F070327

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

STAND UP FOR CALIFORNIA and CHERYL SCHMIT,
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.

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

APPELLANT'S OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, Fifth APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number: F070327
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	FOR COURT USE ONLY
APPELLANT/PETITIONER: Stand Up for California, et al. RESPONDENT/REAL PARTY IN INTEREST: State of California, et al.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): North Fork Rancheria of Mono Indians

2. a. ☐ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☑ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
(1) (1) SC Madera Management, LLC	Executed a management agreement with North Fork Tribe
(2) [continued]	concerning the gaming facility at issue in this litigation
(3) (2) SC Madera Development, LLC	Executed a development agreement with North Fork Tribe
(4) [continued]	concerning the gaming facility at issue in this litigation
(5) [Continued on attachment 2]	

☑ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: 6/15/2015

Christopher E. Babbitt
(TYPE OR PRINT NAME)

▶ Christopher E. Babbitt
(SIGNATURE OF PARTY OR ATTORNEY)

Form Approved for Optional Use
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APP-008 [Rev. January 1, 2009]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cal. Rules of Court, rules 8.208, 8.488
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ATTACHMENT 2

Stand Up for California, et al. v. State of California, et al.
California Court of Appeal, Fifth Appellate District, Case No. F070327
Madera County Superior Court, Case No. MCV062850

	Full name of interested entity or person	**Nature of interest (Explain):**
(3)	NP Opco LLC	100% member of each of SC Madera Management, LLC and SC Madera Development, LLC
(4)	NP Opco Holdings LLC	100% member of NP Opco LCC
(5)	Station Casinos LLC	100% member of NP Opco Holdings LLC

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INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal presents an important question of first impression in this state: May the Legislature's ratification of a tribal-state gaming compact pursuant to article IV, section 19(f) of the California Constitution be undone by referendum? The Cross-Complaint below challenged the validity of a statewide referendum sponsored by Respondent Cheryl Schmit that sought to overturn the California Legislature's ratification of the tribal-state gaming compact between Appellant North Fork Rancheria of Mono Indians ("North Fork" or the "Tribe") and Respondent State of California (the "State"). The Superior Court sustained Respondents' demurrers and dismissed the Cross-Complaint. As a result, the referendum—denominated Proposition 48 and financed by more than $18,000,000 in contributions from rival gaming interests and their Wall Street backers—appeared on the November 2014 ballot, and the ensuing popular vote purported to nullify the compact between North Fork and the State.

The Superior Court ruled that in the absence of clear authority on this question, it was compelled to liberally construe the scope of the referendum power in order to avoid improperly invalidating the people's right to vote. (Appellant's Appendix, vol. 2, pp. 458-460 ["AA 2:458-460"]). As the Supreme Court emphasized in *American Federation of Labor v. Eu* (1984) 36 Cal.3d 687 ("*AFL-CIO*"), however, "[e]ven under the most liberal interpretation … the reserved powers of initiative and

referendum do not encompass all possible actions of a legislative body." (*Id.* at p. 708.) In particular, "it is established beyond dispute that the power of referendum may be invoked only with respect to matters which are strictly legislative in character." (*Sacks v. City of Oakland* (2010) 190 Cal.App.4th 1070, 1090.) And it is equally well established that "ratification … is not an act of legislation within the proper sense of the word." (*Hawke v. Smith* (1920) 253 U.S. 221, 229.) Yet the Superior Court held that merely because the Legislature chose to ratify the compact using the *form* of a statute (Assembly Bill No. 277 ["AB 277"]), it was therefore subject to referendum under the state Constitution. (AA 2:459-460.) In so ruling, the court contravened both the Supreme Court's admonition that "it is the substance, not the label, that controls" whether a legislative enactment is subject to referendum (*AFL-CIO*, 36 Cal.3d at p. 710), as well as almost a century of case law uniformly holding that "ratification" is not a *legislative act* subject to the people's reserved power of initiative or referendum. (See *id.* at pp. 710-712.)

As an alternative ground for its decision, the Superior Court held that ratification of the North Fork compact could be deemed a "legislative act" because the compact "prescribed a new policy or plan" by permitting class III gaming on the Tribe's off-reservation land with certain conditions and restrictions. (AA 2:461-462.) But in ratifying a tribal-state gaming compact, the Legislature is not exercising its *lawmaking* authority to

prescribe state policy on a subject matter with respect to which it possesses sovereign power. Rather, the Legislature is instead merely providing its assent to the terms of a *voluntary agreement* entered into between *two equal sovereign governments* pursuant to the narrow delegation of authority that states may exercise under the federal Indian Gaming Regulatory Act of 1988 ("IGRA"), 25 U.S.C. § 2701 et seq. Under the federal Constitution and IGRA, the State has no inherent authority to regulate North Fork's gaming activities; any restrictions on the Tribe's conduct contained in the compact were thus *voluntarily agreed to* by the Tribe, not prescribed by the State. As the court of appeal explained in *Worthington v. City Council of the City of Rohnert Park* (2005) 130 Cal.App.4th 1132, 1143: "The give-and-take involved when a government entity negotiates an agreement with a sovereign Indian tribe is not legislation, but is a process requiring the consent of both contracting parties."

Further, basic principles of constitutional and statutory interpretation also preclude subjecting the Legislature's ratification of a tribal-state gaming compact to referendum. When properly construed, the state constitutional and statutory provisions that establish the California process for compacting with Indian tribes—article IV, section 19(f) of the California Constitution and section 12012.25 of the Government Code—leave no room for a referendum to occur. The Superior Court's contrary interpretation of California law is premised on a misreading of section

12012.25(f) that cannot be reconciled with the plain text of the statute, other state law requirements, or the Secretary of State's longstanding practices. Moreover, if sustained, the Superior Court's ruling would create an absurd result. State law is expressly designed to operate in accordance with the procedures set out in IGRA; permitting a referendum to undo the ratification of a compact months after state law requires its submission to the Secretary of the Interior would make no sense in light of IGRA's requirement that the Secretary approve or disapprove the compact within 45 days.

For all of these reasons, and for others set forth below, the Superior Court's judgment should be reversed and the Superior Court should be directed to enter judgment granting the relief sought in Appellant's Cross-Complaint and declaring that the referendum against AB 277 is invalid, void, and unenforceable insofar as it purports to overturn the Legislature's ratification of North Fork's tribal-state gaming compact.

STATEMENT OF THE CASE

This case is about whether California law permits a tribal-state gaming compact ratified by the Legislature pursuant to article IV, section 19(f) of the California Constitution to be overturned by referendum—even after it has been approved by the Assembly and Senate, forwarded by the Secretary of State to the U.S. Secretary of the Interior for federal review

and approval, and approved by the Secretary of the Interior, and has gone into effect under federal law.

North Fork filed the Cross-Complaint below seeking a declaratory judgment that under California law such a referendum—Proposition 48 on the November 2014 statewide ballot—was invalid, void, and unenforceable insofar as it purported to overturn the Legislature's ratification of the compact between North Fork and the State of California. (AA 1:1-18.) The Superior Court construed California law to allow for such a referendum, sustained Respondents' demurrers, and entered a final judgment dismissing the Cross-Complaint. (AA 2:453-477.) That ruling was in error.

A. Federal Regulation Of Gaming On Indian Lands

Congress has "plenary power to legislate in the field of Indian affairs." (*Cotton Petroleum Corp. v. New Mexico* (1989) 490 U.S. 163, 192.) Consistent with the longstanding principle that a state has no jurisdiction over Indian lands unless Congress has ceded jurisdiction to the State, the U.S. Supreme Court has held that states have no inherent authority to regulate gaming on Indian lands. (See *California v. Cabazon Band of Mission Indians* (1987) 480 U.S. 202, 207, 222.)

In response, "Congress enacted IGRA to provide a legal framework within which tribes [can] engage in gaming—an enterprise that holds out the hope of providing tribes with the economic prosperity that has so long

eluded their grasp." (*Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger* (9th Cir. 2010) 602 F.3d 1019, 1027.) IGRA's express aim is to facilitate "the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." (25 U.S.C. § 2702(1).)

IGRA divides Indian gaming activities into three classes. A tribe does not need an agreement with its home state to conduct class I or II gaming on its tribal lands. (*Id.*, § 2710(a), (b).) But IGRA contemplates that a tribe seeking to conduct class III gaming (sometimes called "casino-style" gaming), which is at issue in this case, will typically do so pursuant to a compact with its home state. (See *id.*, § 2710(d)(1); cf. *id.*, § 2710(d)(7) [defining alternative process in absence of compact].) IGRA therefore requires states to negotiate in good faith with tribes to enter into such compacts. (*Id.*, § 2710(d)(3)(A).)

IGRA establishes that a tribal-state compact authorizing class III gaming is valid if it is a "compact entered into by the Indian tribe and the State … that is in effect." (*Id.*, § 2710(d)(1)(C).) A compact takes effect after it is approved, or deemed approved, by the U.S. Secretary of the Interior and "notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register." (*Id.*, § 2710(d)(3)(B).)

IGRA requires the Secretary of the Interior to review a compact after it has been submitted by the state and prior to approving it to ensure that it

does not violate IGRA, "any other provision of Federal law," or "the trust obligations of the United States to Indians." (*Id.*, § 2710(d)(8)(B).) IGRA limits the Secretary's review of a compact to 45 days after the State has submitted it; within "45 days after the date on which the compact is submitted to the Secretary for approval," the Secretary must approve or disapprove the compact, or it "shall be considered to have been approved by the Secretary." (*Id.*, § 2710(d)(8)(C); see also 25 C.F.R. § 293.10(a).) Once the compact is approved or deemed approved at the end of the 45-day period, the "Secretary shall publish in the Federal Register notice" of the approved compact. (25 U.S.C. § 2710(d)(8)(D).) The compact "shall take effect" when that notice of approval is published. (*Id.*, § 2710(d)(3)(B).)

B. Tribal-State Compacting Under California Law

Under IGRA, Indian tribes have "the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." (25 U.S.C. § 2701(5); see also *id*., § 2710(d)(1)(B).) When IGRA was enacted and for more than a decade thereafter, the California Constitution prohibited casino-style gaming. (*Hotel Emps. & Rest. Emps. Int'l Union v. Davis* (1999) 21 Cal.4th 585, 589 [discussing Cal. Const., art. IV, § 19(e)].) When the people of California attempted by initiative to require the State to enter into tribal-state compacts authorizing class III

gaming on Indian lands, the California Supreme Court held that the initiative statute conflicted with the California Constitution's prohibition and was therefore invalid. (See *ibid*.; *California Commerce Casino, Inc. v. Schwarzenegger* (2007) 146 Cal.App.4th 1406, 1411-1412.)

The Legislature responded by enacting section 12012.25 of the Government Code, which ratified 57 new compacts the Governor had executed with tribes (section 12012.25(a)) and codified a process for the negotiation, execution, ratification, and submission to the Secretary of the Interior of future tribal-state compacts (section 12012.25(b)-(f)). (See *California Commerce Casino*, 146 Cal.App.4th at p. 1412.) After section 12012.25 was added to the Government Code, voters in the March 2000 statewide election approved Proposition 1A, which added article IV, section 19(f) to the California Constitution to authorize tribal-state compacts and resolve the Supreme Court's concerns about class III gaming on Indian lands in California. (See *Flynt v. California Gambling Control Comm'n* (2002) 104 Cal.App.4th 1125, 1128, 1137.)

Article IV, section 19(f) and section 12012.25 establish California's current policy on class III Indian gaming, prescribe the process for tribal-state compacting in California, and explicitly operate against the backdrop of IGRA's federal requirements. Article IV, section 19(f) grants the Governor, "[n]otwithstanding … any other provision of state law," the authority "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." It restricts the Legislature's authority to "ratification" and makes executed compacts subject to ratification only "by the Legislature." (*Ibid.*)

The Legislative Counsel has noted that as a constitutional provision, "the procedure set forth in subdivision (f) for the ratification of tribal-state compacts takes precedence to the extent it that it conflicts with any statutory provisions on this subject, such as Section 12012.25 of the Government Code." (Leg. Counsel Op. No. 0730426 (Nov. 7, 2007), pp. 5-6 [AA 1:97-98].) It added that the "provision is silent as to the method of ratification" and that "while the Legislature may elect to codify its actions by means of statute, it is not required to do so, and in our opinion may supercede any putative statutory restriction on the exercise of this power without regard to that codified rule." (*Id.*, p. 6 [AA 1:98].)

To the extent that it is not inconsistent with article IV, section 19(f) of the California Constitution, section 12012.25 of the Government Code further delineates California's tribal-state compacting process. In particular, section 12012.25(f) governs when the State is to submit a compact to the Secretary of the Interior:

> "Upon receipt of a statute ratifying a tribal-state compact negotiated and executed pursuant to subdivision (c), … the Secretary of State shall forward a copy of the executed

> compact and the ratifying statute … 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."

In turn, section 9510 of the Government Code defines when the Secretary of State is in "receipt" of any statute. Section 9510 provides:

> "When the Governor approves a bill, he shall affix his name thereto, with the date of signing, and deposit it in the Office of the Secretary of State, where it becomes the official record. Upon the receipt of any such bill, the Secretary of State shall give it a number, to be known as the chapter number. He shall number each bill in the order in which it is received by him, and the order of numbering shall be presumed to be the order in which the bills were approved by the Governor."

C. North Fork's Compact

The North Fork Tribe has roughly 1,900 citizens. (AA 1:7.) It has no independent income to support its government; to provide housing, educational, and other services to its citizens; or to support tribal self-determination and self-sufficiency. (*Ibid.*) North Fork has therefore proposed to develop a gaming hotel and casino, as envisioned by IGRA.

Because North Fork's Rancheria land is located in an environmentally sensitive area adjacent to the Sierra National Forest that is not appropriate for a gaming facility, the Tribe requested that the Secretary of the Interior take into trust for its benefit a 305-acre parcel of land located in Madera County. (AA 1:7.)[1] In September 2011, the Secretary

[1] IGRA generally prohibits gaming on Indian lands taken into trust after the statute was enacted in 1988. (25 U.S.C. § 2719(a).) But under the

determined that gaming on the Madera land would be in the Tribe's best interest and would not be detrimental to the surrounding community, and in August 2012, Governor Brown concurred in that determination. (AA 1:11.) Governor Brown also announced that he had signed a compact with North Fork governing the operation of class III gaming by the Tribe on the Madera land. (*Ibid.*) After being informed of Governor Brown's actions, the Secretary of the Interior took the land into trust for North Fork on February 5, 2013. (AA 1:12.)[2]

Following execution of the North Fork compact, Governor Brown forwarded it to the Legislature for approval. AB 277 was introduced to ratify the North Fork compact and another compact between the State and the Wiyot Tribe. (AA 1:12.)[3] AB 277 also provided that actions related to

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"two-part determination" exception, gaming on such lands is permitted if the Secretary of the Interior finds that it (i) would be in the tribe's best interest and (ii) would not be detrimental to the surrounding community, and if the Governor of the home state concurs in that two-part determination. (*Id.*, § 2719(b)(1)(A).)

[2] A group of plaintiffs led by Respondent Cheryl Schmit's organization Stand Up for California challenged the Secretary's decision in federal court and asked that court to issue a preliminary injunction blocking transfer of the land. On January 29, 2013, the court refused to enjoin the transfer. (*Stand Up for California! v. U.S. Dep't of the Interior* (D.D.C. 2013) 919 F.Supp.2d 51.) That case remains pending on the parties' cross-motions for summary judgment, which were filed earlier this year.

[3] As part of its compact, North Fork agreed to share a portion of its gaming revenues with the Wiyot Tribe, in exchange for the latter's agreement to forgo class III gaming on its environmentally sensitive lands. The Wiyot compact is actually an agreement memorializing that tribe's commitment not to engage in class III gaming activities on its tribal lands

the compact and other intergovernmental agreements with the Tribe are deemed not to be "projects" for purposes of the California Environmental Quality Act. (*Ibid.*; see *Picayune Rancheria of Chukchansi Indians v. Brown* (2014) 229 Cal.App.4th 1416, 1427.)

The Assembly approved AB 277 by a 41-12 vote on May 2, 2013, and the Senate approved it 22-11 on June 27, 2013. (See Complete Bill History, AB 277 (2013), available at <http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0251-0300/ab_277_bill_20130703_history.html>.) The Governor approved AB 277 on July 3, 2013, and transmitted it to the Secretary of State. (See *ibid.*) That same day, the Secretary of State numbered AB 277 as Chapter 51, Statutes of 2013, which has now been codified as section 12012.59 of the Government Code. (See *ibid.*; see also AA 1:12.) In accordance with section 12012.25(f), upon receipt of AB 277 and the compact from the Governor, Secretary of State Debra Bowen forwarded a copy of the compact to the Secretary of Interior for her review and approval. (AA 1:12.) On October 22, 2013, following the expiration of the 45-day period for the Secretary to review the compact, the Secretary of the Interior published notice in the Federal Register that the compact was

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in exchange for the payments specified in the compact. (See Tribal-State Compact Between the State of California and the Wiyot Tribe [Mar. 20, 2013], available at <http://gov.ca.gov/docs/Wiyot_Compact.pdf>.)

considered to be approved and that it was therefore "taking effect." (*Ibid.*; see 78 Fed. Reg. 62,649 (Oct. 22, 2013).)

D. Schmit's Referendum

On July 8, 2013, under the letterhead of Stand Up for California—an organization that has tried to block the Secretary of the Interior's acquisition of the Madera land for North Fork (see *supra*, p. 22, fn. 2)—Respondent Cheryl Schmit submitted to the California Attorney General's office a request for title and summary for a "proposed statewide referendum of AB 277." (AA 1:12.) On July 19, 2013, the Attorney General issued a title and summary, entitling the measure "Referendum to Overturn Indian Gaming Compacts," and soon thereafter, Schmit began circulating the Referendum petition among voters to gather the requisite number of signatures to qualify it for the ballot. (*Ibid.*) On November 20, 2013, the Secretary of State certified that the referendum petition had been signed by a sufficient number of registered voters to qualify for the November 2014 general election ballot. (AA 1:12-13.)

Rival Indian tribes who already operated profitable casinos and their Wall Street backers contributed more than $18 million to the referendum campaign in support of overturning North Fork's compact. (See California Fair Political Practices Commission, Top Contributors to State Ballot Measure Committees Raising At Least $1,000,000 (2014), available at <http://fppc.ca.gov/topcontributors/past_elections/nov2014/index.html>.)

However, North Fork—with no independent source of income—and its supporters raised less than $1 million to defend its compact. (*Ibid.*) On November 4, 2014, the electorate voted to reject the statute ratifying the compact.[4]

E. This Litigation

On February 27, 2014, North Fork filed a cross-complaint against the State of California and Schmit seeking a declaratory judgment that the referendum was invalid, void, and unenforceable. (AA 1:1-18.)[5] The State and Schmit demurred. (AA 1:31-34, 1:234-236.) On June 26, 2014, Judge Michael Jurkovich sustained their demurrers. (AA 2:453-472.)

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[4] Following the referendum vote and the State's refusal either to honor the existing compact or to negotiate a new compact, North Fork brought suit against the State in the Eastern District of California under IGRA's remedial provision, asserting that "[b]y refusing to honor the existing compact and refusing to negotiate to enter into a new tribal-state gaming compact, the State has breached its obligation under IGRA 'to negotiate with the [Tribe] in good faith to enter into such a compact.' 25 U.S.C. § 2710(d)(3)(A)." (*North Fork Rancheria of Mono Indians v. State of California* (E.D. Cal. Mar. 17, 2015) No. 1:15-cv-00419-AWI-SAB, Dkt. 1, ¶ 9.) That case remains pending.

[5] The underlying case was initially brought on March 27, 2013 by Stand Up for California, which alleged that the Governor's concurrence in the Secretary's two-part determination with respect to gaming on the Madera parcel was invalid. (See *Stand Up for California v. State of California* (Cal. App. 5th Dist.) No. F069302, Appellants' Appendix, vol. I, pp. 1-8.) On August 23, 2013, the court granted North Fork's application for leave to intervene. (*Id.* at p. 469.) On March 3, 2014, the court sustained demurrers to Stand Up's complaint without leave to amend. (*Id.* at pp. 687-700.) Stand Up's appeal of that decision is currently pending in this district as Case No. F069302.

STATEMENT OF APPEALABILITY

The Superior Court entered a judgment of dismissal on July 9, 2014. (AA 2:475-477.) The Superior Court's judgment resolved all issues presented in the Cross-Complaint between North Fork and all cross-defendants named in the Cross-Complaint—State of California et al. and Cheryl Schmit. The judgment was therefore a final judgment appealable under section 904(a)(1) of the Code of Civil Procedure. North Fork timely filed its notice of appeal on September 5, 2014. (AA 2:507-512.)

STANDARD OF REVIEW

This appeal presents solely questions of law, primarily involving the proper interpretation of article IV, section 19(f), of the California Constitution; the proper interpretation of section 12012.25 of the Government Code; and the scope of the referendum power under article IV, section 1, and article II, section 9(a) of the California Constitution. Questions of statutory or constitutional interpretation are subject to independent de novo review on appeal, and accordingly no deference is owed to the Superior Court's ruling or reasoning. (*Alameda Cnty. Mgmt. Emps. Assn. v. Superior Court* (2011) 195 Cal.App.4th 325, 339.)

ARGUMENT

I. THE RATIFICATION OF A TRIBAL-STATE GAMING COMPACT PURSUANT TO ARTICLE IV, SECTION 19(f), OF THE STATE CONSTITUTION IS NOT A "LEGISLATIVE" ACT THAT IS SUBJECT TO REFERENDUM

A. A Referendum May Only Be Used To Overturn "Legislative" Acts, Regardless Of The Form Of The Enactment

A referendum may only be used to review *legislative* acts. (*Simpson v. Hite* (1950) 36 Cal.2d 125, 129 ["the powers of initiative and referendum … apply only to acts which are legislative in character"]; *Sacks v. City of Oakland*, 190 Cal.App.4th at p. 1090 ["the power of referendum may be invoked only with respect to matters which are strictly legislative in character."].) Thus, while the courts must "jealously guard" the right of initiative and referendum, "[e]ven under the most liberal interpretation, … the reserved powers of initiative and referendum do not encompass all possible actions of a legislative body. Those powers are limited, under article II, to the adoption or rejection of 'statutes.'" (*AFL-CIO*, 36 Cal.3d at p. 708.)

Relying upon this statement in *AFL-CIO* and the language of article II, section 9(a) defining the referendum as "the power of the electors to approve or reject *statutes* or parts of *statutes*,"[6] the Superior Court ruled

[6] Article II, section 9(a) provides: "The referendum is the power of the electors to approve or reject statutes or parts of statutes except urgency

that because the ratification of North Fork's compact was included in a "statute"—AB 277—that fact alone made it subject to referendum. (AA 2:459-460.) The court fundamentally misconstrued the decision in *AFL-CIO*, however. Indeed, that decision's primary point was that it is not the *form* of a legislative enactment that determines whether it is subject to initiative or referendum, but its *substance*. The Court discussed its earlier decision in *Hopping v. Council of City of Richmond* (1915) 170 Cal. 605, which held that the City Council's acceptance of a gift of land and money was subject to referendum because it constituted an exercise of the Council's legislative power, even though it took the form of a resolution rather than an ordinance. The Court there explained: "[T]he referendum powers given to the people of Richmond … apply only to legislative acts of the council. *The name given it is of no consequence*. If the council should, either by resolution or ordinance, do something purely executive in character, unmixed with any exercise of legislative power, the provisions of this section should be held inapplicable thereto. But if a legislative act is thereby done, the referendum may be invoked whether the measure is denominated an ordinance or resolution." (170 Cal. at p. 611 [italics added; citation omitted].) As the Court in *AFL-CIO* recapitulated, "it is the substance, not the label, that controls." (36 Cal.3d at p. 710.)

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statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State."

At the state level, therefore, the referendum "applie[s] only to 'acts which *must be* passed in the form of a statute'" (*id*. at p. 709, *quoting Hopping*, 170 Cal. at p. 609 [italics added])—that is, those that truly constitute exercises of the *legislative* power—not to all actions that *are* passed in the form of a statute.[7] *People's Advocate, Inc. v. Superior Court* (1986) 181 Cal.App.3d 316, illustrates this principle. The court in that case invalidated portions of a statutory initiative that added provisions to the Government Code purporting to regulate the internal proceedings of the Legislature. The court held that under the Constitution, such matters were properly the subject of "rules and resolutions" adopted by the Legislature—not statutory "laws"—and were therefore not subject to the people's initiative and referendum power. (*Id.* at p. 325.) The initiative's proponents protested that the Legislature itself had in the past regulated its

[7] This distinction is especially critical in the present case, for as is discussed at greater length *infra*, the Legislative Counsel has opined that following the passage of Proposition 1A, "*the Legislature is not required to ratify a tribal-state gaming compact by means of a statute*, but instead may do so by means of resolution adopted by each house." (Leg. Counsel Op. No. 0730426, *supra*, p. 7 [italics added] [AA 1:99].) The Legislative Counsel's opinion—which is entitled to "great persuasive weight" (*Barratt Am., Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685,697)—thus confirms that the Legislature's ratification of a tribal-state gaming compact pursuant to section 19(f) does not constitute an exercise of "legislative power" that must be passed in the form of a statute, and therefore *it is not subject to referendum* under the Supreme Court's decisions in *Hopping* and *AFL-CIO*.

internal proceedings through the enactment of statutes, but the court held this to have no legal significance:

> "A rule of proceeding adopted by the Legislature by statute is, notwithstanding its means of adoption or label, a rule or resolution within the provisions of article IV, sections 7 and 11. It is not the form by which the rule is adopted but its substance which measures its place in the constitutional scheme. The people wholly lack this power whatever the form of its application." (*Id.* at pp. 326-327.)

Accordingly, the Superior Court plainly erred in ruling that "AB 277's non-exempt statutory form is dispositive of the issue." (AA 2:461.) The mere use of the statutory form does not convert a non-legislative action into a legislative act that is subject to the initiative and referendum. Indeed, the Court noted in *AFL-CIO* that the term "statute" did not even appear in the original 1911 constitutional amendment reserving the initiative and referendum power to the people. That amendment (then part of article IV, section 1) reserved to the people the power (1) to propose "laws" (the initiative) or (2) to reject any "acts" passed by the Legislature (the referendum). It was not until 1966, when the California Constitution Revision Commission recommended "statutes" as a single shorthand for both reserved powers, *without intending any change in meaning*, that the term was included in what became article II, section 9. (See *AFL-CIO*, 36 Cal.3d at pp. 707-708.) For this reason, the Court in *AFL-CIO* did not view the use of the statutory form as dispositive, but held that "the reserved power of initiative and referendum [is] limited to such measures as

constitute[] the exercise of *legislative power* to create *binding law*." (*Id*. at p. 711 [italics added].)[8]

The final point that the Superior Court failed to acknowledge is that AB 277 did more than just ratify the North Fork and Wiyot compacts. Subdivision (b) of the statute also exempted certain actions relating to the execution and implementation of those compacts from CEQA's requirements, which could well explain why the Legislature chose to proceed by a statute, since that subdivision would likely qualify as a "legislative" act that *must* take the form of a statute. North Fork's Cross-Complaint did not seek a declaration that *the entirety of AB 277* is not subject to referendum, only that *the portion of AB 277 ratifying North Fork's gaming compact* may not be undone by referendum. Consequently, when the Superior Court ruled that "because AB 277 was enacted as a statute, it is subject to referendum under the State Constitution" (AA 2:459), it was not even addressing *the correct question*. The issue in the

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[8] Courts in other states have reached the same conclusion—that the referendum applies only to "legislative acts" and it is the substance, not the form, that controls. (See, e.g., *Tillamook Peoples' Utility Dist. v. Coates* (1944) 174 Or. 476, 483-484 ["In stating that all ordinances should be subject to the referendum, the legislature contemplated only ordinances of a legislative nature, that is, 'legislative acts' expressed in written resolutions or ordinances …. The name given by the [legislative body] to the formal expression of their action, whether 'ordinance' or 'resolution,' does not change the essential nature of their act."]; *City of Lawrence v. McArdle* (1974) 214 Kan. 862, 867 [statute making any non-emergency "ordinance" subject to referendum did not apply to executive or administrative ordinances, only ordinances that were legislative in their character].)

present case is not whether the Legislature enacted a "statute" when it ratified North Fork's gaming compact—it plainly did—but whether the Legislature's ratification of the compact was a "legislative" act. And because the answer to that question is "no," the Legislature's action is not subject to referendum.

B. The Language Of Article IV, Section 19(f), Makes Clear That The Legislature's Ratification Of A Tribal-State Gaming Compact Is Not A "Legislative" Act Subject To Referendum

Article IV, section 19(f) provides the exclusive means for the State to enter into a tribal-state gaming compact in California. Section 19(f) declares:

> "Notwithstanding subdivisions (a) and (e),[9] 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."

Virtually *every phrase* of section 19(f) underscores that the referendum cannot be used to undo the Legislature's ratification of a tribal-state compact.

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[9] Subdivision (a) of article IV, section 19, provides: "The Legislature has no power to authorize lotteries, and shall prohibit the sale of lottery tickets in the State." Subdivision (e) states: "The Legislature has no power to authorize, and shall prohibit casinos of the type currently operating in Nevada and New Jersey."

First, the Constitution explicitly restricts the Legislature's role in the compact process to the "ratification" of an agreement that has already been "negotiate[d] and conclude[d]" by the Governor. The term "ratification" has a well-established meaning, and it "is not an act of legislation within the proper sense of the word." (*Hawke*, 253 U.S. at p. 229.) Accordingly, courts throughout the country—including both the U.S. and the California Supreme Courts—have uniformly held that a legislature's action in "ratifying" a proposed measure or agreement is not subject to initiative or referendum.

"A constitutional amendment should be construed in accordance with the natural and ordinary meaning of its words." (*Amador Valley Jt. Union High School Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 277.) The natural and ordinary meaning of the word "ratification" is not the enactment of legislation in the first instance, but the "confirmation and acceptance of a *previous* act." (*Cruz v. HomeBase* (2000) 83 Cal.App.4th 160, 168, *quoting* Black's Law Dictionary (7th ed. 1999) p. 1268 [italics added].) Put differently, the essential feature of "ratification" is "to give validity to the act of *another*." (*Snook v. Page* (1915) 29 Cal.App. 246, *quoting Norton v. Shelby County* (1886) 118 U.S. 425 [italics added].) Based on the plain meaning of the term, when the Legislature "ratifies" a tribal-state compact that has been negotiated by the Governor and a tribe, it is not taking any legislative action of its own, but is merely expressing its

approval of the previous action of the Governor in "concluding" the compact.

In the only other context in which the duty of "ratification" is constitutionally assigned to the Legislature, it has long been understood that the Legislature is not performing a legislative function, and that its action is therefore not subject to referendum. Thus, in *Hawke v. Smith*, the U.S. Supreme Court held that the Ohio Constitution's referendum provision was *not applicable* to its General Assembly's ratification of a proposed federal constitutional amendment, explaining:

> "The argument … [supporting use of the referendum] … rests upon the proposition that the federal Constitution requires ratification by the *legislative action* of the states through the medium provided at the time of the proposed approval of an amendment. *This argument is fallacious in this—ratification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word*. It is but the expression of the assent of the state to a proposed amendment." (253 U.S. at p. 229 [italics added].)

Every other court to have considered the issue has likewise held that the initiative and referendum do not apply to a legislature's act of "ratifying" a constitutional amendment because such ratification is not a *legislative act* subject to the people's reserved powers.[10] In particular, the

[10] See, e.g., *State ex rel. Hatch v. Murray* (Mont. 1974) 526 P.2d 1369; *Wise v. Chandler* (Ky. 1937) 108 S.W.2d 1024, 1027, 1033 ["[t]he ratification of a proposed amendment to the Federal Constitution by the State Legislatures *is not legislation*"]; *State ex rel. Tate v. Sevier* (Mo. 1933) 62 S.W.2d 895, 897 ["It is settled law that the act of a state in ratifying or rejecting a proposed amendment to the federal Constitution is

California Supreme Court in *Barlotti v. Lyons* (1920) 182 Cal. 575, held that under "the ordinary acceptation of the term," the phrase "ratified by the legislature" referred only to action by *the representative body* elected by the people and did not contemplate action by the entire electorate through the reserved initiative and referendum powers. (*Id*. at pp. 578-582.)

The same is true of the Legislature's ratification of a tribal-state gaming compact negotiated by the Governor. In that context, just as in the case of a constitutional amendment, the Legislature has no ability to subtract, add to, or change any of the terms or language of what it receives. All the Legislature can do is give or withhold its approval. This is one of the critical elements that differentiates "ratification" from true "legislation." In distinct contrast to its role in the normal legislative process, the Legislature cannot initiate the process for negotiation or execution of a compact. The process for legislative ratification of a proposed compact is thus *exactly like* the process for ratifying a proposed federal constitutional amendment: All the Legislature can do is say yea or nay. Indeed, at least one state's supreme court explicitly analogized the state legislature's

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not a legislative act within the meaning of the initiative and referendum provisions of the Constitution and laws of the various states."]; *Decher v. Secretary of State* (Mich. 1920) 177 N.W. 388, 392 ["the action of the state Legislature in ratifying [a constitutional amendment] is not the making of a law or an 'act' as understood in legislative parlance."]. Many of these cases were cited with approval by the California Supreme Court in *AFL-CIO*. (36 Cal.3d at pp. 699-703.)

approval of a tribal-state compact to its ratification of a proposed constitutional amendment, holding that neither amounted to the enactment of "legislation." (See *Taxpayers of Michigan Against Casinos v. State* (Mich. 2004) 685 N.W.2d 221, 232 ("*TOMAC I*") ["[In ratifying amendments of the federal constitution], the Legislature did not engage in a legislative act that enacted a law, but merely expressed its assent to the proposed amendment. In the same way, the Legislature here is merely expressing its 'assent' to the compacts through HCR 115."].)[11]

Moreover, just as "a state in ratifying [a constitutional] amendment was not asserting legislative power under its own constitution, but exercising a power delegated to the state legislatures by article V of the federal Constitution" (*AFL-CIO*, 36 Cal.3d at pp. 711-712), the state Legislature does not derive its power to ratify a tribal-state compact from its inherent legislative power under the California Constitution, but from

[11] The impermissibility of using a referendum to *overturn* a tribal-state compact that has been negotiated by the Governor and ratified by the Legislature is further demonstrated by the manifest impropriety of using an initiative—the constitutional "flipside" of a referendum—to *compel* the Governor and the Legislature to enter into a compact on behalf of the State. It cannot plausibly be argued that the people may propose the terms of a compact via an initiative and bind the State to those terms by passing the measure in a popular election, because that would run directly counter to section 19(f)'s mandate that *the Governor* must negotiate the compact's terms, not the Legislature and not the people through the exercise of their reserved initiative power. But if the compact approval process is not subject to the *initiative* because that would be inconsistent with the Constitution's requirements, it cannot be subject to the referendum either.

IGRA's narrow grant to the state of authority that would otherwise belong to Congress. Although the *procedure* employed by a state to negotiate and execute a tribal-state compact is a matter of state law, the *authority* of a state to enter into a gaming compact in the first instance is *exclusively* the result of *Congress' grant of such authority* to the state in IGRA. (See generally *Worthington*, 130 Cal.App.4th at p. 1137; *Gaming Corp. of Am. v. Dorsey & Whitney* (8th Cir. 1996) 88 F.3d 536, 546 ["Tribal-state compacts … are a creation of federal law, and IGRA prescribes 'the permissible scope of a Tribal-State compact.'"].) This point is driven home in the language of section 19(f), which specifically mandates that the negotiation, conclusion, and ratification of compacts for Indian gaming must be "in accordance with federal law." Consequently, both when it ratifies a proposed amendment to the federal Constitution and when it ratifies a proposed tribal-state compact, the Legislature is not exercising the inherent state legislative authority that is reserved to the people through the power of initiative and referendum, but is exercising a power that has been granted to the state by federal law.[12]

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[12] This distinction is critical because, as the Court emphasized in *AFL-CIO*, the people's reserved powers extend only to the exercise of the state's inherent legislative or lawmaking authority under its own constitution. (36 Cal.3d at pp. 711-712.) Numerous California cases therefore hold that when a legislative body is not exercising its own organic legislative authority, but is instead acting pursuant to a duty or grant of authority delegated to it by some superior power, its actions are not "legislative" and are not subject to initiative or referendum. For this

The Superior Court disregarded this universally accepted understanding of the phrase "ratification by the Legislature," failing to engage in any analysis of the language of section 19(f) beyond its assertion that "[i]f the electorate had intended to exclude statutes ratifying state-tribal compacts from the referendum process, it would have explicitly excluded them either in that provision or in Article II, § 9(a)." (AA 2:461.) That conclusion is contrary to the dictates and reasoning of the pertinent case law. When the voters employed the phrase "ratification by the Legislature" in section 19(f), they are presumed to have adopted and incorporated the accepted judicial construction of that same phrase in the constitutional amendment context. (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 23 ["When an initiative contains terms that have been judicially construed, 'the presumption is almost irresistible' that those terms have been used 'in the precise and technical sense' in which they have been used

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reason, too, the Legislature's ratification of a tribal-state compact is not a "legislative" act subject to referendum. (See, e.g., *Housing Authority v. Superior Court* (1950) 35 Cal.2d 550, 557-559 [because state Housing Authorities Law provided the authority for city to establish a public housing program, city council's actions in carrying out the housing program are not subject to referendum]; *W.W. Dean & Associates v. City of South San Francisco* (1987) 190 Cal.App.3d 1368, 1376 ["where a local governing body implements federal policy pursuant to a comprehensive plan of federal regulations governing matters of national concern, its actions are administrative and not subject to local referendum"]; *Andrews v. City of San Bernardino* (1959) 175 Cal.App.2d 459 [city council's determination to approve redevelopment project pursuant to authority delegated to city under Community Redevelopment Law is not subject to referendum].

by the courts."].) This is especially so when, as here, the phrase "ratification by the Legislature" does not appear anywhere else in the state Constitution. Thus, it was not incumbent on the drafters of section 19(f) to "explicitly exclude" statutes ratifying tribal-state compacts from the referendum process; by using the judicially construed phrase "ratification by the Legislature," the drafters made clear that the Legislature's action was not subject to the initiative and referendum power *in the first place*.[13]

In any event, section 19(f) *does include* language explicitly excluding statutes ratifying compacts from the referendum process. By declaring that the Governor is authorized to "negotiate" and "conclude" compacts, subject only to "ratification" by the Legislature, "*notwithstanding … any other provision of state law*," section 19(f) declares that *not even another provision of the state Constitution—*

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[13] Also notable is the *difference* in the language used in section 19(f) from the language used in other provisions of that same section, which explicitly direct the Legislature to take action by means of a "statute." (See, e.g., Cal. Const., art. IV, § 19(c) ["the Legislature *by statute* may authorize cities and counties to provide for bingo games"].) In fact, every subdivision of section 19 other than subdivision (f) either confirms or denies the Legislature's power to "authorize" certain forms of gaming in California. That the language of subdivision (f) makes no reference to the Legislature's normal legislative authority, but instead uses the term "ratification," which has uniformly been interpreted by the courts *not* to constitute legislative action, is telling. Equally significant is section 19(f)'s *removal* of the phrase "by a statute" from the comparable language in the statute (Gov. Code, § 12012.5(c)) that had previously governed the compact approval process. (See Leg. Counsel Op. No. 0730426, *supra*, pp. 3-6 [AA 1:95-98].)

including article II, section 9(a)—may interfere with the Governor's and the Legislature's actions in entering into gaming compacts with tribes in this state. As the Legislative Counsel noted in Opinion No. 0730426, *supra*, the phrase "notwithstanding any other provision of law" makes the language that follows "sui generis" and controlling over all constitutional, statutory or decisional law. (*Id.*, p. 5, *citing In re Marriage of Dover* (1971) 15 Cal.App.3d 675, 678, fn. 3 [AA 1:97].) In the context of section 19(f), the inclusion of this phrase underscores that the procedure for the execution of tribal-state compacts set forth in that subdivision was intended to take precedence over all other state laws and to preclude a role for anyone other than the Governor and the Legislature in the compact negotiation and approval process.

In sum, the language of section 19(f) unmistakably precludes the use of the referendum to overturn and undo a compact that has been "negotiated" and "concluded" by the Governor and "ratified" by the Legislature. The key phrase in that section—"ratification by the Legislature"—has, for almost a century, been understood to mean something very different than "legislation" and has uniformly been held *not to permit* invalidation by referendum. In enacting section 19(f), the voters are presumed to have adopted these prior judicial interpretations of the term. By the language they employed, the voters made clear that the

Legislature's ratification of a compact pursuant to section 19(f) is not subject to referendum.

C. The Ratification Of A Tribal-State Compact Does Not Constitute An Exercise Of The Inherent State "Lawmaking" Function Of The Legislature, But Merely Constitutes Its Approval Of A Consensual Agreement Between Two Equal Sovereign Governments

The language of section 19(f), by itself, resolves the question whether ratification of a compact is a legislative act: It is not. Moreover, independently, the substance of the ratification demonstrates that the Legislature is not exercising its inherent "lawmaking" authority to prescribe rules governing the conduct of the state's citizens, but is instead merely giving its approval to the terms of a consensual agreement reached between two equal sovereign governments. For this reason, too, the Legislature's action is not subject to referendum.

As the Court emphasized in *AFL-CIO*, the people's reserved initiative and referendum power is restricted to the adoption or rejection of "laws." (36 Cal.3d at p. 708.) "The word 'law,'" in turn, "imports a general rule of conduct with appropriate means for its enforcement *declared by some authority possessing sovereign power over the subject*; it implies *command* and not entreaty." (*Id.* at p. 711, *quoting Opinion of the Justices* (Mass. 1928) 160 N.E. 439, 440] [italics added]; accord, *Worthington*, 130 Cal.App.4th at pp. 1142-1143 ["a legislative act … carries the implication of an ability to compel compliance"].) True

legislation binds its subjects through the exercise of the state's lawmaking authority over its citizenry, not as a result of a bargained-for exchange with another sovereign entity over whom the state can lawfully exercise no regulatory control. The former is a "law"; the latter is merely a contract, a voluntary agreement.

Simply put, a tribal-state compact is not a state "law." The State of California possesses no inherent regulatory power over an Indian tribe, and a gaming compact does not constitute the exercise of the State's unilateral lawmaking authority over the tribe. Rather, a compact is a *contract*—negotiated and voluntarily agreed to by two equal sovereign governments—and thus when the Legislature ratifies a compact, it is not exercising its lawmaking authority to unilaterally regulate the conduct of a party subject to its legislative control, but is merely giving its assent and approval to the terms of that mutual *agreement*.

The contractual—as opposed to legislative—nature of tribal-state gaming compacts is by now too well-established to allow for dispute.[14] As discussed above, under federal law generally and under IGRA specifically,

[14] See, e.g., *Texas v. New Mexico* (1987) 482 U.S. 124, 128 ["[A] Compact is, after all, a contract."]; *Confederated Tribes of the Chehalis Reservation v. Johnson* (Wash. 1998) 958 P.2d 260, 267 ["Tribal-state gaming compacts are agreements, not legislation."]; *California Commerce Casino*, 146 Cal.App.4th at p. 1422, fn. 15 ["Thus, the contracts in issue here, namely, the [tribal-state gaming] compacts, involve financing and financial obligations of the state."]; see also 25 U.S.C. § 2710(d)(3)(C)(v) [authorizing gaming compacts to provide remedies for breach of contract].

the states may not impose their legislative will on the tribes by unilaterally regulating gaming on Indian lands—the defining characteristic of "lawmaking" or "legislation"—but may only *negotiate* with the tribes through the compacting process established in IGRA. As the Michigan Supreme Court explained in describing the consensual nature of tribal-state gaming compacts in *TOMAC I*:

> "IGRA only grants the states bargaining power, not regulatory power, over tribal gaming. The Legislature is prohibited from unilaterally imposing its will on the tribes; rather, under IGRA, it must negotiate with the tribes to reach a mutual agreement…. *[T]he hallmark of legislation is unilateral imposition of legislative will. Such a unilateral imposition of legislative will is completely absent in the Legislature's approval of tribal-state gaming compacts under IGRA*…. Thus, the Legislature's role here requires mutual assent by the parties—a characteristic that is not only the hallmark of a contractual agreement but is also absolutely foreign to the concept of legislating." (685 N.W.2d at p. 229 [italics added].)[15]

[15] The Legislative Counsel's Office relied upon this same distinction in concluding that the Legislature "is not required to ratify a tribal-state gaming compact by means of a statute, but instead may do so by means of resolution adopted by each house." (Leg. Counsel Op. No. 0730426, *supra*, p. 7 [AA 1:99].) The opinion cites with approval *TOMAC I*'s reasoning that "'legislation' involves 'unilateral regulation' and that, because the compacts were contracts between two sovereigns, the Legislature 'could not have unilaterally exerted its will over the tribes involved.'" (*Id*., p. 6, *quoting TOMAC I*, 685 N.W.2d at pp. 225-226 [AA 1:98].) Since a referendum may only be used to challenge legislative actions, and since the Michigan and California Constitutions require that all legislation must be enacted by statute rather than resolution (see Cal. Const., art. IV, § 8(b)), the logical consequence of both *TOMAC I* and the Legislative Counsel's opinion is that the Legislature's ratification of a tribal-state compact is *not* a legislative act that is subject to referendum.

Here, too, because the Legislature's ratification of the North Fork compact merely signified its assent to the terms of a mutually agreed-upon *contract* between two sovereign governments and did not constitute an exercise of *legislative* authority over the state's citizens, its ratification action is not subject to referendum. This same rationale led the court of appeal in *Worthington*—a case directly on point—to rule that a city council's adoption of a memorandum of understanding (MOU) with a local tribe addressing the mitigation of potential impacts of a future casino was not subject to referendum. *Worthington* held that because the MOU required the tribe's consent, the council's approval of the MOU was not a *legislative act* subject to the right of referendum:

> "A governmental entity legislates when it unilaterally regulates, or in addition to declaring a public purpose, makes provisions for the 'ways and means of its accomplishment.' When an action requires the consent of the governmental entity and another party, the action is contractual or administrative. *The give-and-take involved when a government entity negotiates an agreement with a sovereign Indian tribe is not legislation, but is a process requiring the consent of both contracting parties.*" (130 Cal.App.4th at p. 1143 [citations omitted; italics added].)

As in *Worthington*, the execution of North Fork's compact resulted not from the State's unilateral regulation of the Tribe's gaming activities, but from a give-and-take negotiation between two sovereign entities, resulting in a consensual agreement between the State and the Tribe. Like the MOU in *Worthington*, the compact "is a contract, not a law." (*Ibid.*)

And as in *Worthington*, the Legislature's ratification of the compact is therefore not subject to being overturned by a referendum sponsored by the Tribe's competitors or by any other interest group who would prefer that the Governor had negotiated different terms or had not entered into any compact with the Tribe at all.

The Superior Court's ruling below did not address *Worthington*, *TOMAC I*, or the Legislative Counsel's opinion. Indeed, the ruling nowhere even acknowledged that North Fork's compact is not a traditional "law" that unilaterally regulates North Fork's activities, but is a *consensual agreement* negotiated and voluntarily entered into by two sovereign governments. Instead, the Superior Court erroneously concluded that ratification of the compact was a "legislative act" because the compact supposedly "prescribes a new policy or plan" rather than "merely pursu[ing] a plan already adopted by the legislative body itself, or some power superior to it." (AA 2:461 [quoting *Fishman v. City of Palo Alto* (1978) 86 Cal.App.3d 506, 509].)

The quoted language from *Fishman* articulates the classic formulation of the test for distinguishing between "legislative" acts, which are subject to referendum, and "administrative" acts, which are not. (See *Simpson v. Hite*, 36 Cal.2d at p. 129 ["The powers or initiative and referendum … apply only to acts which are legislative in character, and not to executive or administrative acts."].) But "prescribing a new policy or

plan" is a *necessary* condition, not a *sufficient* condition, for an action to be legislative. For the referendum to apply, the legislative body's action must in the first instance constitute the enactment of a "law," in the sense that it "imports a general rule of conduct with appropriate means for its enforcement *declared by some authority possessing sovereign power over the subject*; it implies *command* and not entreaty." (*AFL-CIO*, 36 Cal.3d at p. 711 [italics added].) Because, as shown above, the Legislature's ratification of North Fork's compact fails to satisfy this predicate condition, it does not matter whether the compact "prescribes a new policy" or not; ratification of a *contractual agreement* between two equal sovereigns cannot constitute *legislation*.

In any event, even leaving aside the consensual nature of North Fork's compact, it does not "prescribe a new policy or plan," as the Superior Court erroneously held. The court noted that the compact "permits Class III 'off reservation' gaming" and pointed to provisions of the compact that permit certain types of gaming, convey new powers and duties to state agencies, and implement a revenue sharing agreement with the Wiyot Tribe as examples of language "indicating its intent to 'prescribe a new policy or plan.'" (AA 2:461-462.) None of these provisions, however, establishes any new state policy regarding Indian gaming. Rather, they "merely pursue a plan already adopted by the legislative body

itself [in Proposition 1A] or some power superior to it [in IGRA]." (*Fishman*, 86 Cal.App.3d at p. 509.)

For example, it was not North Fork's compact that established the state policy "permit[ting] Class III 'off reservation' gaming." That "policy" was established when the voters adopted Proposition 1A and enacted section 19(f), which authorizes Class III gaming "by federally recognized Indian tribes *on Indian lands* in California in accordance with federal law" (italics added). Under federal law, the term "Indian lands" includes *both* reservation lands and "off reservation" lands held in trust for the benefit of a tribe by the United States. (25 U.S.C. § 2703(4).) Thus, it was IGRA and section 19(f), not North Fork's gaming compact, that "prescribe[d] a new policy" permitting Class III gaming on "off reservation" Indian lands in California.[16]

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[16] This was what the Superior Court itself had concluded in rejecting Stand Up's argument in the underlying proceeding (Case No. F069302) that the Governor exceeded his authority under section 19(f) by concurring in the Secretary of the Interior's determination to permit Class III gaming on the land taken into trust for North Fork. The court there stated: "From this language [in section 19(f)], it is clear, at least to this court, that the people intended to expand Class III gaming to Indian lands in California where permitted by federal law. Federal law permits casinos (Class III gaming) on off reservation lands placed in trust by the Secretary of the Interior (*see* 25 U.S.C. section 2719(b)(1)(A)), with the concurrence of the Governor." (Appendix in Case No. F069302, vol. 3, p. 697.)

In its ruling below, the Superior Court remarked that it believed North Fork was in a "delicate position" because in opposing Stand Up's complaint in the prior proceeding, the Tribe had acknowledged the Legislature's use of its "own legislative prerogative" to validate the

Likewise, it was IGRA and section 19(f) that provided the "ways and means" for accomplishing the state's Indian gaming policy by prescribing what particular subjects may be included in a tribal-state compact (see 25 U.S.C. § 2710(d)(3)(C)) and by imposing a duty upon the Governor to negotiate and conclude a gaming compact with any federally recognized tribe that makes such a request, subject to ratification by the Legislature (§ 19(f)). The terms of North Fork's compact merely pursue and implement these existing policies in the context of the Tribe's own factual circumstances; they do not prescribe any new state policy or plan in the first instance. The provisions in the compact identified by the Superior Court regarding the types of games and the number of gaming devices permitted in North Fork's casino, or regarding North Fork's revenue-

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Governor's concurrence by ratifying the compact, but now characterized the Legislature's action as "non legislative" to defeat the referendum process. (AA 2:461-462.) There is no conflict, however, in North Fork's positions. Stand Up's complaint did not raise the issue whether the ratification of North Fork's compact constituted a "legislative" act for purposes of being subject to referendum, and the Tribe's briefing in that proceeding was not addressed to that issue. Rather, North Fork was responding to Stand Up's claim that the Governor's concurrence had infringed on "core legislative prerogatives" under the separation-of-powers doctrine. North Fork opposed that contention on the merits, but also pointed out that the Legislature's subsequent ratification of the compact had removed any basis for the claim by independently validating the Governor's concurrence through the use of its "own legislative prerogative." North Fork's reference was to action taken by the legislative *branch of government* to validate and give assent to the Governor's concurrence; the statement implied nothing one way or the other with respect to whether the Legislature's ratification of the compact constituted a "legislative" act subject to referendum.

sharing payments to the Wiyot Tribe, do not establish any "new policy" with respect to Indian gaming; there is no state policy, for example, to limit all tribes to 2,000 gaming devices at a single gaming facility. Rather, these are all site-specific restrictions and requirements that are *unique* to North Fork's circumstances, hammered out in give-and-take negotiations between the Governor and the Tribe, and which merely pursue and carry out the "legislative" policies previously adopted in section 19(f) and IGRA. The ratification of North Fork's compact thus fits the classic description of an "administrative" action, not a legislative one.[17]

In sum, the ratification of an individual Indian gaming compact in accordance with section 19(f) is an "administrative" action that is not subject to referendum under well-established precedent. More fundamentally, because a tribal-state compact cannot unilaterally be *imposed* on a tribe by legislative fiat—but instead requires the *mutual*

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[17] See, e.g., *Simpson v. Hite,* 36 Cal.2d at pp. 129-130 [where the Legislature had prescribed the basic state policy by declaring that "the board of supervisors shall provide suitable quarters for the municipal and superior courts," all actions taken thereafter by the Los Angeles County Board of Supervisors to carry out that policy by designating and acquiring a site for the courts were administrative in nature and were not subject to initiative or referendum]; *McKevitt v. City of Sacramento* (1921) 55 Cal.App. 117, 123-125 [once city commissioners had agreed to accept bequest for purpose of acquiring a park, city's actions in selecting a location and approving contract to purchase land for the park were administrative decisions necessary to carry out the previously declared legislative policies and were not proper subjects of referendum].

consent of both the State and the sovereign Indian tribe—the compact is not even a "law" in the first instance, but is a contract. The Superior Court ignored both this critical factual distinction and the case law holding that an action requiring the consent of both parties is not a legislative act subject to initiative and referendum. Under either rationale, the Legislature's ratification of North Fork's compact is not subject to referendum, and the Superior Court's judgment must be reversed.

II. WHEN CONSTRUED "IN ACCORDANCE WITH" IGRA, STATE LAW LEAVES NO ROOM FOR A REFERENDUM ON THE LEGISLATURE'S RATIFICATION OF A TRIBAL-STATE COMPACT

Basic principles of constitutional and statutory construction also preclude subjecting the Legislature's ratification of a tribal-state compact to referendum. When construed in accordance with IGRA—as their plain text requires—the state constitutional and statutory provisions that establish the state process for compacting with Indian tribes leave no room for a referendum to occur. The Superior Court's contrary interpretation of California law rests on a misreading of section 12012.25(f) of the Government Code that cannot be reconciled with the text of the statute, with section 9510 of the Government Code, or with the Secretary of State's longstanding practice for chaptering statutes and submitting executed tribal-state compacts for federal approval. Moreover, if sustained, the Superior

Court's ruling would create absurd results. It should be rejected for each of these reasons.

A. State Law Must Be Construed To Be Internally Consistent And Rational

It is well settled that in interpreting state laws, "sections of the Constitution, as well as of the codes, will be harmonized where reasonably possible, in order that all may stand." (*Rose v. State* (1942) 19 Cal.2d 713, 723.) The California Supreme Court has repeatedly emphasized that state laws "must be harmonized, both internally and with each other, to the extent possible." (*Tuolumne Jobs & Small Bus. Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1037 [internal quotation marks omitted]; see also, e.g., *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1099 ["[C]ourts do not construe statutes in isolation, but rather read every statute with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness."] [internal quotation marks omitted].) Similarly, "[s]tate law should be construed, whenever possible, to be in harmony with federal law." (*Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, 231, citing *Greater Westchester Homeowners Assn. v. City of Los Angeles* (1979) 26 Cal.3d 86, 93); see also, e.g., *Choate v. Celite Corp.* (2013) 215 Cal.App.4th 1460, 1466 ["[W]e try to harmonize state and federal law."].)

It is also "a well settled rule of statutory construction that if possible, legislation is to be interpreted to lead to rational, rather than absurd outcomes." (*People v. Burroughs* (1984) 35 Cal.3d 824, 836 fn. 10; see also *Tuolumne Jobs,* 59 Cal.4th at p. 1037 ["Interpretations that lead to absurd results … are to be avoided."] [internal quotation marks omitted]; *Reuter v. Board of Supervisors of San Mateo Cnty.* (1934) 220 Cal. 314, 321 ["It is a cardinal rule in the interpretation of statutes and also of constitutional enactments that a construction should not be given to the statute or to the Constitution, if it can be avoided, which would lead to absurd results."].)

These principles apply with equal force to referenda. In construing whether an act is subject to the referendum power, courts must take account of the consequences of subjecting the act to referendum. (See, e.g., *Geiger v. Board of Supervisors* (1957) 48 Cal.2d 832, 839 ["Although it is the general rule that referendum provisions are to be liberally construed in favor of the reserved power, it is settled that consideration must also be given to the consequences of applying the rule. If essential government functions would be seriously impaired by the referendum process, the courts, in construing the applicable constitutional and statutory provisions, will assume that no such result was intended."] [citations omitted]; *Hunt v. Mayor & Council of City of Riverside* (1948) 31 Cal.2d 619, 628-629 [referendum not permitted where "effect would be greatly to impair or

wholly destroy the efficacy of some other governmental power"].) Likewise, where a state process permits no time for a referendum, the courts should not interpret California law to have made a referendum available. (E.g., *City of Malibu v. California Coastal Comm'n* (2004) 121 Cal.App.4th 989, 998 ["Permitting no time for a referendum is evidence no referendum was to be allowed."] [citing *Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 777].)

B. A Referendum Would Be Inconsistent With The Text And Purpose Of The Provisions Of California Law That Set Forth The State's Process For Compacting With Indian Tribes Under IGRA

Subjecting the ratification of the compact to referendum would be inconsistent with the text and purpose of the California constitutional and statutory provisions that establish the State's process for compacting with Indian tribes under IGRA: article IV, section 19(f) of the California Constitution and section 12012.25(f) of the Government Code.[18] As explained above (*supra*, pp. 16-18), IGRA permits class III gaming on

[18] As the Legislative Counsel concluded, the "ratified by a statute" language in section 12012.25(c) of the Government Code was necessarily superseded by the enactment of article IV, section 19(f) of the California Constitution, which used only the term "ratification" and does not require ratification by a statute. (See *supra*, pp. 20, 39 fn. 13.) The remainder of section 12012.25, including section 12012.25(f), however, presents no inconsistency with section 19(f) and therefore remains fully operative. Section 12012.25(f) is fully consistent with the non-referendable process contemplated by section 19(f). Indeed, for the reasons set forth below, it demonstrates that even when the Legislature may choose, as it did here, to ratify by a statute, no referendum was contemplated.

Indian lands pursuant to compacts executed between the tribe and the state in which the Indian lands are located—and expressly requires states to negotiate in good faith with tribes to enter into such compacts. (25 U.S.C. § 2710(d)(1), (3).) To ensure that negotiated compacts conform with the relevant federal requirements, IGRA further requires that such compacts, once executed, be submitted to the Secretary of the Interior for review and approval before they are placed into effect under federal law. (*Id.*, § 2710(d)(3)(B), (d)(8).) And IGRA provides that if the Secretary of the Interior does not approve or disapprove a compact within 45 days of submission, the compact will be deemed approved, whereupon it goes into effect through publication in the Federal Register. (*Id.*, § 2710(d)(8)(C).)[19] Under California law, however, a referendum could not be completed within that 45-day window, which would make California's compacting provisions nonsensical. (Cal. Const., art. II, § 9 [providing referendum petitioners 90 days from enactment date to qualify a referendum for the ballot, which is generally to be held on the next general election held at least 31 days thereafter].)

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[19] Thus, in the case of the North Fork compact at issue here, the Secretary of State submitted the compact, as executed by the Governor and ratified by the Legislature, to the Secretary of the Interior in July 2013. (AA 1:13.) Following the expiration of the Secretary of the Interior's 45-day review period under IGRA, the compact was deemed approved, and notice of such approval was published in the Federal Register on October 22, 2013, whereupon the compact took effect under 25 U.S.C. § 2710(d)(3)(B). (AA 1:13; see 78 Fed. Reg. 62,649 (Oct. 22, 2013).)

The State's process for compacting with tribes under IGRA is prescribed in the Constitution (article IV, section 19(f)) and the Government Code (section 12012.25(f)). The Constitution establishes the Governor's and the Legislature's respective roles in the execution and ratification of such compacts:

> "Notwithstanding … 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." (Cal. Const., art. IV, § 19(f).)

In turn, section 12012.25(f) of the Government Code establishes the Secretary of State's obligation to submit compacts—once executed by the Governor and ratified by the Legislature—to the Secretary of the Interior for review and approval under federal law. It provides:

> "Upon receipt of a statute ratifying a tribal-state compact … the Secretary of State shall forward a copy of the executed compact and the ratifying statute … to the Secretary of the Interior for his or her review and approval, in accordance with [25 U.S.C. § 2710(d)(8)]." (Gov. Code, § 12012.25(f).)

By their terms, these provisions prescribe a state process "in accordance with" the federal regime they effectuate—and must be construed accordingly. (See *Mabry*, 185 Cal.App.4th at p. 231; *Choate*, 215 Cal.App.4th at p. 1466.)

So construed, California law cannot reasonably be read to subject a compact to referendum *after* California has submitted the compact to the

federal government, the federal government has approved it, and it has gone into effect under federal law. Rather, state law must be construed so that—once placed into effect under IGRA—the compact submitted by the State can fulfill the State's own constitutional purpose of enabling "the operation of slot machines and … 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." (Cal. Const., art. IV, § 19(f).) Allowing a referendum to "un-ratify" a compact *after* the State's submission to the federal government would frustrate that purpose. To achieve the purpose of section 19(f), therefore, state law must be interpreted not to permit a referendum on the Legislature's ratification of tribal-state compacts.

C. The Superior Court's Ruling Was Premised On An Erroneous Interpretation Of Section 12012.25(f) That Is Inconsistent With That Provision's Plain Text, With Other California Law, And With Longstanding Practice

The Superior Court's contrary holding—that "California's referendum process does not conflict either with Cal. Gov. Code § 12012.25(f) or with IGRA's timing requirements"—was premised on its erroneous understanding that "[t]he Secretary of State is not in receipt of a statute ratifying a compact for purposes of Cal. Gov. Code. § 12012.25(f) until that statute takes effect" and therefore "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 2:464.) As shown below, that ruling conflicts with the plain text of section 12012.25(f), with another provision of the Government Code addressing when the Secretary of State is in "receipt" of a statute for purposes of discharging other essential obligations of her office, and with the longstanding practices of that office—including with respect to the submission of tribal-state compacts to the Secretary of the Interior under IGRA.

1. The Superior Court's Ruling Is Inconsistent With The Plain Text Of Sections 12012.25(f) And 9510 Of The Government Code

The Superior Court's ruling rests on a misreading of section 12012.25(f) of the Government Code. To initiate the federal process for the review, approval, and effectuation of tribal-state compacts—i.e., to start the Secretary of the Interior's 45-day review period in 25 U.S.C. § 2710(d)(8)—section 12012.25(f) directs that, "upon receipt" of a statute ratifying a tribal-state compact negotiated and executed by the Governor, the Secretary of State "shall forward a copy of the executed compact and the ratifying statute … to the Secretary of the Interior for his or her review and approval in accordance with [25 U.S.C. § 2710(d)(8)]." The statute thus speaks in unequivocal, mandatory terms: the Secretary of State "shall forward" the executed compact "upon receipt" of a ratifying statute. (*Ibid.*)

To avoid the absurdity of allowing the State to "un-ratify" a compact after it has submitted the compact to the Secretary of the Interior and the

compact has taken effect under federal law, however, the Superior Court held that "[t]he Secretary of State is not in *receipt* of a statute ratifying a compact for purposes of Cal. Gov. Code § 12012.25(f) until that statute takes effect." (AA 2:464 [italics added].) In other words, the Superior Court held that the Secretary of State in this case erred by submitting the compact almost 16 months too early—before the referendum process had run its course. But the Secretary of State acted in strict compliance with her obligations under state law.

The Superior Court's conclusion that "[t]he Secretary of State is not in receipt of a statute ratifying a compact for purposes of Cal. Gov. Code. § 12012.25(f) until that statute takes effect" (AA 2:464), even after receiving the approved ratifying bill from the Governor, contradicts the ordinary meaning of "receipt." (See, e.g., Black's Law Dictionary 1459 (10th ed. 2014) ["The act of receiving something, esp[ecially] by taking physical possession."]; 13 The Oxford English Dictionary 313 (2d ed. 1989) ["The act of receiving something given or handed to one; the fact of being received."].) It may be rejected on that basis alone. (See *Holland v. Assessment Appeals Bd. No. 1* (2014) 58 Cal.4th 482, 490 ["The words of the statute should be given their ordinary and usual meaning …."] [internal quotation marks omitted].)

The Superior Court's interpretation of "receipt" is also inconsistent with provisions of the Government Code and Supreme Court decisions

addressing when the Secretary of State is in "receipt" of a statute for purposes of discharging other essential obligations of her office. Section 9510 of the Government Code, which governs the Secretary's obligation to chapter statutes under state law in the order in which they are "received," provides:

> "*When the Governor approves a bill, he shall* affix his name thereto, with the date of signing, and *deposit it in the Office of the Secretary of State*, where it becomes the official record. *Upon the receipt of any such bill*, the Secretary of State shall give it a number, to be known as the chapter number. He shall number each bill in the order *in which it is received* by him, and the order of numbering shall be presumed to be the order in which the bills were approved by the Governor." (Gov. Code, § 9510 [italics added].)

As the California Supreme Court explained:

> "After the Governor has signed and dated a bill it is deposited in the office of the Secretary of State where it is assigned a consecutive chapter number corresponding to the order in which it was *received*. The order of *receipt* is presumed to be the order in which the bill was approved by the Governor …." (*In re Thierry S.* (1977) 19 Cal.3d 727, 739 [italics added].)

Thus, the Secretary of State is in "receipt" of "a bill" when it is transmitted to her office by the Governor—as the ordinary meaning of "receipt" suggests. "Receipt" is not delayed until months after the Governor has transmitted the bill, when the statute ultimately goes into effect by

operation of law under article II, section 10(a) or article IV, section 8(c)(1) of the California Constitution.[20]

Together, then, sections 9510 and 12012.25(f) of the Government Code establish that after the Governor approves a ratifying statute, he deposits it in the Secretary of State's office, whereupon the Secretary of State is in "receipt" of that statute—and must forward the ratified compact to the U.S. Secretary of the Interior for review and approval in accordance with IGRA, 25 U.S.C. § 2710(d)(8). Because the Secretary of State's submission to the Secretary of the Interior must occur "upon receipt" of the ratifying statute, California law requires it to occur before any months-long referendum process could take place. The Secretary of State thus did just what California law requires—and the Superior Court's contrary ruling cannot be upheld.

[20] The Superior Court's interpretation would thus upset California's established system for chaptering statutes. The Secretary of State must assign statutes chapter numbers upon "receipt," in the order of "receipt." (Gov. Code, § 9510; *Thierry S.*, 19 Cal.3d at p. 739.) This rule has meant that chapter numbers are assigned when the Governor transmits statutes to the Secretary, in the order of that transmission. (See *ibid.*) Under the Superior Court's interpretation of "receipt," however, the Secretary of State should not assign statutes chapter numbers until they take effect, and should number them in the order of their effective dates, not their enactment dates. That interpretation would be inconsistent with section 9510, as interpreted by the Supreme Court, and demonstrates the fallacy at the heart of the Superior Court's ruling.

2. The Superior Court's Ruling Ignores The Distinction Between A Statute's Enactment Date And Its Effective Date

The Superior Court's interpretation is also wrong because it overrides the fundamental distinction—embodied in the California Constitution—between a statute's *enactment* date and its *effective* date.

The Constitution provides that most types of statutes "go into effect on January 1 next following a 90-day period *from the date of enactment of the statute*." (Cal. Const., art. IV, § 8(c)(1) [italics added].) A statute's date of enactment, therefore, will necessarily precede the date on which it goes into effect. And the California Supreme Court has held that a statute is enacted when the Secretary of State receives it. (*Thierry S.*, 19 Cal.3d at p. 739; see *id.* at pp. 738-739 ["[A] bill is not enacted into a statute until it has been signed by the Governor *and transmitted by him to the Secretary of State*."] [italics added, citing *Davis v. Whidden* (1897) 177 Cal. 618]; see also *People v. Bunn* (2002) 27 Cal.4th 1, 11 fn. 9 ["Such enactment occurred on June 30, 1997, when the bill … was first approved by the Governor *and then filed with the Secretary of State*."] [italics added].)

The Superior Court's reasoning, under which the "Secretary of State is not receipt of a statute … until that statute takes effect" (AA 2:464) would mean that the Secretary of State receives the statute, and thus the statute is enacted, on the same date that the statute takes effect. That result cannot be reconciled with the Constitution's clear distinction between the

dates of enactment and effectiveness, further illustrating the fallacy of the Superior Court's interpretation.

3. The Secretary Of State's Submission Of The Compact To The Secretary Of The Interior Was Consistent With The Longstanding Practice Of Her Office

The Superior Court also dismissed "[t]he fact that in this case the Secretary of State forwarded the statute to the Secretary of the Interior before it was in effect." (AA 2:464.) But the Secretary of State's actions were consistent with the longstanding practice of her office, which is to chapter ratification statutes and forward compacts to the Secretary of the Interior upon receipt of the Governor's transmission—before waiting for any referenda to be held or the statutes to take effect.

Indeed, there are numerous instances—going back more than a decade—in which the Secretary of State has forwarded compacts to the Secretary of the Interior upon receiving them, rather than waiting until the referendum process had run its course. For example, the compacts of the Agua Caliente Band of Cahuilla Indians, Morongo Band of Mission Indians, Pechanga Band of Luiseño Mission Indians, and Sycuan Band of the Kumeyaay Nation were all filed with and chaptered by the Secretary of State on July 10, 2007. (See Cal. Stats. 2007 ch. 38-41 [SB 174, 175, 903, 957], codified at Gov. Code, §§ 12012.46, 12012.48, 12012.49, 12012.51.) They were then forwarded by the Secretary of State to the Secretary of the

Interior, were approved, and went into effect under federal law through publication in the Federal Register on December 19, 2007. (See 72 Fed. Reg. 71,939-71,940 (Dec. 19, 2007).) And all of this occurred even though the statutes ratifying those compacts were subsequently subjected to referenda (and approved) on the February 5, 2008 ballot and the statutes did not become effective until February 6, 2008. (See Cal. Props. 94-97, Feb. 2008.)

Likewise, the compacts of the Buena Vista Rancheria of Me-Wuk Indians and Coyote Valley Band of Pomo Indians were both filed with and chaptered by the Secretary of State on September 29, 2004. (See Cal. Stats. 2004 ch. 856 (SB 1117), codified at Gov. Code, § 12012.45.) They were then forwarded by the Secretary of State and went into effect under federal law on December 20, 2004 (69 Fed. Reg. 76,004 (Dec. 20, 2004))—before the 90-day deadline to submit a referendum petition on the statute ratifying the compacts would have expired on December 28, 2004 and before the statute's effective date of January 1, 2005. Other compacts have followed a similar timeline, in which the Secretary of State has submitted the compacts to the Secretary of the Interior before the deadline to qualify a referendum for the ballot. (E.g., compare 72 Fed. Reg. 62,264 (Nov. 2, 2007), with Cal. Stats. 2007 ch 37 (SB 106), codified at Gov. Code, § 12012.52 [Yurok Tribe compact forwarded prior to the 90-day deadline to qualify a

referendum on ratifying statute and statute's effective date].) Indeed, North Fork is not aware of any contrary examples.

* * * * *

In sum, the Secretary of State acted in accordance with her statutory obligations and the longstanding practice of her office, as shown above. The Superior Court's strained interpretation of "receipt" in section 12012.25(f) cannot be sustained. Rather, the absurdity of permitting a referendum to "un-ratify" a compact after the Secretary of State has submitted it to the Secretary of the Interior and it has been approved and gone into effect under federal law can be avoided only by recognizing that legislative ratifications of tribal-state compacts are not subject to referendum in the first place.

CONCLUSION

For the reasons stated above, the Superior Court's judgment should be reversed and the Superior Court should be directed to enter judgment granting the relief sought in Appellant's Cross-Complaint and declaring that the referendum against AB 277 is invalid, void, and unenforceable insofar as it purports to overturn the Legislature's ratification of North Fork's tribal-state gaming compact.

Dated: June 15, 2015

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CERTIFICATE OF COMPLIANCE WITH RULE 8.204(c)

I certify that, pursuant to California Rule of Court 8.204(c), the attached Appellant's Opening Brief is proportionally spaced, has a typeface of 13 points or more, and contains 13,629 words, exclusive of the matters that may be omitted under Rule 8.204(c)(3), as determined by the word count feature of the word processing program used to prepare this brief.

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PROOF OF SERVICE

I, the undersigned, declare:

I am employed in Washington, DC. I am over the age of 18 and not a party to the within action. My business address is 1875 Pennsylvania Avenue NW, Washington, DC 20006.

On June 15, 2015, I served the foregoing documents described as:

APPELLANT'S OPENING BRIEF

on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

By causing the document listed above to be served on the parties by:

☒**U.S. Mail**: By putting a true and correct copy thereof, together with a signed copy of this declaration in a sealed envelope with postage thereon fully prepaid, in the United States mail at Washington, DC, addressed as set forth below. I am readily familiar with the firm's practice of collecting and processing correspondence for mailing. It is deposited with the U.S. Postal Service each day and that practice was followed in the ordinary course of business for the service herein attested to. (C.C.P., § 1013(a))

☒**Electronic Service**: By causing a true copy to be sent via electronic mail transmission from the firm's computer network in Portable Document Format (PDF) to the email addresses stated. (C.R.C. 8.212(c)(2)(A))

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on June 15, 2015, at Washington, DC.

By: 

Christopher E. Babbitt

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