**F069302**

# In the Court of Appeal of the State of California
## Fifth Appellate District

Stand Up for California and Barbara Leach,

Plaintiffs and Appellants,

v.

State of California, *et al.*

Defendants and Respondents.

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

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## Appellants' 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: F069302 |
|---|---|
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| APPELLANT/PETITIONER: Stand Up for California and Barbara Leach<br>RESPONDENT/REAL PARTY IN INTEREST: State of California, et al. | |

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Date: September 25, 2014

Todd E. Lundell
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| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*<br>Todd E. Lundell #250813<br>Snell & Wilmer L.L.P.<br>600 Anton Blvd. #1400<br>Costa Mesa CA 92626<br>TELEPHONE NO.: 714-427-7000 FAX NO. *(Optional)*: 714-427-7799<br>E-MAIL ADDRESS *(Optional)*: tlundell@swlaw.com<br>ATTORNEY FOR *(Name)*: Stand Up for California and Barbara Leach | Superior Court Case Number: MCV062850<br>*FOR COURT USE ONLY* |
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1. This form is being submitted on behalf of the following party (*name*): Barbara Leach

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

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## Introduction

In August 2012, the Governor of California, Edmund G. Brown, Jr. ("Governor"), made the extraordinary decision to concur in a determination by the Secretary of the Interior ("Secretary") to take 305 acres of land into trust for an Indian tribe to develop a casino. The concurrence had the ultimate effect of ceding land previously within the state's jurisdiction to the tribe and creating new Indian land on which casino-style gaming that is otherwise prohibited may now be conducted. That is because, under federal law, the Secretary had no authority to take the land into trust to allow gaming without the Governor's concurrence. Whether the Governor had authority to concur, however, is a question of state law and is the ultimate question presented by this appeal.

It is undisputed that no California statute or constitutional provision explicitly gives the Governor power to concur in the creation of new Indian land for gaming purposes. Nonetheless, in sustaining a demurrer to appellants' complaint seeking a declaration that the Governor's concurrence was unauthorized, the trial court held that the Governor's authority to concur is contained within his power under the California Constitution to negotiate and conclude tribal-state compacts to allow gaming on existing Indian land. That decision was wrong.

The Governor's authority to negotiate and conclude compacts is narrow, and the law specifically dictates the permissible and impermissible subjects over which the Governor

can negotiate. Importantly, the Constitution requires that the Legislature ratify any compact negotiated by the Governor, which precludes the Governor from unilaterally binding the state to a tribal-state compact and ensures that the Legislature retains policymaking authority over gaming on Indian land.

By contrast, if empowered under state law, the Governor has virtually unlimited discretion whether or not to concur in the Secretary's decision to take land into trust for purposes of gaming. Neither federal nor state law prescribes any standards the Governor must follow in deciding whether or not to concur. And, once the Governor concurs, that decision is binding on the state, and the Legislature has no opportunity to determine whether to ratify the concurrence in light of the sensitive policy issues implicated thereby.

Simply put, the broad, undefined, and binding power to concur in the creation of new Indian land for gaming cannot be contained within the Governor's narrowly defined and non-binding authority to negotiate and conclude compacts.

Moreover, while the trial court did not reach the issue, we expect the defendants to argue that the Legislature's ratification of a compact concerning gaming on the land at issue effectively ratified the Governor's decision to concur in the creation of that Indian land. That is wrong. The bill ratifying the compact says nothing, explicitly or implicitly, that can be construed as ratifying the Governor's concurrence. To the contrary, the Legislature indicated that it ratified the compact because the Governor had

already unilaterally made the decision to create the land for gaming purposes and the compact would at least provide the state some revenue from that gaming.

Because the Governor had no authority to concur in the creation of new Indian land for purposes of gaming, the trial court's judgment must be reversed.

## Statutory Background

The factual and procedural history will be clearer if the court understands the statutory framework covering Indian gaming. Accordingly, we begin with an explanation of the federal and state law governing Las Vegas-style casino gaming on Indian land.

### A. Federal Indian gaming law

In 1987, the United States Supreme Court held that Indian tribes had the right to conduct gaming on Indian land, regardless of state gaming laws, unless the state prohibited gaming throughout the state. *California v. Cabazon Band of Mission Indians* (1987) 480 U.S. 202. In response to that decision, Congress enacted the Indian Gaming Regulatory Act ("IGRA") "to provide a statutory basis for 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 was intended "to shield [gaming] from organized crime and other corrupting influences, [and] to ensure that the Indian tribe is the primary beneficiary of the gaming operation . . . ." 25 U.S.C. § 2702(2).

"IGRA divides Indian gaming into three categories, or 'classes,' with different regulatory schemes for each." *Keweenaw Bay Indian Community v. United States* (6th Cir. 1998) 136 F.3d 469, 472. Those three categories are:

- **Class I gaming** includes "social games solely for prizes of minimal value or traditional forms of Indian gaming" associated with ceremonies or celebrations. 25 U.S.C. § 2703(6). Class I gaming "is within the exclusive jurisdiction of the Indian tribes" and is not regulated by the IGRA or the state. 25 U.S.C. § 2710(a)(1).

- **Class II gaming** includes bingo and games such as those allowed in California card clubs but does not include Las Vegas-style casino gaming. Class II gaming "is subject only to tribal regulation and federal oversight by the National Indian Gaming Commission." *Keweenaw Bay*, *supra*, 136 F.3d at 473 (citing 25 U.S.C. § 2710(a), (b), & (c)).

- **Class III gaming** is Las Vegas-style casino gaming. Class III gaming may only be conducted on Indian land "located in a State that permits such gaming for any purpose by any person, organization, or entity, [and must be] conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . ." 25 U.S.C. § 2710(d)(1).

Because Congress had previously authorized the Secretary of the Interior to acquire land and hold it in trust "for the purpose of providing land for Indians," 25 U.S.C. § 465, IGRA's authorization of gaming on Indian land had potentially broad impacts if tribes could acquire new land for gaming—which could infringe on states' sovereign choices regarding gaming policy.

To limit expansion of authorized gaming, IGRA expressly prohibits the acquisition of new land for the purpose of gaming. 25 U.S.C. § 2719(a) ("[G]aming regulated by this Act shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after the date of enactment of this Act [October 17, 1988] . . . ."). This prohibition is subject to several exceptions, including the "two part determination" exception that is at the core of this case. 25 U.S.C. § 2719(b)(1)(A) (the two-part determination exception).[1]

Under the two-part determination exception, a tribe may acquire new land on which to conduct gaming if, after consulting with the tribe and state officials, the Secretary of the Interior determines that gaming (i) would be in the best interest of the tribe and (ii) would not be detrimental to the surrounding

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[1] The other exceptions are often referred to as the "equal footing" exceptions and apply primarily to benefit newly-recognized tribes by "ensuring that tribes lacking reservations when IGRA was enacted [were] not disadvantaged relative to more established ones." *City of Roseville v. Norton* (D.C. Cir. 2003) 348 F.3d 1020, 1030; see also 25 U.S.C. § 2719(b)(1)(B)(i) (land settlement claim exception); § 2719(b)(1)(B)(ii) (initial reservation exception); § 2719(b)(1)(B)(iii) (restored land exception).

community. Importantly, the governor of the state in which the gaming would occur must concur with the Secretary's determinations for the exception to apply. 25 U.S.C. § 2719(b)(1)(A). The text of the statute is set forth in the margin.[2]

This exception is applicable to tribes that wish to conduct either class II or class III gaming on land acquired after 1988 because both types are regulated by IGRA. See 25 U.S.C. § 2710(a), (b), & (c)); § 2710(d)(1). Thus, although the state has no authority whatsoever to regulate class II gaming on Indian land, 25 U.S.C. § 2710(a), (b), & (c)), the governor's concurrence is still necessary for a tribe to acquire new land to be used for class II gaming.

By requiring that the governor concur in the Secretary's two-part determination, IGRA gives the state unfettered discretion to allow or disallow the creation of new Indian land for the purpose of class II or class III gaming. "Unless and until the appropriate governor issues a concurrence, the Secretary of the Interior has no authority under § 2719(b)(1)(A) to take land into trust for the benefit of an Indian tribe for the purpose of the

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[2] Under section 2719, the prohibition against off-reservation gaming does not apply when "(A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, *but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination*." 25 U.S.C. § 2719(b)(1)(A) (emphasis added).

operation of a gaming establishment." *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States* (7th Cir. 2004) 367 F.3d 650, 656; see also *Confederated Tribes of Siletz Indians of Oregon v. United States* (9th Cir. 1997) 110 F.3d 688, 696 ("[T]he Governor must agree that gaming should occur on the newly acquired trust land before gaming can in fact take place.").

Notably, although federal law requires the appropriate governor's concurrence to validate the Secretary's two-part determination, whether the governor has authority to concur is an issue of state law. *Confederated Tribes of Siletz*, *supra*, 110 F.3d at 697 ("The concurrence (or lack thereof) is given effect under federal law, but the authority to act is provided by state law.").

### B. Indian gaming law in California

In 1984, the people of California amended the California Constitution to ensure that the Legislature could not authorize casino gaming: "The [California] Legislature has no power to authorize, and shall prohibit casinos of the type currently operating in Nevada and New Jersey." Cal. Const. Art. IV, section 19(e). In 1998, the people of California approved a statutory measure that purported to authorize various forms of Indian gaming on Indian land in California. The California Supreme Court, however, held the measure invalid because, as a statutory measure, it violated Article IV, section 19(e), of the

California Constitution. *Hotel Employees and Restaurant Employees Int'l Union v. Davis* (1999) 21 Cal.4th 585, 589.

In response to the Supreme Court's ruling in *Hotel Employees*, the Legislature proposed an amendment to the Constitution, Proposition 1A, to authorize class III gaming on Indian land in California, and the people of California voted to enact that amendment. Proposition 1A added section 19(f) to Article IV, which gives the Governor the authority to negotiate "compacts" with federally recognized Indian tribes to allow Las Vegas-style gaming on Indian land, subject to Legislative ratification:

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

(Emphasis added). Because, as noted above, the state has no authority to regulate class II gaming, no compact is necessary for a tribe to conduct such gaming on any Indian land, even land acquired after 1988. 25 U.S.C. § 2710(a), (b), & (c).

Although the Governor has the authority to negotiate compacts to authorize gaming on existing Indian land, no

constitutional or statutory provision explicitly authorizes the Governor to concur in the Secretary's two-part determination in order to create new Indian land for the purposes of gaming.

## Factual Background

### A. The North Fork Tribe partners with a major Las Vegas casino developer to acquire off-reservation land for gaming purposes

The North Fork Rancheria of Mono Indians ("North Fork Tribe" or "Tribe") is a federally recognized Indian tribe with existing trust land near North Fork, California. [2AA Tab 11 at 410.] Rather than build a casino on that land, however, the Tribe wishes to do so elsewhere by invoking the two-part determination exception. [3AA Tab 20 at 555-556.]

To that end, the Tribe's financial partner, Las Vegas-based Station Casinos, purchased a 305-acre parcel adjacent to State Route 99 in Madera County (the "Madera site"), approximately 40 miles from the Tribe's existing land near North Fork. [3AA Tab 20 at 554-555.] The proposed casino will include an 83,065 square-foot main gambling hall, up to 2,500 Las Vegas-style slot machines, table games, and bingo. [*Id.* at 555.] The casino development will also include a 200-room hotel and 4,500 parking spaces. [*Ibid.*] Station Casinos has funded the development efforts, and in return the North Fork Tribe has signed a casino management contract with Station Casinos, giving Station Casinos the right to operate the casino and receive 24% of the casino's net income. [*Ibid.*]

### B. The Secretary makes a favorable two-part determination, and the Governor concurs

In March 2005, the North Fork Tribe applied to the U.S. Department of the Interior and the Bureau of Indian Affairs to have the Madera site taken into trust for gaming purposes. [3AA Tab 20 at 554.] In September 2011, then Assistant Secretary for Indian Affairs, Larry Echo Hawk, informed Governor Brown that the Secretary had made a favorable two-part determination and requested that Governor Brown concur in the determination. [*Id.* at 555-556.]

One year later, Governor Brown concurred with the Secretary's determination. In doing so, the Governor cited no statute or constitutional provision authorizing such a concurrence and stated, "While I am reluctant to allow the expansion of gaming on land currently ineligible for it, I concur in your determination in this case because of several exceptional circumstances." [1AA Tab 6 at 88.] In December 2012, the Secretary published notice in the Federal Register that the Madera site was to be taken into trust for the Tribe. 77 Fed. Reg. 71611 (Dec. 3, 2012). Subsequently, Station Casinos as owner granted the Madera site to the United States in trust for the North Fork Tribe. [1AA Tab 4 at 45.]

### C. The Governor negotiates a compact for gaming on the newly acquired land

On the day that the Governor concurred in the two-part determination, he also announced that he had already negotiated and concluded a compact with the North Fork Tribe for the

conduct and regulation of class III gaming at the Madera site. [3AA Tab 20 at 556.] Subsequently, the California Legislature passed AB 277, a bill to ratify the compact, which the Governor signed in July 2013. [1AA Tab 8 at 163.]

Before AB 277 went into effect, however, a citizen referendum on AB 277 qualified for the November 2014 ballot to allow California voters to decide whether to approve or reject the statute.[3] [3AA Tab 23 at 596, 599.] The compact, as ratified through AB 277, will only take effect under California law if voters approve AB 277 in the upcoming referendum.

**Procedural History**

Plaintiff and appellant Stand Up For California! is a nonprofit community watchdog group that focuses on gambling issues affecting California citizens. [3AA Tab 20 at 552.] Plaintiff and appellant Barbara Leach is a children's pastor and resident of the County of Madera who lives with her family approximately seven miles from the Madera site. [*Id.* at 553.]

Stand Up and Leach filed suit in March 2013, requesting (i) a declaration that the Governor's concurrence in the Secretary's two-part determination is void, and (ii) a writ of

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[3] Under California law, tribal-state gaming compacts are ratified by statute. Gov. Code § 12012.25(c). Except for urgency measures, statutes enacted at a regular session do not go into effect until January 1 of the next year. Cal. Const., art IV, § 8. This delayed effective date provides time for citizens of California, pursuant to Article II, Section 9, of the State Constitution, to exercise their right to qualify a referendum to approve or reject the statute.

mandate ordering the Governor to set his concurrence aside. [3AA Tab 20 at 560.] The operative complaint asserts claims against the State of California, Governor Brown, Kamala D. Harris, in her official capacity as the Attorney General of California, the California Gambling Control Commission, and the Bureau of Gambling Control. [*Id.* at 553.] Plaintiffs alleged that the Governor lacked the authority to concur in the two-part determination and that the concurrence violated the separation of powers clause of the California Constitution. [*Id.* at 557-560.]

The defendants filed a demurrer. Following the Legislature's passage of AB 277 ratifying the compact, the court requested supplemental briefing on the issue of whether AB 277 ratified not just the compact but also the Governor's concurrence. [2AA Tab 10 at 401; RT 32-33.] The Tribe then intervened to assert that AB 277 ratified the concurrence.[4] [2AA Tab 11 at 402-406; *id* at 441.]

The trial court sustained the demurrer. The court held that the Governor's authority to negotiate and conclude compacts for gaming on Indian land necessarily includes the authority to concur in the Secretary's two-part determination that creates the

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[4] The Tribe also cross-complained against the defendants and Cheryl Schmit, the official proponent of the AB 277 referendum, seeking a declaration that the referendum is invalid. [4AA Tab 36 at 747.] Neither Stand Up nor Barbara Leach was named a party to the cross-complaint. An appeal from the order sustaining a demurrer and dismissing that cross-complaint is currently pending in this court. [4AA Tab 36 at 766; 4AA Tab 37 at 770-771.]

Indian land in the first place. [3AA Tab 30 at 693.] Because it held that the Governor had the authority to concur, the trial court did not address whether AB 277 subsequently ratified the concurrence. [*Ibid.*]

After sustaining the demurrer, the trial court entered a judgment of dismissal [3AA Tab 32 at 706], from which Stand Up and Leach appeal. [3AA Tab 34 at 730-731.]

**Statement of Appealability**

The trial court entered a judgment of dismissal on March 12, 2014. [3AA Tab 32 at 706.] Stand Up and Leach timely filed their notice of appeal on April 11, 2014. [3AA Tab 34 at 730-731.]

The trial court's judgment resolved all issues between plaintiffs Stand Up and Leach, and all defendants named in the complaint. The judgment was therefore a final judgment appealable under Code of Civil Procedure section 904.1(a)(1), despite that the Tribe's cross-complaint against certain defendants was still pending. See, e.g., *Justus v. Atchison* (1977) 19 Cal.3d 564, 568 ("It is settled that the rule requiring dismissal does not apply when the case involves multiple parties and a judgment is entered which leaves no issue to be determined as to one party."), disapproved on other grounds in *Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 171; see also *Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 437.

## Standard of Review

In an appeal from an order sustaining a demurrer, this court reviews the trial court's decision de novo "to determine whether it alleges facts sufficient to state a cause of action under any legal theory, such facts being assumed true for this purpose." *McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.

## Legal Discussion

### I

### The Governor Lacked Authority to Concur in the Secretary's Two-Part Determination

The primary issue in this appeal is whether the Governor has authority to authorize the Secretary to create new Indian land in California for the purposes of gaming by concurring in the Secretary's two-part determination. Whether the Governor has such authority is entirely a matter of state law. As the Ninth Circuit has held, while "federal law provides the Governor with an opportunity to participate in the determination of whether gaming will be allowed on newly acquired trust land," when the Governor concurs in a two-part determination, he "acts under state law, as a state executive, pursuant to state interests." *Confederated Tribes of Siletz*, *supra*, 110 F.3d at 698. "The Governor does not act with 'significant authority' under federal law." *Id.* at 698. Rather, the Governor can only concur if *state law* gives the Governor that concurrence authority:

> When the Governor exercises authority under IGRA, the Governor is exercising state authority. If the Governor concurs, or refuses to concur, it is as a State

> executive, *under the authority of state law*. The concurrence (or lack thereof) is given effect under federal law, but the authority to act is provided by state law.

*Id.* at 697 (emphasis added).

As the balance of this brief shows, the California Governor has no authority under state law to concur in the creation of new Indian land for gaming. That authority is not found within the Governor's constitutional authority to negotiate compacts with Indian tribes, and it is not inherent in the Governor's powers as an executive. Moreover, as we show in Part II, the Legislature's approval of the compact did not ratify the concurrence.

### A. The concurrence power is not inherent in the power to negotiate and conclude compacts

As explained above, Article IV, Section 19(f), provides the Governor explicit authority "to negotiate and conclude compacts, subject to ratification by the Legislature" to allow Class III gaming on Indian land. Neither that constitutional provision, nor any other, mentions the power to create *new* Indian land for the purposes of gaming or to concur in the Secretary's two-part determination for that purpose. Nonetheless, the trial court held that the Governor's power to negotiate and conclude compacts *necessarily includes* the power to concur in a secretarial two-part determination. According to the court, "[t]o hold otherwise would make the phrase 'negotiate and conclude compacts' meaningless, where concurrence is necessary under, for example, the two part

test of 25 U.S.C. section 2719(b)(1)(A)." [3AA Tab 30 at 693.] The trial court was wrong.

The trial court's reasoning ignores critical distinctions between the power to negotiate compacts for class III gaming on existing Indian land and the power to concur in the creation of new Indian land for purposes of gaming. Close examination of those distinctions, as well as the distinct purposes of the two separate powers, demonstrates that the concurrence power cannot reside within the power to negotiate and conclude compacts. In short, a narrowly defined and non-binding power for an express purpose (the power to negotiate and conclude compacts) cannot subsume within it a broad, undefined, and binding power for a totally different purpose (the power to concur and authorize the creation of new Indian land for gaming).

### 1. The narrow and limited authority to negotiate and conclude compacts cannot contain the unlimited and absolute discretionary power to concur in a two-part determination

The Governor's authority to negotiate compacts granted by section 19(f) is narrowly defined and nonbinding on the state. First, compacts must be negotiated "in accordance with federal law." Cal. Const. art. IV, § 19(f). Under IGRA, the state is required to negotiate in good faith with a tribe that has jurisdiction over Indian land within the state and that requests a compact allowing gaming on that land. 25 U.S.C. § 2710(d)(3)(A). If the state refuses, the tribe has a right of action in federal court to compel negotiation. 25 U.S.C. § 2710(d)(7)(A). IGRA also

specifically enumerates the permissible subjects of negotiation. 25 U.S.C. § 2710(d)(3)(C) (listing permissible subjects of negotiation); see also 25 U.S.C. § 2710(d)(4) (forbidding state from imposing any type of tax or fee as part of negotiations). Thus, in exercising his authority under section 19(f), the Governor has no discretion in deciding whether to negotiate and is expressly guided through his exercise of the negotiation power.

Second, negotiated compacts are "subject to ratification by the Legislature" Cal. Const. art. IV, § 19(f). Thus, section 19(f)'s grant of power to the Governor requires action by the Legislature to be given effect; the Constitution expressly precludes the Governor from legally binding the state to a compact. This ratification requirement gives the Legislature the right to reject any compact negotiated by the Governor.

The contrast between this limited authority and the authority necessary to concur in the Secretary's creation of new land for gaming purposes is sharp. The state is granted unlimited discretion in deciding whether or not to concur in the Secretary's two-part determination, unconstrained by any particular federal law. Congress has not enacted any statute outlining or limiting permissible subjects a governor can or must consider in deciding whether to concur. And, in contrast to the compacting process, Congress did not grant tribes any right to negotiate with the state over the creation of new Indian land or any right of action against a state if the governor declines to concur in a two-part determination. *Lac Courte*, *supra*, 367 F.3d at 656. When it comes

to granting a concurrence, the state has no obligation whatsoever to the requesting tribe. *Ibid.* Thus, the governor has the absolute discretion to reject or approve the Secretary's two-part determination to create new Indian land for gaming, providing he is empowered to do so under state law.

The governor's absolute discretion in concurring also binds the state even without legislative ratification. Here, by concurring with the Secretary's determination to take the Madera site into trust, not only did the Governor bind the state to the creation of new Indian land for gaming, but he also effectively locked the Legislature out from weighing in on the decision.

True, the Legislature could have refused to ratify a compact with the North Fork Tribe for class III gaming on the Madera site, but the land would still exist in trust for the tribe for the purposes of gaming. Since no compact is required for class II gaming, the Governor's concurrence—all by itself—has created new Indian land for gaming purposes without any legislative input. 25 U.S.C. §§ 2719(b)(1)(A), 2710(a), (b), & (c). That is a power the Governor simply does not have when negotiating compacts that are subject to legislative ratification.

Moreover, the Legislature's refusal to ratify the compact may not necessarily preclude even class III gaming. In certain circumstances, IGRA provides that tribes that are unable to successfully negotiate tribal-state compacts may still engage in

class III gaming under procedures prescribed by the Secretary.[5] 25 U.S.C. § 2710(d)(7)(B)(vi). Relying on this provision, at least one federal district court has held that "[c]lass III gaming will be conducted on tribal lands. The only question is whether the gaming is conducted under Tribal-State compact with state regulation, or under procedures prescribed by the Secretary." *Yavapai-Prescott Indian Tribe v. State of Arizona* (D. Ariz. 1992) 796 F. Supp. 1292, 1298. Thus, by concurring in the Secretary's two-part determination, the Governor went far beyond the limited authority granted him to negotiate compacts.

This point cannot be overemphasized. The Governor's authority to negotiate and conclude compacts does not give him the power to bind the state to an agreement to participate in the regulation of class III gaming on Indian land. That decision is left to the Legislature, which under the Constitution must ratify any compact negotiated by the Governor. The limited power to negotiate compacts, which are nonbinding until ratified by the Legislature, granted the Governor by the Constitution simply cannot also confer on the Governor the unlimited power to bind the state to the decision to create new Indian land for gaming.

When it came time to vote on the ratification of the North Fork compact, California legislators were acutely aware that they

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[5] Of course, to conduct class III gaming under this provision, the Tribe would still have to qualify for such secretarial procedures, which would be contested. 25 U.S.C. § 2710(d)(7)(B). The point is that, even if the Legislature had refused to ratify the compact, there would still be significant question whether class III gaming would ultimately be conducted at the Madera site.

had already been locked out of the decision regarding whether or not to designate this land as Indian land for purposes of gaming. Senator Wright, speaking in support of ratifying the compact, pointed out that the Legislature's choice in deciding whether or not to ratify the compact did not include a decision about whether California wanted new Indian land created for gaming. That decision was already made—we believe improperly—by the Governor. The only decision left for the Legislature was whether the gaming on the newly created Indian land would be class III, which would be conducted pursuant to a compact that benefited certain state entities and other tribes and stakeholders,[6] or class II, which does not require a compact and therefore would not provide any of those benefits:

> We are not voting today to determine whether or not there will or won't be gambling on the site. That decision was made by the Department of the Interior, and *there is nothing that we are able to do about that*. The decision that we are making today is whether or not there is a compact that allows us to partake of the revenues, so that Madera County, so that the Chukchansi, so that all of the other benefits that will accrue from the compact take place…. So members, you can vote "no" and then there's no revenue for you and no benefit, because they will go Class II and walk away, or you can vote "aye" and the state and the community as a whole can benefit from a gaming exercise that will take place. I ask for an "aye" vote.

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[6] For example, the compact requires the North Fork Tribe to make nearly $5 million in payments to Madera county and the City of Madera pursuant to memorandums of understanding with the Tribe. [2AA Tab 9 at 194.] See also, post, footnote 10 (describing tribe's ability to negotiate with local governments to support a two-part determination).

[3AA Tab 16 at 507-508 (emphasis added).][7]

The Governor's actions presented the Legislature with a sort of Hobson's choice. Any legislator who opposed the creation of new Indian land for gaming could not have any impact on that decision by voting against the compact. The decision to create new Indian land had been made, and the Legislature's choice was limited to whether to obtain certain benefits from that gaming by ratifying the compact.

In sum, finding the unlimited concurrence power to be part of the Governor's power to negotiate compacts would allow the Governor to unilaterally control California gaming policy. Such a decision would effectively give the Governor the plenary power to determine whether land to which the Tribe previously had no legal claim should be converted to Indian land eligible for gaming. Furthermore, as occurred here, in granting the concurrence, the Governor can essentially direct the Legislature's decision to ratify the compact, thereby allowing class III casino-style gaming on land that was previously not even under the Tribe's jurisdiction. It would defy logic to hold that such an absolute power lives within the Governor's narrow and limited power to negotiate and conclude compacts.

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[7] Senator Wright was correct that the initial decision authorizing the creation of the Madera site for gaming was made by the Secretary, but that decision was not effective until the Governor concurred with the Secretary's two-part determination. See 25 U.S.C. § 2719(b)(1)(A). Without the Governor's concurrence, the Secretary could not have taken the land into trust for gaming.

### 2. The compact and concurrence requirement are independent and serve different purposes

The trial court's holding that the concurrence power is inherent in the Governor's authority to negotiate compacts is further undermined by the fact that the compact and the concurrence requirements are independent requirements derived from separate IGRA sections that serve entirely different purposes. The purpose of a tribal-state compact is to develop a cooperative regulatory scheme between a tribe and the state for class III gaming on Indian land. *In re Indian Gaming Related Cases* (9th Cir. 2003) 331 F.3d 1094, 1097. Without a tribal-state compact, the state has no authority to regulate Indian gaming. *Cheyenne River Sioux Tribe v. State of S.D.* (D.S.D. 1993) 830 F.Supp. 523, 526, aff'd, (8th Cir. 1993) 3 F.3d 273. Thus, for a state to have any regulatory authority, all class III gaming, whether on land acquired before 1988 or after, must be conducted pursuant to a tribal-state compact. 25 U.S.C. § 2710(d)(1)(C).

While compacts give the state limited regulatory authority over gaming, they also offer the tribe the ability to take advantage of the state's existing gaming policies and its regulatory agencies. *Pueblo of Santa Ana v. Kelly* (10th Cir. 1997) 104 F.3d 1546, 1549. Compacts allow both the state and tribe to protect their interests and to "shield [gaming] from organized crime and other corrupting influences." 25 U.S.C. § 2702(2); see also *In re Indian Gaming Related Cases*, *supra*, 331 F.3d at 1097 (stating that states have more serious and legitimate public

policy concerns with class III gaming than class II gaming and therefore Congress limited class III Indian gaming to only those states that already allow some measure of class III gaming).

California gaming laws and policies regarding the conduct and regulation of class III gaming on Indian land are well-developed to serve the above-stated purposes. For example, California state gaming agencies, such as the Gambling Control Commission and the Bureau of Gambling Control, have prescribed regulatory duties under tribal-state compacts to assist tribes in regulating gaming for the protection of both tribal and non-tribal citizens. [See e.g., 2AA Tab 9 at 233-234 ("The Tribe may request the assistance of the State Gaming Agency whenever it reasonably appears that such assistance is necessary to . . . protect public health, safety, or welfare.").] California has also protected its citizens from corrupt elements of gaming by specifically banning certain games. The Penal Code has long prohibited roulette and games incorporating the physical use of dice. Pen. Code § 330. Section 19(f) of the Constitution, while legalizing most forms of gaming under tribal-state compacts, did not legalize roulette or dice games, which tribes may not engage in under California tribal-state compacts. [2AA Tab 9 at 187.] Thus, when the Governor negotiates and concludes compacts, he acts within the state's existing law and policy in protection of the state's interests, fulfilling the very purpose of compacts as defined by IGRA.

By contrast, the purpose of the IGRA's concurrence provision is not to *regulate* the conduct of class III gaming, and it has nothing to do with protecting against organized crime and other corrupting influences that infiltrate class III gaming. Nor does IGRA's concurrence provision seek to balance the interests of states and tribes. And it does not, by itself, offer tribes the benefit of existing gaming policies or regulations.

Rather, the purpose of the concurrence provision is to provide the state the opportunity to reject the Secretary's decision to create new Indian land for the purpose of gaming, even if the Secretary determines the creation of such land is in the best interest of the tribe and would not be detrimental to the surrounding community. *Confederated Tribes of Siletz*, *supra*, 110 F.3d at 693 (stating that in the two-part determination exception "Congress recognized the federal and state concerns and provided that *both had to be satisfied* by requiring action by the appropriate federal and state officials" (emphasis added)). The state may have other broader, statewide interests to protect, and it is free to do so by rejecting the Secretary's determination.

Importantly, unlike the well-developed policy governing the Governor's use of the compact power, California has not addressed the legal and policy issues implicated by concurring in the creation of new Indian land for gaming. Neither the Constitution nor the Legislature, for example, has spoken on any of the potential, broader statewide policy concerns Congress allowed for in providing states with the power to veto a two-part

determination. And no California law explicitly authorizes the concurrence.

In fact, after the Legislature reluctantly ratified the compact here, Senator De Leon, Chair of the Senate Appropriations Committee, informed the Governor that the California Senate was creating a working group "to examine the policy and procedural implications associated with off-reservation gaming agreements in light of the concerns raised during the June 27th Senate vote on AB 277 . . . ." [3AA Tab 16 at 512.] Senator De Leon's letter explicitly asked the Governor *not to grant* any more concurrences until the Legislature addressed the policy concerns related to them. [*Ibid.*] In the letter, Senator De Leon explained that the concurrence effects a material change in California policy: "The Agreement between your Administration and the [North Fork Tribe] represents a significant policy departure from previous agreements in California by allowing the [Tribe] to build a casino off reservation property." [*Ibid.*] As Senator De Leon's letter makes clear, the Legislature has not yet made the fundamental policy determinations regarding off-reservation gaming that are implicated by the Governor's concurrence.

Simply stated, the legal and policy decisions undergirding the compact are not the same as the legal and policy decisions involved in the decision to authorize the Secretary to create new Indian land for gaming. The concurrence is about land. It results in the removal of land from the jurisdiction of the state, and once

removed the land is no longer subject to state or local taxation. See 25 U.S.C. § 465. It changes the distribution of land eligible for gaming in the state, moving it from remote reservations to more urban and suburban areas. [See 1AA Tab 6 at 86 (proponents of Proposition 1A stating that "[t]he majority of Indian Tribes are located on remote reservations . . .").] It provides the opportunity for non-Indian entities to pursue gaming from which they would otherwise be barred.[8]

Because the purpose and policy determinations related to the compact do not overlap with the purpose and policy determinations of the concurrence, and because the Legislature has yet to make the fundamental policy decisions implicated by off-reservation gaming, the concurrence power cannot live within the power to negotiate and conclude compacts.

### 3. The history of Proposition 1A evidences an intent to strictly limit the Governor's authority only to that necessary to negotiate compacts

Finally, in proposing and passing Proposition 1A—which, as explained above, added section 19(f) to Article IV of the California Constitution and gave the Governor authority to negotiate compacts—both the Legislature and the voters implicitly withheld from the Governor any additional authority beyond the limited power to negotiate and conclude compacts.

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[8] As occurred here, a tribe's corporate financial partners can purchase and develop land that the tribe could not have purchased or developed on its own.

The Tribal Government Gaming and Economic Self-Sufficiency Act, which was held unconstitutional in *Hotel Employees*, authorized the Governor to execute compacts on behalf of the state. Gov. Code § 98002(a). That statute also contained an explicit provision authorizing and directing the Governor to "execute, as a ministerial act on behalf of the state, *any additional documents* that may be necessary to implement this chapter or any Tribal-State compact entered into pursuant to this chapter." Gov. Code § 98002(c) (emphasis added).

After that statutory provision was deemed unconstitutional, the Legislature proposed Proposition 1A as a constitutional amendment to replace it, and the people voted to approve that amendment. Notably, Proposition 1A *did not contain* any provision comparable to Section 98002(c) that would allow the Governor to execute "additional documents" necessary to implement a compact. Nor has the Legislature enacted any comparable statute since.

The Legislature clearly knew how to delegate to the Governor powers beyond the narrow and defined power to negotiate and conclude compacts, but chose not to do so in updating the law in response to *Hotel Employees*. This represents an implicit determination not to give the Governor the broad authority he asserts in this case. Accord *Digital Biometrics, Inc. v. Anthony* (1993) 13 Cal. App. 4th 1145, 1160-1161 ("Courts should generally 'assume that the Legislature knew what it was saying and meant what it said.' . . . And this is particularly true

where the Legislature has omitted a provision which it has employed in other circumstances where the asserted effect is intended." (citation omitted)); *CPF Agency Corp v. Sevel's 24 Hour Towing Service* (2005) 132 Cal.App.4th 1034, 1050 (stating that when the Legislature amended a code section by including subdivisions (l) and (k) but omitting subdivision (i), "it made an implicit legislative determination that [subdivision] (i) [was] not enacted").

Moreover, the voters who enacted Proposition 1A intended to authorize class III gaming on then-existing Indian land but did not intend to allow the Governor to authorize the creation of new Indian land for purposes of gaming. Indeed, the plain language of section 19(f) does not provide the Governor any power to authorize the creation of new Indian land for the purpose of class II or class III gaming, but only grants the much narrower authority to "negotiate and conclude compacts, subject to ratification by the Legislature," for class III gaming on then-existing Indian land.[9] To interpret section 19(f) to include a grant of authority to create new Indian land for gaming would add to the Constitution a power that is not apparent from the plain meaning of the words. *Prof'l Eng'rs in Cal. Gov't v. Kempton* (2007) 40 Cal.4th 1016, 1037 ("Absent ambiguity, we presume that the voters intend the meaning apparent on the face of an initiative measure and the court *may not add to the statute* or

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[9] Because class III gaming can only occur on Indian land, such land must exist before gaming can occur. Again, the State is under no obligation to authorize the creation of such new land.

rewrite it to conform to an assumed intent that is not apparent in its language." (emphasis added; internal marks omitted)); see also *People v. Mathews* (1998) 64 Cal.App.4th 485, 489 ("We will not insert words which would, in effect, add a provision to the statute.").

To the extent that the text of section 19(f) is ambiguous as to whether it impliedly grants the Governor the power to concur, the court may consider the ballot summaries and arguments to resolve the ambiguity. *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 673, n.14 ("Ballot summaries and arguments may be considered when determining the voters' intent and understanding of a ballot measure."). The dispositive question is whether the average voter reading the summaries and ballot arguments contemplated that Proposition 1A also authorized the creation of new Indian land for the purpose of gaming. See *Legislature v. Eu* (1991) 54 Cal.3d 492, 504. The answer is "no."

The only reference to any type of Indian land in the official Voter Guide to Proposition 1A is to "reservations and Rancherias." There are no references to trust land in general and no references to the possibility that new Indian land will be created for the purpose of gaming. In fact, quite the opposite is implied.

The Voter Guide contains a plea by leaders of three California tribes for voters to approve Proposition 1A "so we can keep the gaming we have on our reservations." [1AA Tab 6 at 85.] In the ballot arguments, opponents expressed their concern that

the proposition would create new Indian land for gaming: "Casinos won't be limited to remote locations;" "Indian tribes are already buying up prime property for casinos in our towns and cities [a]nd . . . bringing in Nevada gambling interests to build and run their casinos." [*Id.* at 86.] Proponents dismissed these concerns as "scare tactics" because "Proposition 1A and federal law strictly limits Indian gaming to tribal land" and because "[t]he claim that casinos could be built anywhere is totally false." [*Ibid.*] Furthermore, proponents stated, "The majority of Indian tribes are located on remote reservations . . . ." [*Ibid.*]

If section 19(f) is interpreted to include the concurrence power, however, the proponents' assurances regarding Proposition 1A will be proven false. See *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1397-1398 ("We cannot condone the perpetuation of such a deception on those voters who enacted Proposition 215, relying on its ballot arguments and legislative digest assuring them that sales of marijuana would continue to be proscribed."). Proposition 1A's constitutional provision will have empowered the Governor to cede jurisdiction over land and authorize the creation of new Indian land anywhere in the state that the Secretary chooses. As discussed above, the only limitation on the Governor's action is that the Secretary first find that gaming on the new land is in the tribe's best interest and not detrimental to the surrounding

community.[10] The evidence strongly suggests this would be directly at odds with the voters' intent.

### B. The concurrence power is not inherent in the Governor's executive authority

The state defendants might also argue that the authority to concur in the Secretary's two-part determination may be found in the Governor's executive power to see that the law is faithfully executed. See Cal. Const. Art V, § 1. The trial court did not find this argument persuasive, and neither should this court. In California, the Governor cannot exercise legislative power without explicit constitutional or statutory authorization, and the power to create new Indian land for purposes of gaming is a legislative power.

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[10] The Department of Interior has defined "surrounding community" to refer only to local government entities and Indian tribes within 25 miles. 25 C.F.R. § 292.2. To secure support from the surrounding community, tribes are free to negotiate agreements with local governments to make payments from the casino's profits to "mitigate" any impacts of the casino, which is what the North Fork Tribe has done here. [See 2AA Tab 9 at 178.] See also *Worthington v. City Council of City of Rohnert Park* (2005) 130 Cal.App.4th 1132, 1138 (stating that a tribe entered "into a voluntary contractual arrangement with the City to make contributions and community investments to mitigate impacts of the casino project"). Thus the tribe can, in effect, bargain with local governments to support a favorable two-part determination. Furthermore, since most tribes are on remote reservations [See 1AA Tab 6 at 86], a proposed casino project in an urban area, such as the North Fork's, will face limited input by other tribes as the Secretary makes a two-part determination.

### 1. The Governor may not exercise legislative power without explicit constitutional or statutory authorization

In California, the powers of the Legislature are plenary. *Howard Jarvis Taxpayers' Assn. v. Fresno Metro. Projects Auth.* (1995) 40 Cal.App.4th 1359, 1374. The core functions of the Legislature include passing laws, levying taxes, making appropriations, and determining and formulating legislative policy. *Carmel Valley Fire Prot. Dist. v. State* (2001) 25 Cal.4th 287, 299, 374; see also Cal. Const., art IV, § 8 (charging the Legislature with "mak[ing] law . . . by statute")

The Governor's authority, by contrast, is limited to those powers conferred by statute or the Constitution. See, e.g., *Prof'l Eng'rs in Cal. Gov't v. Schwarzenegger* (2010) 50 Cal.4th 989, 1041; 62 Ops. Cal. Atty. Gen. 781, 784 (1979) ("[T]he Governor has powers derived both from the state Constitution and from statutes enacted by the Legislature."). Particularly where the Governor's actions "are legislative in nature, '[a]s an executive officer, [he] is forbidden to exercise any legislative power or function except as . . . the Constitution expressly provide[s].'" *St. John's Well Child & Family Ctr. v. Schwarzenegger* (2010) 50 Cal.4th 960, 986 (quoting *Lukens v. Nye* (1909) 156 Cal. 498, 501); see also *Harbor v. Deukmejian* (1987) 43 Cal.3d 1078, 1087.

The Supreme Court's decision in *Professional Engineers* illustrates the limited nature of the Governor's executive power. There, the California Supreme Court rejected the Governor's argument that "the power to furlough state employees in the face

of a fiscal emergency is an inherent part of [the Governor's] constitutional authority as the state's chief executive." *Prof'l Eng'rs*, *supra*, 50 Cal.4th at 1015. The court held that the Governor lacked such power because neither the Constitution nor any statute conferred it. *Ibid.* ("[I]t is the Legislature, rather than the Governor, that generally possesses the ultimate authority to establish or revise the terms and conditions of state employment . . . ."); *id.* at 1041 (analyzing various statutory provisions and holding that none conferred the power at issue). *Professional Engineers* thus makes clear that the Governor has only those powers conferred by the Constitution or by a statute.[11]

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[11] In the proceedings below, the Governor argued that his actions did not violate the separation of powers clause because they did not *materially impair* the constitutional functions of another branch. [1AA Tab 3 at 20 (citing *Marine Forests Society v. California Coastal Comm'n* (2005) 36 Cal.4th 1, 45).] The trial court similarly relied on *Younger v. Superior Court* (1978) 21 Cal.3d 102, 117, to conclude that the California Supreme Court "has made it clear" that each branch may exercise some powers of the other branches. [3AA Tab 30 at 692-693.] These cases are inapposite. In addressing the powers of the Governor, the Supreme Court has not invoked these separation-of-powers principles at all. Rather, in the three most recent cases on the issue, the Supreme Court has not relied on *Marine Forests*, *Younger*, or any other case relating to separation of powers, but has focused solely on the rule that the Governor may act only if authorized by the Constitution or delegated authority from the Legislature. See *St. John's Well Child*, *supra*, 50 Cal.4th at 986; *Professional Engineers*, *supra*, 50 Cal.4th at 1015, 1041; *Harbor*, *supra*, 43 Cal.3d at 1087.

### 2. The power to concur in the creation of new Indian land for purposes of gaming is a legislative power

The power to concur, which creates new Indian land for the purposes of gaming and effectively cedes the state's jurisdiction over that land, is a legislative power not an executive power that the Governor may exercise by fiat.

There can be no legitimate dispute that "[t]he power to place public lands in trust for Native Americans for the purpose of gaming is not an Executive power." *Confederated Tribes of Siletz*, *supra*, 110 F.3d at 694. Rather, as the Ninth Circuit has held, "[t]he power delegated to the Secretary to acquire Indian trust lands for gaming purposes is a legislative power." *Id.* at 696. If the power to place land in trust for Indian tribes for purposes of gaming is a legislative power—and it is—then so too must be the state's power to concur in the creation of that very same Indian land for those same purposes.

Moreover, the Governor's concurrence in the Secretary's two-part determination made the decision, on behalf of the state, to participate in IGRA's program regarding newly-acquired Indian land. As the California Attorney General has recognized, "the decision of the State of California to participate in a federal program is basically a legislative act and the Legislature has the exclusive power to determine whether and the manner in which the state shall participate." 62 Ops. Cal. Atty. Gen. 781, 784 (1979).

Most importantly, the Governor's concurrence set California public policy regarding off-reservation gaming that previously did not exist in California, and setting public policy is a legislative, not executive, function. *Carmel Valley Fire Prot. Dist.*, *supra*, 25 Cal.4th at 299 (the Legislature "is charged with the formulation of policy"). Deciding whether or not to concur in the creation of new Indian land for purposes of gaming involves making fundamental policy decisions regarding whether, how, and where to allow off-reservation gaming. Those policy decisions involve balancing the interests of nearby tribes and local communities, and implicate broader statewide policy regarding whether and under what circumstances off-reservation gaming should be allowed.

Indeed, as the Governor acknowledged in his concurrence here, "exceptional circumstances" were necessary to "allow the expansion of gaming on land currently ineligible for it . . . ." [1AA Tab 6 at 88.] Yet, the Governor did not, and could not, point to any existing policies that could guide him in determining what constitutes "exceptional circumstances" or even whether such circumstances should justify an exception in the first instance. Instead, the Governor simply created, defined, and applied an "exceptional circumstances" exception entirely out of whole cloth.

As explained in more detail above, California has not addressed the policy issues implicated by off-reservation gaming. There is no existing policy granting the Governor power to concur in the Secretary's two-part determination, specifying the factors

the Governor must take into consideration in deciding whether or not to concur, or otherwise governing the expansion of gaming onto newly acquired Indian land. And, making those fundamental policy decisions is a legislative function, not an executive one. *Carmel Valley Fire Prot. Dist.*, *supra*, 25 Cal.4th at 299.

The policy determinations involved in creating new Indian land also have significant consequences on the state's regulatory and taxing authority. For example, land taken into trust for a tribe by the United States "shall be exempt from state and local taxation." 25 U.S.C. § 465. Additionally, the trust acquisition converts land formerly under the jurisdiction of the state into Indian country. *Mich. Gambling Opposition v. Kempthorne* (D.C. Cir. 2008) 525 F.3d 23, 39 (Brown, J., dissenting) ("By taking land in trust for Indians, the Secretary removes it from the jurisdiction of the State in which it sits and places it under the authority of a tribe." (citing *Alaska v. Native Vill. of Venetie Tribal Gov't* (1998) 522 U.S. 520, 529-531)).

These consequences further demonstrate the legislative nature of the concurrence. See, e.g., *River Garden Retirement Home v. Franchise Tax Bd.* (2010) 186 Cal.App.4th 922, 937 (refusing to reform statute to preserve constitutionality and holding that "we will not encroach *on the legislative function by making a tax policy* disguised as statutory reformation" (emphasis added)); *Arnel Development Co. v. City of Costa Mesa*

(1980) 28 Cal.3d 511, 523 (describing "the making of land-use policy" as "a legislative act").

In short, the state's decision to allow land to be removed from the state and local taxing authorities and authorize the creation of new Indian land for gaming under section 2719(b)(1)(A) involves fundamental policy determinations implicating state sovereignty and the best interests of other nearby tribes and local communities, as well as broader statewide concerns regarding the expansion of gaming. These policy determinations belong to the Legislature in the first instance. In order for the Governor to make these policy decisions for the state by concurring in the two-part determination, therefore, the Legislature must have conferred that authority on the Governor by statute or through the Constitution.[12]

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[12] In a recent decision, the Third District held that the Governor's concurrence was not the act of a "public agency" subject to the requirements of the California Environmental Quality Act because "it is the Governor—not his office—who took the action" of concurring in the Secretary's determination. *Picayune Rancheria of Chukchansi Indians v. Brown* (September 24, 2014) __Cal.App.4th __, 2014 WL 4732582. In so holding, the court noted that "under the federal provision at issue here (25 U.S.C. § 2719(b)(1)(A)), the power to concur in the Secretary of the Interior's two-part determination is vested in 'the Governor of the State in which the gaming activity is to be conducted," and it is also the individual who holds the office of the Governor in whom our state constitution vests the 'supreme executive power' of the state (Cal. Const., art. V, § 1)." *Picayune Rancheria*, *supra*, 2014 WL 4732582. Whether the Governor actually had authority to concur was not an issue in that case, however, and the Third District's decision cannot be construed as holding that the

## II

### The Legislature's Ratification of the Compact Was Not a Ratification of the Governor's Concurrence

In the proceedings below, both the Governor and the North Fork Tribe argued that even if the Governor lacked the authority to concur with the Secretary's two-part determination to take land into trust for the tribe, the Legislature's ratification of the compact through AB 277 was a statutory ratification of the Governor's ultra vires action. The trial court did not reach this issue because it held that the Governor had the necessary authority to concur. Nonetheless, we expect the Governor and the Tribe to raise this ratification argument as an alternative ground for this court to affirm the judgment. This argument must be rejected.

By ratifying the compact through AB 277, the Legislature gave its approval to an agreement between the State of California and Tribe regarding the conduct and regulation of class III gaming at the Madera site. The Legislature did not enact a statute subsequently validating the Governor's unilateral decision to cede jurisdiction over the land and authorize the creation of new Indian land for class II or class III gaming. Since

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governor's authority derived either from federal law or from his authority as an executive. *American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1039 ("As we have often observed, . . . cases are not authority for propositions not considered." (internal marks omitted)). Rather, the court was simply recognizing that both federal and state law point to the governor as an individual, and not to the governor's office, as the source of the concurrence.

the land had already been taken into trust for the Tribe—which could now conduct class II gaming on that land, and possibly class III gaming under secretarial procedures, see ante at 18-19, regardless of whether the Legislature ratified the compact—the Legislature's choice to approve the compact simply cannot be interpreted as ratifying the concurrence.

### A. AB 277 does not mention the Governor's concurrence or give any indication that it serves as a post-hoc validation of the Governor's actions

In the proceedings below, the state defendants seized on the court's holding in *Professional Engineers* that the Legislature's passing of a revised budget act ratified the Governor's ultra vires actions with regard to employees whose salaries derived from that budget. *Prof'l Eng'rs in Cal. Gov't*, *supra*, 50 Cal.4th at 1043-1052. Under the analysis in *Professional Engineers*, however, AB 277 did not ratify the Governor's ultra vires concurrence.

In *Professional Engineers*, the Governor issued an executive order implementing a mandatory two-day-a-month unpaid furlough of most state workers employed in the executive branch. Thereafter, several employee organizations filed suit claiming the Governor lacked authority to unilaterally implement the furlough. The case eventually reached the California Supreme Court, which held that the Governor lacked statutory or constitutional authority over the furlough.

The court further explained, however, that shortly after the furlough went into effect, the Legislature enacted and the Governor signed a revised budget act that included a provision stating that "each item of appropriation in this act . . . shall be reduced . . . to reflect a reduction in employee compensation achieved through . . . existing administration authority . . . ." *Id.* at 1044. The court held that this provision reflected the Legislature's intent to reduce employee salaries by the amount provided for in the Governor's furlough plan, thereby ratifying the Governor's unilateral action. *Id.* at 1045-1047. According to the court, "the legislative history of the provision in question clearly and explicitly establishes that the reductions in appropriations for employee compensation that were included in the bill *reflected the two-day-a-month furloughs*." *Id.* at 1046 (emphasis in original). Furthermore, there was no other "existing administration authority" to which the Legislature could have been referring. *Id.* at 1047.

In contrast to the budget act at issue in *Professional Engineers*, AB 277 makes no reference, expressly or impliedly, to the Governor's concurrence or any action taken by the Governor. To the contrary, the Legislature was very clear that AB 277 would ratify only the compacts between the state and certain tribes, and certain determinations regarding the California Environmental Quality Act:

> This bill would ratify the tribal-state gaming compact entered into between the State of California and the North Fork Rancheria Band of Mono Indians,

> executed on August 31, 2012. The bill would also ratify the tribal-gaming compact entered into between the State of California and the Wiyot Tribe, executed on March 20, 2013. The bill would provide that, in deference to tribal sovereignty, certain actions are not projects for purposes of CEQA.

[3AA Tab 13 at 466.]

The Legislature's failure to even mention the Governor's concurrence is fatal to any argument that the Legislature's action somehow ratified that concurrence. In addressing unauthorized actions by state agencies, California courts have held that "subsequent legislative action . . . can amount to a ratification only if the regulations are specifically referred to." *Yeoman v. Department of Motor Vehicles* (1969) 273 Cal.App.2d 71, 80-81; see also *Blatz Brewing v. Collins* (1948) 88 Cal.App.2d 438, 448 (finding no subsequent legislative ratification where legislation did not specifically refer to the agency's unauthorized rule, and stating that "[i]f ratification had been intended, it is rather strange that, . . . the Legislature . . . would have used such an oblique way of approving the rule").[13]

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[13] Other cases that were cited to the trial court for the proposition that the Legislature can ratify another's ultra vires acts involved statutes that explicitly ratified, confirmed, validated, and declared legal such acts or expressly referred to such acts in the statute. [2AA Tab 11 at 442 (citing *Hoffman v. Red Bluff* (1965) 63 Cal.2d 584, 592 n.6 (Improvement Act of 1911 validated previously unauthorized actions stating, "All acts and proceedings heretofore taken by or on behalf of any public body under any law, or under color of any law, for the authorization, issuance, sale, or exchange of bonds of any such public body for any public purpose *are hereby confirmed, validated, and declared*

True, the compact itself references the concurrence, but the compact also specifically states in Section 14.2(d) that it "shall be deemed null and void" if the Governor's concurrence is invalidated. [2AA Tab 9 at 282.] In ratifying the compact, the Legislature could have ensured that the concurrence was not invalidated by simply stating that it was ratifying the concurrence. The Legislature did not do so, and there is nothing in the ratification of the compact itself that implies such an intent. Cf. *Whitman v. American Trucking Associations* (2001)

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*legally effective*"(emphasis added)); *Chuoco Tiaco v. Forbes* (1913) 228 U.S. 549, 556. (act passed by the Philippine legislature to ratify the governor general's actions "recit[ed] that the governor general had authorized the deportation 'in the exercise of authority vested in him by law,'[and] enacted that his action was '*approved* and *ratified* and *confirmed*, and in all respects *declared legal*, and not subject to question or review'"(emphasis added)); *United States. v. Heinszen & Co.* (1907) 206 U.S. 370, 381 (Congress passed act stating that the President's unauthorized order "is *hereby legalized* and *ratified* and *confirmed* as fully to all intents and purposes as if the same had, by prior act of Congress, been specifically authorized as directed" (emphasis added)); *National Civil Service League v. City of Santa Fe* (D.N.M. 1973) 370 F.Supp. 1128, 1133 (City Council passed unanimous resolution allocating $21,000 to "Consultants and Contract Services," an exact restatement of an allocation in an unauthorized agreement by the City Manager); *Fairbanks North Star Borough v. State* (Alaska 1988) 753 P.2d 1158, 1160 ("In this case, the state legislature passed H.B. 132 with the express intention of validating the governor's impoundment orders"); *De Muro v. Martini* (N.J. 1949) 64 A.2d 351, 354 (local board cured contract that was not executed according to statutory requirements by enacting an ordinance that made "special reference . . . to the plans and specifications prepared by [the improperly executed contract] and the same were specifically approved")).]

531 U.S. 457, 468 ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

Simply stated, there is no provision of AB 277 which refers to or authorizes the creation of the Madera site for gaming. Rather, that legislative act simply ratified the compact to allow class III gaming on a site that had already been taken into trust as a result of the Governor's act.

### B. The Governor's ultra-vires concurrence deprived the Legislature of its legislative prerogative to authorize the creation of new Indian land for the purpose of gaming

The *Professional Engineers* court found that the revised budget act could ratify the Governor's ultra vires action because, despite the Governor's action, the Legislature maintained ultimate control of the salary and wages of state employees through its power of appropriations. *Prof'l Eng'rs in Cal. Gov't*, *supra*, 50 Cal.4th at 1047-1048; see also *Brown v. Superior Court* (2011) 199 Cal.App.4th 971, 986 (interpreting the holding in *Professional Engineers*); *Service Employees International Union, Local 1000 (SEIU) v. Brown* (2011) 197 Cal.App.4th 252, 265-269 (stating that the revised budget act ratified the Governor's furlough plan only to the extent that employees' salaries were funded through appropriations). In ratifying the North Fork compact, however, the Legislature did not maintain ultimate

control over its prerogative to determine whether to create new Indian land for gaming.

Here, the Governor unilaterally exercised the power to determine whether to participate in IGRA's off-reservation gaming exception and allow for the creation of new Indian land for gaming purposes. Not only did the Governor unilaterally make the decision, but by concurring, the Governor prevented the Legislature from even weighing in on that determination.

As explained above, even if the Legislature refused to ratify the compact, it could not have reversed the Governor's decision to create new Indian land for gaming. As Senator Wright noted prior to the vote on ratification, "We are not voting today to determine whether or not there will or won't be gambling on the site. That decision was made by the Department of the Interior, and there is nothing that we are able to do about that." [3AA Tab 16 at 507.] During the same floor statements, Senator Yee noted that the Legislature must "come up with some kind of understanding as to where can the legislature weigh in about where some of these tribes are going to locate their particular casinos and what input we can have in moderating that particular siting . . . ." [*Id.* at 505.]

As these Senators made clear, the Governor's actions deprived the Legislature of its power to decide whether to participate in a federal program allowing for the creation of new Indian land for the purpose of class II or class III gaming. Unable to do anything about the Governor's authorization of new land for

gaming, the Legislature simply passed a bill ratifying the compact. The decision to ratify the compact and thereby allow, subject to state regulation, class III gaming on land that was already created by the Governor's concurrence simply cannot be construed as a ratification of that concurrence.

## Conclusion

For the reasons stated above, the trial court's order sustaining the demurrers to the plaintiffs' First Amended Complaint should be reversed.

Dated: September 25, 2014

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## Certificate of Word Count

The undersigned certifies that pursuant to the word count feature of the word processing program used to prepare this brief, it contains 11,110 words, exclusive of the matters that may be omitted under rule 8.204(c)(3).

Dated: September 25, 2014

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## Proof of Service

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 600 Anton Boulevard, Suite 1400, Costa Mesa, CA 92626-7689.

On September 25, 2014, I served, in the manner indicated below, the foregoing document described as **Appellants' Opening Brief** on the interested parties in this action by placing a true copy thereof, enclosed in sealed envelopes, at Costa Mesa, addressed as follows:

*See the Attached Service List*

- ☒ BY REGULAR MAIL: I caused such envelopes to be deposited in the United States mail at Costa Mesa, California, with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the United States 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)).
- ☒ BY ELECTRONIC SERVICE: C.R.C., rule 8.212(c)(2)(A)) as indicated on the service list.
- ☐ BY PERSONAL SERVICE: I caused such envelopes to be delivered by hand to the offices of the addressees. (C.C.P. § 1011(a)(b)).
- ☐ BY FEDERAL EXPRESS: I caused such envelopes to be delivered by air courier, with next day service, to the offices of the addressees. (C.C.P. § 1013(c)(d)).

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

Executed on September 25, 2014, at Costa Mesa, California.

Sandy Cairelli

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