally goes into effect under California law "on January 1 next following a 90-day period from the date" of the statute's enactment. (Cal. Const., art. IV, § 8, subd. (c)(1).) The purpose for this 90-day window is to provide the people with the opportunity to file a referendum petition. (See *Busch v. Turner* (1945) 26 Cal.2d 817, 823.) The California Supreme Court has long held that "a statute has no force whatever until it goes into effect pursuant to the law relating to legislative enactment." (*Hersch v. The State Bar of California* (1972) 7 Cal.3d 241, 245, quoting *People v. Righthouse* (1937) 10 Cal.2d 86, 88.)

Accordingly, while AB 277 was passed by the Legislature and signed by the Governor, the ratification statute never took effect under California law because it was challenged by a referendum, and subsequently defeated in the election. This outcome clearly does not conflict with IGRA, because California law controls the North Fork Compact's effective date. (See *Pueblo of Santa Ana*, *supra*, 104 F.3d at p. 1553.) With this guidance in mind, the superior court properly rejected North Fork's two specific "conflict with federal law" claims.

A. California's referendum process does not conflict with the Government Code

The superior court correctly held that California's constitutional referendum process does not conflict with the statutory timing requirements for tribal-state compacts under IGRA and the California Government Code. (AA II pp. 463-465.) In alleging the existence of a timing conflict under state law, North Fork points to Government Code section 12012.25, subdivision (f).[6] There is no dispute that this state law contains a timing

[6] This statute reads as follows:

(continued…)

component. Under the Government Code, once the California Secretary of State receives "a statute ratifying a tribal-state compact . . .", this state official is directed to forward "a copy of the executed compact and the ratifying statute" to the federal Secretary. (Gov. Code, §12012.25, subd. (f).)

But in light of the judicial requirement to "'jealously guard' the people's right to referendum," the superior court properly rejected North Fork's argument that Government Code section 12012.25, subdivision (f)'s timing component conflicted with the referendum process. (AA II p. 464.) As previously discussed, the superior court correctly observed that AB 277 had never gone into effect under state law. Accordingly, because a referendum challenging the ratification statute qualified for the ballot, the referendum was not an "un-ratification" of the North Fork Compact. No such outcome was possible because under Article II, Section 10, subdivision (a) of the California Constitution, "the ratification was never effective to begin with." (*Ibid*.)

(…continued)

> Upon receipt of a statute ratifying a tribal-state compact negotiated and executed pursuant to subdivision (c), or upon the expiration of the review period described in subdivision (b), the Secretary of State shall forward a copy of the executed compact and the ratifying statute, if applicable, to the Secretary of the Interior for his or her review and approval, in accordance with paragraph (8) of subsection (d) of Section 2710 of Title 25 of the United States Code.

(Gov. Code, § 12012.25, subd. (f).)

Because AB 277 never went into effect, "the Secretary of State's obligations under Cal. Gov. Code § 12012.25(f) do not apply until the day after a referendum adopted the statute." (AA II p. 464.) While the Secretary of State nonetheless forwarded AB 277 to the federal secretary before it went into effect under state law, that decision did not, and could not, make AB 277 effective under the California Constitution. (*Ibid*.)

North Fork argues that the superior court misconstrued the California Secretary of State's duty under Government Code section 12012.25, subdivision (f). (AOB, pp. 53-60.) The Tribe also complains that the superior court's analysis defies the general meaning of the term "receipt" (AOB, pp. 57-60), ignores the distinction between a statutes enactment and its effective date (AOB, pp. 61-62), and dismisses the California Secretary of State's previous practice regarding the forwarding of compacts. (AOB, pp. 62-64). But all of these arguments overstate the duty performed by the California Secretary of State under Government Code section 12012.25, subdivision (f).

Simply put, the California Secretary of State's task of forwarding compacts under Government Code section 12012.25, subdivision (f), did not, and constitutionally could not, change AB 277's effective date under the California Constitution. Regardless of when the Secretary of State forwards a compact under Government Code section 12012.25, subdivision (f), an exempt ratification statute still goes into effect "on January 1 next following a 90-day period from the date" of the statute's enactment (Cal. Const., art. IV, § 8, subd. (c)(1)), and a nonexempt statute still does not take effect until the day after the referendum election, if the voters approve the statute. (Cal. Const., art. II, § 10, subd. (a).) In this case, the latter occurred, and therefore, under the California Constitution, AB 277 never went into effect. This legal outcome is determined solely by the California Constitution, and not by the California Secretary of State's manner of

complying with Government Code section 12012.25, subdivision (f). Accordingly, North Fork's criticisms about the superior court's interpretation of Government Code section 12012.25, subdivision (f) fail to support overturning the judgment in the State Respondents' favor.

B. California's referendum process does not conflict with IGRA

In addition to holding that California's direct democracy does not conflict with the Government Code, the superior court also held that this process created no timing conflict with IGRA. (AA II pp. 464-465.) Under *Pueblo of Santa Ana*, the federal Secretary's publication of a compact in the Federal Registrar "does not give it effect when it was not effective under state law." (AA II p. 465, citing *Pueblo of Santa Ana*, *supra*, 104 F.3d at p. 1055.)

The reason is straight forward. While this IGRA provision requires the federal Secretary to approve or disprove a compact within 45 days, it does not require the federal Secretary to "make extensive inquiry into state law" to determine if the state validly entered into the compact with the tribe. (*Pueblo of Santa Ana*, *supra*, 104 F.3d at p. 1557.) The federal Secretary can timely act under section 2710 (d)(8)(C) of title 25 of the United States Code, and "consequences" can still arise from a latter determination that the state had "not validly bound itself to the compact." (*Ibid*.) But in no event is the federal Secretary "expected to *resolve* state law issues regarding" a state's authority to validly bind itself to a compact "in the 45-day period given to him to approve a compact." (*Ibid*.) Therefore, California's referendum process does not conflict with IGRA.

C. California's referendum process does not conflict with IGRA's Requirement for Good Faith Negotiations

Nor did California's referendum process present North Fork with a declaratory relief claim regarding the State's obligation to negotiate in good faith under IGRA. Without question, IGRA requires the State to negotiate in "good faith" for possible class III tribal-state gaming compacts when negotiations are requested by eligible Indian tribes. (25 U.S.C. § 2710(d)(3)(A).) Litigation in *federal court* against the State can occur when the State fails to negotiate in good faith. (25 U.S.C. § 2710(d)(7)(A)(i).) But while North Fork is presently pursuing such a federal action against the State of California under IGRA, that pending federal lawsuit does not provide this Court with concurrent state law jurisdiction to adjudicate North Fork's IGRA claim. For this reason alone, the superior court properly granted the demurrer in the State Respondents' favor.

Equally important, on the merits of North Fork's good faith argument, there simply is no controlling federal authority holding that a state's direct democracy process violates IGRA. North Fork has not, and cannot, point to any state or federal court decision holding that Congress intended IGRA to be interpreted or enforced in such a manner. Moreover, given that states are not compelled under IGRA to enter into a compact with a tribe (*Warren v. United States* (W.D.N.Y. 2012) 859 F.Supp.2d 522, 532-533), IGRA provides no authority for any court to order a state to abandon its constitutionally based democratic procedures to comply with this federal statute. Through California's established and democratic ratification procedures, either the Legislature or the people can say "no" to compacts negotiated by a Governor. This *ratification* process does not constitute "bad faith" negotiations under IGRA.

Finally, and most importantly, as the superior court held, "IGRA allows California to determine its own means of entering into compacts." (AA II p. 466.) And under California law, that process includes negotiations by the Governor (Cal. Const., art. IV, § 19, subd. (f)), ratification by the Legislature (*ibid.*), and possibly referendum challenges by the people if the legislative ratification occurs through a nonexempt statute (Cal. Const., art. II, § 9, subd. (a)). This is California's constitutionally mandated ratification process for tribal-state compacts, and IGRA defers to states to determine their own ratification methods. (See *Pueblo of Santa Ana*, *supra*, 104 F.3d at p. 1553.) Thus, the people's referendum challenge to AB 277 did not conflict with IGRA's requirement to negotiate in good faith.

CONCLUSION

For all the forgoing reasons, this Court should affirm the superior court's judgment in the State Respondents' favor.

Dated: September 18, 2015

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
SARA J. DRAKE
Senior Assistant Attorney General
WILLIAM P. TORNGREN
Deputy Attorney General

/s/ TIMOTHY M. MUSCAT

TIMOTHY M. MUSCAT
Deputy Attorney General
Attorneys for State Respondents

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13-point Times New Roman font and contains 7,802 words.

Dated: September 18, 2015

KAMALA D. HARRIS
Attorney General of California
SARA J. DRAKE
Senior Assistant Attorney General
WILLIAM P. TORNGREN
Deputy Attorney General

/s/ TIMOTHY M. MUSCAT

TIMOTHY M. MUSCAT
Deputy Attorney General
Attorneys for State Respondents

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***Stand Up for California, et al. v. State of California, et al.***
No.: **F070327**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On September 18, 2015, I served the attached **RESPONDENT'S BRIEF** and I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, addressed as follows:

Fredric D. Woocher
Strum & Woocher LLP
10940 Wilshire Blvd., Suite 2000
Los Angeles, CA 90024
fwoocher@strumwooch.com Via U.S. Mail and E-mail

Attorneys for Appellant North Fork Rancheria of Mono Indians Defendant, Cross Complainant and Appellant

John A. Maier
Maier Pfeffer Kim & Geary, LLP
1440 Broadway, Suite 812
Oakland, CA 94612
jmaier@jmandmplaw.com Via U.S. Mail and E-mail

Attorneys for Appellant North Fork Rancheria of Mono Indians Defendant, Cross Complainant and Appellant

Christopher E. Babbitt
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
christopher.babbitt@wilmerhale.com Via U.S. Mail and E-mail

Attorneys for Appellant North Fork Rancheria of Mono Indians Defendant, Cross Complainant and Appellant

Sean M. Sherlock
Todd E. Lundell
Brian A. Caluiso
Snell & Wilmer LLP
600 Anton Blvd., Suite 1400
Costa Mesa, CA 92626-7689
ssherlock@swlaw.com Via U.S. Mail and E-mail

Attorneys for Stand Up for California, Plaintiff and Respondent

Madera County Superior Court Via Regular U.S. Mail
Clerk
209 West Yosemite Avenue
Madera, CA 93637

Supreme Court of California Via Electronic Service
Clerk
350 McAllister Street, Room 1295
San Francisco, CA 94102

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 18, 2015, at Sacramento, California.

Paula Corral	/S/ PAULA CORRAL
Declarant	Signature