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.

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

Appellants' Reply Brief

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Introduction

Under California law, the powers of the Governor are limited to those granted by the California Constitution and statutes enacted by the Legislature. While the California Supreme Court has consistently taken a narrow view of the Governor's powers, which has not included an analysis of implied, incidental, or ancillary powers, the Governor and the North Fork Tribe take the opposite view, arguing for a broad, sweeping interpretation of the Governor's powers. Ignoring controlling Supreme Court precedent, both respondents rely instead on separation of powers cases implicating other branches of government and on cases from other jurisdictions that do not address the issues before this court.

When Governor Brown concurred in the two-part determination and authorized gaming (both class II and class III) to occur at the Madera site, he exercised a power that is not granted by Section 19(f) of the California Constitution, which grants him only the power negotiate compacts "subject to ratification by the Legislature." Section 19(f) does not grant the power to create the precondition to a compact—that is, the existence of Indian land on which gaming can properly be conducted under the Indian Gaming Regulatory Act ("IGRA").

Moreover, California's existing gaming policy, which is expressed in Section 19 of the Constitution, expressly provides that any authorization of gaming in California is reserved for the Legislature. Consequently, authorizations of gaming are not

within the executive powers of the Governor, and any authority the Governor has to concur must derive from a statutory delegation of the Legislature's power. Because the Legislature has not enacted any statute delegating the concurrence power to the Governor, the Governor lacked the authority to concur.

Finally, all parties agree that on November 4, 2014, California voters, by popular referendum, rejected the Legislature's enactment of Assembly Bill No. 277 ("AB 277"), which ratified the compact between the state and the North Fork Tribe. The referendum rendered AB 277 null and void, and no statute ratifying the compact ever went into effect. Nonetheless, the Tribe and the Governor argue that the Legislature's mere enactment of AB 277 constitutes an express statutory ratification of the concurrence. Not so. There can be no statutory ratification because there is no statute that purports to ratify even the compact, let alone the concurrence.

Because the Governor lacked the authority to concur in the Secretary's two-part determination, and because the referendum has rendered the statutory ratification issue moot, the trial court's judgment must be reversed.

Legal Discussion

I

Neither the California Constitution nor any Statute Authorizes the Governor to Concur in the Secretary's Two-Part Determination

A. Article IV, § 19(f), does not give the Governor the authority to concur

1. The text of Section 19(f) does not authorize the Governor to concur

While the Governor urges a plain language interpretation of Section 19(f) (GRB at 17), neither the text of Section 19(f), nor its implementing statute, mentions or refers to the concurrence power in any way. Rather, Section 19(f) grants the governor only the narrow and limited power to negotiate and conclude compacts for class III gaming on Indian land. Cal. Const., art. IV, § 19(f); Gov. Code. § 12012.5(d) ("The Governor is the designated state officer responsible for negotiating and executing, on behalf of the state, tribal-state gaming compacts with federally recognized Indian tribes in the State of California pursuant to the federal [IGRA] for the purpose of authorizing class III gaming, as defined in that act, on Indian land."). The Governor's conclusion that the concurrence power is nonetheless included in Section 19(f)'s "plain meaning" is meritless.

The Governor finds the concurrence power in Section 19(f)'s requirement that the Governor negotiate compacts for class III gaming on "Indian lands in accordance with federal law." According to the Governor, "As long as Indian lands are

established 'in accordance with federal law,' meaning IGRA, those lands become eligible for gaming." [GRB at 29.] The Governor continues, "Because the language of article IV, section 19, subdivision (f) does not distinguish among the different federal procedures for how lands may become Indian lands," the concurrence power is within the Governor's power to negotiate and conclude compacts. [*Ibid.*] The court should reject this argument.

First, under the plain meaning of Section 19(f), the phrase "in accordance with federal law" does not, as the Governor claims, modify "Indian lands" or refer to any mechanism under which non-Indian lands become Indian lands. The phrase modifies the "negotiat[ion]" for the "operation of slot machines" and the "conduct of" the other class III games listed. These "actions"—the class III gaming that may be conducted pursuant to a compact—must be done "in accordance with federal law." As explained in the opening brief (at 16-17), the Governor is expressly confined by IGRA to what he can and cannot negotiate, and the gaming regulated by the compact must be regulated so as to comply with federal law.

The Governor, however, goes further to claim that his concurrence was authorized because the concurrence is the mechanism under federal law by which the land in question here would become Indian land on which gaming could occur, which gaming is then subject to the state compact negotiated by the Governor. [GRB at 19.] But this argument is circular. The

existence of Indian land on which gaming can occur *is the precondition to* the Governor's authority to negotiate a compact pursuant to which such gaming on that land would be regulated. Nothing in Section 19(f) even purports to give the Governor the authority to create that precondition.[1] *Cf. Zack v. Marin Emergency Radio Authority* (2004) 118 Cal.App.4th 617, 630 (holding that the "power to construct and operate an emergency communiciations system or service was the "precondition," not the result, of the "statutory power to issue bonds for that purpose").

Second, while the compact must be negotiated in accordance with federal law, and class III gaming must be conducted in accordance with federal law, the Governor's concurrence need not be in accordance with federal law—that is, the Governor is not limited by federal policy or the determinations of the Secretary in deciding whether to concur. As the Seventh Circuit has pointed out, "[B]efore the land is taken into trust, it is within the jurisdiction of a state and is not yet

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[1] Appellants recognize that Section 19(f) does not distinguish among different types of Indian lands as defined by IGRA—e.g., whether those lands were procured pre- or post-1988. Appellants also recognize that Section 19(f) does not apply only to lands that existed at the time of Proposition 1A's passage. Obviously, the Governor has authority under Section 19(f) to negotiate compacts on Indian lands that are properly determined to be eligible for gaming under the two-part determination. Appellants' point is simply that the authority to negotiate such compacts does not include the authority to create the precondition—the existence of Indian land on which gaming can occur—which would trigger the necessity and opportunity to negotiate a compact.

subject to federal regulation under IGRA . . . ." *Lac Courte Oreilles Band of Superior Chippewa Indians of Wisconsin v. United States* (7th Cir. 2004) 367 F.3d 650, 657. Consequently, there is no basis for the Governor's bald assertion that the phrase "in accordance with federal law" provides for the concurrence power.

The Tribe applies the same flawed reasoning to assert that, in concurring, the Governor is limited to deciding whether gaming would be in the best interest of the Tribe and would not be detrimental to the surrounding community—the same two-part determination made by the Secretary. [NFRB at 25.] But section 2719(b)(1)(A) lists the requirements *the Secretary must find*, not any requirements that the Governor must find.

There is nothing preventing the concurrence from being based on state needs and state policies rather than on federal requirements or policies. Indeed, the Tribe itself points this out by listing all of the reasons the Governor provided in issuing his concurrence. [NFRB at 25 n.5.] The concurrence was granted for the benefit of the Wiyot Tribe and its environmentally sensitive land; it was granted to benefit other tribes that do not have casinos or are unable to develop casinos; it was granted because the Madera site was not in an urban area.[2] [*Ibid.*] These reasons

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[2] While this last reason appears to be related to the surrounding community, it does not address whether the gaming would be detrimental to the surrounding community. It is a policy statement that concurrences should not be granted for gaming in urban areas of California.

are not confined to the best interest of the Tribe; nor do they demonstrate that the casino will not be detrimental to the surrounding community.

By its plain language, Section 19(f) is concerned solely with compacts for class III gaming on Indians lands that are, under federal law, already authorized for gaming. That provision says nothing about the authority to concur in the creation of Indian lands on which gaming can occur, which is the precondition for the compact.

2. The concurrence power is not necessary to "effectuate" the power to negotiate compacts

The Governor and the Tribe also argue that the concurrence is authorized because it is necessary for the Governor to fulfill his constitutionally prescribed duty to negotiate compacts. [GRB at 23; NFRB at 17.] As explained in the opening brief, the trial court accepted this argument, concluding that "[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.]

But the California Supreme Court has rejected the contention that the Governor's unilateral action is authorized where *under the circumstances* it is *necessary* to meet a prescribed duty. *Professional Engineers in California Government v. Schwarzenegger* (2010) 50 Cal.4th 989, 1025 (rejecting the trial

court's finding that a fiscal emergency, which the Governor had declared under his express constitutional authority, authorized the furlough program to ensure state agencies would not be "unable to meet their statutorily mandated functions"). Rather, the Court scrutinized the language and purposes of the statutes that purportedly authorized the Governor's unilateral action but did not address what was "necessary" under particular circumstances. *Id.* at 1025-1035. Neither the Tribe nor the Governor cites or attempts to distinguish this controlling precedent.

Further, the respondents' contention that the compacting power would be meaningless without the concurrence power is factually untrue. The power granted by Section 19(f) can, of course, be employed meaningfully in any case where a concurrence is not required to authorize gaming on pre-existing or newly acquired Indian land. And the Governor has exercised this non-meaningless power extensively. [3AA Tab 26 at 625 ("[T]he State of California has signed and ratified Tribal-State Gaming Compacts with 71 Tribes.").][3]

The fact that no new Indian lands could be properly acquired under the two-part determination if the Governor does not have the authority to concur does not diminish the Governor's

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[3] Appellants acknowledged in the proceedings below that the Fort Mojave Tribe had land taken into trust under a two-part determination in which the Governor concurred. But no legal challenge was brought against the concurrence in that instance. [3AA Tab 15 at 487.]

compacting power. Indeed, the two-part determination is the only exception under which Congress expressly provided for the state to have veto power—through the Governor's concurrence—over the creation of Indian land for purposes of gaming. *Confederated Tribes of Siletz Indians of Oregon v. United States* (9th Cir. 1997) 110 F.3d 688, 693. The compacting power, therefore, remains robust.

In arguing that the Governor was properly authorized, the Tribe states that "the concurrence power is necessary to effectuate [the Governor's] expressly granted powers to negotiate and conclude compacts." [NFRB at 17.] Untrue. If by "effectuate" the Tribe is referring to Governor's ability to negotiate with the Tribe for a compact to conduct class III gaming on Indian lands in accordance with federal law, the concurrence is not necessary. In fact, both Governor Schwarzenegger and Governor Brown negotiated and concluded compacts with the North Fork Tribe before Governor Brown concurred. Governor Schwarzenegger fulfilled his prescribed duty four years before the concurrence: "[I]n April 2008, the State and the Tribe *executed a tribal-state gaming compact* but agreed to wait for the Legislature to consider ratification of that compact until the Secretary made a final determination to take the 305-Acre Parcel into trust . . . ." [2AA Tab 2 at 178 (North Fork Compact preamble) (emphasis added).] In 2012, Governor Brown negotiated and concluded a revised compact with the Tribe. [*Id.* at 286.] Nowhere is there mention of the Governor needing to concur in order to effectuate his duty to negotiate.

If, however, by "effectuate" the Tribe is referring to the power to give legal effect to the compact, the Governor is expressly prohibited from doing so. This is a power of the Legislature, which must ratify the compact before it has any legal effect. Cal. Const., art. IV, § 19(f).

For the Tribe, the Governor's concurrence is indeed necessary. Without it, the Secretary cannot take the land into trust for purposes of gaming, the current non-Indian land will not become Indian land on which gaming can occur subject to compacts negotiated by Section 19(f), and the Tribe cannot compel the Governor to negotiate a compact. 25 U.S.C. § 2710(d)(3)(A). Also, obtaining a concurrence is necessary for the Secretary to exercise his authority under IGRA. 25 U.S.C. § 2719(b)(1)(A).

But none of this leads to the conclusion that the Governor's compact power includes the power to concur. Indeed, respondents offer no authority for the proposition that Section 19(f)'s authorization to negotiate compacts also empowers the Governor to create the precondition for those negotiations—that is, to create the existence of Indian land on which gaming can be conducted under IGRA. Such a broad interpretation of Section 19(f) is simply unwarranted.

Finally, as appellants demonstrated in their opening brief (at 16-26), the concurrence power and the power to negotiate compacts, though related and separately required in this particular instance before gaming can occur on the land in

question, are vastly different powers for different purposes. Both the Governor and Tribe fail to address this argument head on, and never offer any argument addressing these differences. Instead, they cite a litany of inapposite cases on "implied powers" unrelated to the Governor's exercise of an express constitutional power. [GRB at 24-25; NFRB at 19-21 (citing *Ravettino v. City of San Diego* (1945) 70 Cal.App.2d 37, 47-48 (holding that action of a crane operator was sufficiently within city's implied powers to impose liability on city for negligence of crane operator in personal injury action)).]

Here, the concurrence did not assist the Governor in negotiating and concluding compacts. And the concurrence was "necessary" to the compact only in the sense that the existence of Indian land on which gaming is authorized under federal law was a precondition to the state's negotiation of a compact, and the concurrence was necessary for the Secretary to create such land. But the authority to do an act, does not necessarily include the authority to create the preconditions for such acts. See, e.g., *Zack*, *supra*, 118 Cal.App.4th at 629. Here, there is no statutory or constitutional basis for concluding that the Governor had the power to concur in the creation of new Indian lands on which gaming will be authorized under federal law, which land is the precondition of the Governor's legitimate authority to negotiate compacts.

Neither the Governor nor the Tribe offers any authority for the proposition that a separate and distinct—and broader—

power can be implied as ancillary to or in the service of another. This is directly contrary to law. For example, the Governor has the power to veto one or more items of appropriation in a bill passed by both houses of the Legislature. Cal. Const., art. IV, § 10(e). He does not, however, have the power to veto sections of the bill that are not items of appropriation, no matter how such sections affect items of appropriation or may be related to items of appropriation. *Harbor v. Deukmejian* (1987) 43 Cal.3d 1078, 1090-1092. Concurring in a two-part determination, while related to negotiating a compact in the broadest sense, is not negotiating and concluding a compact. It is a separate action requiring a separate authorization, which cannot be implied. See *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.").

3. The concurrence power is contrary to and not within the state's existing gaming policy

Contrary to the Tribe's assertion, while the concurrence must be authorized under California law, it is not "a creature of California's existing gaming policy." [NFRB at 22.] Indeed, the Tribe identifies no statute, regulation, or legislative expression that speaks to California's decision to authorize the Secretary to transform non-Indian land into Indian land for the purpose of gaming. Rather, just as the Governor does, the Tribe reverts to the circular argument that because California authorizes class III gaming on Indian land and also authorizes the Governor to negotiate compacts to regulate that gaming, concurring in the

creation of new Indian land for purposes of gaming is within the existing gaming policy. [NFRB at 23.] Again, the argument fails to locate the source of the concurrence power and fails to differentiate between the two separate and distinct powers at issue.

Most importantly, the Tribe fails to offer a single articulation of California's "existing gaming policy" as conceived by the Constitution or the Legislature that would serve to guide or limit the Governor in his exercise of the concurrence power. As appellants discuss in their opening brief, there is no such state law limitation. Thus, if the Governor had the power to concur, he would have absolute discretion and ultimate control over a decision that involves the authorization of gaming in California. This is directly contrary to California's existing gaming policy.

To the extent that the concurrence implicates California's existing gaming policy, that policy is expressed in Article IV, section 19, of the Constitution. Section 19 expressly limits gaming in the state and in so doing places any powers to authorize gaming in the hands of the Legislature, not the Governor. "The Legislature may provide for the regulation of horse races and horse race meetings and wagering on the results." Cal. Const. art. IV § 19(b). "The Legislature by statute may authorize cities and counties to provide for bingo games, but only for charitable purposes." *Id.* §19(c). The Legislature may ratify compacts for the conduct of class III gaming on Indian land. *Id.* § 19(f). "[T]he Legislature may authorize private,

nonprofit, eligible organizations . . . to conduct raffles as a funding mechanism . . . ." *Id.* § 19(f).

Also, where the Constitution prohibits gaming in any form, it directs the prohibitions at the Legislature, not the Governor. "The Legislature has no power to authorize lotteries . . . ." *Id.* §19(a). "The Legislature has no power to authorize, and shall prohibit, casinos of the type currently operating in Nevada and New Jersey." *Id.* §19(e). Section 19 makes clear that authorizations of gaming, binding on the state and its citizens, are under the ultimate control of the Legislature.

While the Governor and the Tribe attempt to diminish the importance of the concurrence by casting it as merely "one precondition" to the Secretary's action under IGRA, the concurrence is nothing less than an authorization of gaming. Without the Governor's concurrence, the Secretary is helpless to permit gaming under the two-part exception because both the Secretary's determination and Governor's concurrence are independently required to effect the authorization of gaming under the two-part determination. Moreover, in respondents' view the Governor's decision whether or not to concur is committed to his sole and absolute discretion, and he cannot be challenged on it. The Secretary's decision, by contrast, is governed by standards in IGRA and subject to judicial review under the Administrative Procedures Act, 5 U.S.C. §§ 701 et seq. Thus, the power to concur cannot be discounted as any less significant or less controlling than the Secretary's power.

In concurring, the Governor unilaterally decided that gaming (both class II and class III) was authorized at the Madera site. The Governor, therefore, exercised a power reserved for the Legislature in binding the state to his unilateral decision.

Ignoring this, the Tribe relies on the Seventh Circuit's decision in *Lac Courte* to argue that the concurrence is within California's existing gaming policy and, therefore, a typical executive action. According to the Tribe, "The Seventh Circuit rejected the same challenge to the governor's concurrence that Appellants' raise here." [NFRB at 24.] Not true. The challenges are not even similar. But the Tribe's heavy reliance on this case, which addresses federal questions only, requires a more detailed discussion of the Seventh Circuit's analysis than the Tribe offers.

In *Lac Courte*, three Indian tribes sought a declaration that the governor's concurrence provision of IGRA was unconstitutional because it violated federal separation of powers, the appointments clause, and the principles of federalism. The Seventh Circuit held the provision constitutional. The litigation arose when the Governor of Wisconsin *declined to concur* in a secretarial two-part determination. Unable to compel the Governor to concur or reconsider his decision, the tribes sought to invalidate the concurrence requirement.

The tribes' principle argument was that the concurrence requires the Governor to execute federal law. The court rejected this argument because "[b]efore the land is taken into trust, it is within the jurisdiction of the state and is not yet subject to

federal regulation under IGRA." *Lac Courte, supra*, 367 F.3d at 657. Therefore, "the gubernatorial concurrence provision does not require or even permit any governor to execute federal law." *Id.* at 658.

The tribes also argued, however, that because no Wisconsin statute authorized the Governor to concur and the only authorization is that expressed in IGRA, the Governor necessarily carries out the functions of an "Officer of the United States." *Ibid.* The Seventh Circuit rejected this contention, holding that "[n]otwithstanding the absence of a specific Wisconsin state law authorizing the Governor of Wisconsin to respond to the Secretary of the Interior's request for concurrence, we conclude that the Governor of Wisconsin's role under § 2719(b)(1)(A) is not one that requires appointment in conformity with Article II [of the United States Constitution]." *Id.* at 661.

The tribes further argued that the concurrence "violates principles of federalism because it impermissibly interferes with the functioning of state government by rearranging its structure." *Id.* at 664. According to the tribes, the provision "requires the Governor to legislate Wisconsin's gaming policy in violation of the Wisconsin Constitution." *Id.* at 664. The Seventh Circuit flatly rejected this notion: "The Tribes erroneously assume that § 2719(b)(1)(A) vests the Governor of Wisconsin with authority to act outside of the strictures of the gaming policy that Wisconsin

has already established through legislation and amendments to the Wisconsin Constitution." *Ibid.*

The North Fork Tribe seizes upon *Lac Courte* to conclude that, even without explicit legislative authorization, whenever a governor concurs, he necessarily acts properly under state law and within the state's existing gaming policy. But *Lac Courte* cannot be read so broadly.

Rather, the Seventh Circuit decision simply locates the *source* of the Governor's concurrence power in state, not federal, law. In that sense, the Seventh Circuit's reasoning is consistent with, and no broader than, the Ninth Circuit's holding in *Confederated Tribes of Siletz* that when a governor concurs or declines to concur, he does so under state law, not federal law. *Confederated Tribes of Siletz, supra,* 110 F.3d at 698. But neither of those cases answers the question here, which is whether the Governor's concurrence was, in fact, authorized by state law. Indeed, the Seventh Circuit in *La Courte* was not even called upon to decide whether the Wisconsin Governor's concurrence was valid under Wisconsin state law. That decision does not, therefore, support the Tribe's position that California law authorized the Governor's concurrence merely because California law authorizes gaming on Indian land. *Riverside Cnty. Sheriff's Dep't v. Stiglitz* (2014) 60 Cal.4th 624, 641 ("[I]t is axiomatic that cases are not authority for propositions not considered." (internal quotation marks omitted)).

In California, the Governor must be authorized by the Constitution or by statute to act. *Prof'l Eng'rs, supra,* at 1041; *St. John's Well Child & Family Ctr. v. Schwarzenegger* (2010) 50 Cal.4th 960, 986; *Harbor* 43 Cal.3d at 1087. And, California's existing gaming policy subjects the Governor's actions to legislative approval. Cal. Const., art IV, § 19(f). Accordingly an action—especially one that binds the state to a decision—that is not subject to legislative approval necessarily goes beyond the Governor's authority to execute existing gaming policy.

Finally, contrary to the Tribe's assertion, the Seventh Circuit in no way rejected appellants' argument that "if the Governor had an implied power to concur, the people and the Legislature would be powerless to restrain that authority." [NFRB at 26.] In stating that the Wisconsin Governor's power to concur was not "without a check in the Wisconsin Legislature," the court explained that the Legislature had passed bills to limit the concurrence power, the Governor vetoed them, and the Legislature did not override the vetoes. *Lac Courte, supra,* 367 F.3d at 665.

This "check" on the Governor's power, however, says nothing about the Legislature's ability to maintain ultimate control over a particular concurrence before it is given. Moreover, *La Court*'s reasoning also makes clear that the decision to concur

is properly a legislative decision.[4] The Seventh Circuit also suggested that the people of the state could "check" the governor's power "by repealing the Constitutional amendments that sanction gaming in Wisconsin." *Ibid.* Such a measure would not only be an extreme solution, but it would also fail to address the loss of ultimate control over the concurrence at issue, which unilaterally binds the state to allow gaming on newly created Indian land.

Here, there can be no doubt that by issuing the concurrence the Governor unilaterally bound the state to the creation of new Indian lands on which gaming will be authorized. The electorate of California, endowed with the powers of the Legislature through their right of referendum, rejected the compact negotiated and executed by the Governor. [GRB at 14.] Yet the Madera site is still purportedly Indian land eligible for gaming as the direct result of the Governor's concurrence. See 25 U.S.C. § 2719(b)(1)(A); § 465. The concurrence was not subject to legislative ratification and was not, therefore, subject to referendum. Thus, a 305-acre parcel of land in Madera County that was not Indian land prior to February 2013 is now in trust as Indian land upon which the Tribe can build a class II casino or

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[4] The Tribe only furthers the point by citing an Arizona statute that prohibits the Governor from concurring in any two-part determinations. [NFRB at 27].

possibly pursue gaming under a mechanism other than a compact.[5]

4. The Proposition 1A ballot arguments demonstrate that the Governor's power under Section 19(f) limits him to negotiating and concluding compacts

It is indisputable that the language of Section 19(f) does not include the concurrence power. Nonetheless, if this court finds that Section 19(f) is ambiguous with respect to whether the concurrence power is implied, the ballot summaries and arguments included in the Voter Guide demonstrate that by authorizing the Governor to negotiate compacts, the voters had no intention of also authorizing the Governor to create new lands on which Indian gaming could be conducted.

Like Section 19(f) itself, the official Voter Guide makes no reference to how non-Indian land upon which class III gaming is prohibited becomes Indian land for the purposes of either class II or class III gaming. Rather, as appellants explained in their opening brief (at 29-30), the Voter Guide speaks only of the conduct of class III gaming on Indian land. It contains a plea

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[5] Indeed, in the aftermath of the referendum, North Fork tribal leaders have intimated that they believe the Madera site is now Indian land to do with as they will and intend to proceed with the development of the casino. "The 305 acres of land near Madera is Indian land, and we will proceed with our plans to build our casino there." Voters statewide say NO to Prop. 48, *Sierra Star* (November 5, 2014) http://www.sierrastar.com/2014/11/05/70801/voters-statewide-say-no-to-prop.html?rh=1.

from Tribes for the voters to authorize gaming on their existing lands [1AA Tab 6 at 85]; it notifies the voters that, if passed, Proposition 1A will ratify 57 compacts already negotiated by the Governor [*id.* at 84]; it states that Indian lands in California are generally confined to remote reservations and Rancherias [*id.* at 86]; and it contains assurances by proponents that gaming would not spread by Nevada gambling interests buying up prime property in our towns and cities, as they unquestionably have done here. [*Ibid.*]

The Tribe incorrectly argues that opponents' concerns that "[c]asinos won't be limited to remote locations . . ." "cuts *against* Appellants' current assertion that voters would have understood the proposed amendment to apply only to 'then existing Indian lands.'" [NFRB at 34.] But the Tribe misunderstands the standard for evaluating the Voter Guide. True, opponents' arguments reveal a worry that such events will occur, but the standard requires the court to determine whether the average voter would conclude that the measure would permit reservation shopping. *Legislature v. Eu* (1991) 54 Cal.3d 492, 504. And in this analysis, the proponents are held to account for their assurances, not the opponents for their concerns. 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."), superseded on other grounds as stated in *People v. London* (2014) 228 Cal.App.4th 544.

Finally, the Tribe incorrectly contends that "Appellants' preferred construction would be inconsistent with the Voter Guide's own description of the situation in California at the time." [NFRB at 34.] The Tribe points out that the 57 tribal-state compacts, which the Voter Guide explained would be ratified, included compacts for gaming on lands acquired after 1988. [*Id.* at 35.] The Tribe then points to a compact negotiated between the state and the United Auburn Indian Rancheria. [*Ibid.*] As the D.C. Circuit stated, however, gaming was authorized on the Auburn Tribe's trust land under 25 U.S.C 2719(b)(1)(B)'s "restored lands exceptions." *City of Roseville v. Norton* (D.C. Cir. 2003) 348 F.3d 1020, 1024. Under this exception, the Secretary was not required to make a two-part determination or obtain the Governor's concurrence. *Ibid.* The existence of this compact among those ratified by the Proposition does not, therefore, have any bearing on whether the Proposition was meant to give the Governor authority to concur.

As discussed above, acquisitions under any other exception do not require a concurrence or offer the state any opportunity to reject or even weigh in on the acquisition. Moreover, not a single one of the 57 compacts ratified by Proposition 1A was for gaming under a two-part exception. Any gaming authorized on existing Indian land or land acquired under another exception is consistent with Section 19(f) and the Voter Guide. For off-reservation casinos of the type proposed by the North Fork Tribe, however, the state does have the absolute power to prevent "Nevada gambling interests" and tribes from "buying up prime

property in our towns and cities" for the purposes of casino gaming. [1AA Tab 6 at 86.] And California voters were given assurances that this would not happen.

B. The Governor's authority to faithfully execute the laws of the state does not include the concurrence power

Both the Governor and the Tribe contend that even if the Section 19(f) does not give the Governor the concurrence power, the Governor nonetheless possesses that power by virtue of his authority as the state's chief executive. In so arguing, respondents rely on doctrines and cases that apply to other branches of government and ignore the cases related to the Governor's powers. Most tellingly, both respondents ignore the California Supreme Court's detailed analysis in *Professional Engineers.* There, the Court exhaustively evaluated the Governor's authority to act unilaterally pursuant to both the California Constitution and statutes enacted by the Legislature and held the Governor lacked the power to act. Neither the Tribe nor the Governor discusses this case in support of their arguments that the Governor has the power to concur. Nor do they distinguish the case.[6]

In *Professional Engineers*, the Governor argued that his authority to institute a two-day-a-month furlough program for executive branch employees derived from Article V, § 1, of the

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[6] Respondents only reference this case when discussing whether AB 277 subsequently ratified the concurrence. See Part II, infra.

California Constitution, which gives the Governor the power to "see that the law is faithfully executed." *Prof'l Eng'rs, supra,* 50 Cal.4th at 1015. The Supreme Court rejected this argument, holding that "(1) [u]nder the California Constitution it is *the Legislature*, rather than the Governor, that generally possesses the ultimate authority to establish or revise the terms and conditions of state employment through legislative enactments, and (2) *any authority* that the Governor . . . is entitled to exercise in this area emanates from the Legislature's delegation of a portion of its legislative authority . . . through statutory enactments." *Ibid.* (emphasis added).

Despite the Governor's authority to hire executive branch employees, and despite statutes authorizing the Governor to adjust their work weeks, work days, hours, time, and attendance [Govt. Code, §§19851(a), 19852, 19853, 19849], and to lay them off [Govt. Code, §19997], that was not enough in the Supreme Court's view to authorize the Governor to implement the two-day-a-month furloughs. *Prof'l Eng'rs, supra,* 50 Cal.4th at 1025-1035.

Thus, contrary to respondents' arguments in this case, the Supreme Court takes a very limited and narrow view of the Governor's authority. And, applying the Supreme Court's analysis here leads to the same conclusion—the Governor exceeded his authority.

1. The concurrence power is the province of the Legislature, not the Governor

The Tribe contends that "the concurrence power is executive, not legislative, in nature" (NFRB at 36), and in so arguing merely repeats its flawed argument that when the Governor concurs, he necessarily acts within the state's existing gaming policy.

The California policy on which the Tribe relies is that allowing *gaming on Indian lands*, not any policy allowing the Governor to authorize land to be removed from state jurisdiction or any policy allowing the Governor to authorize gaming on that land. Other than citing general legal principles distinguishing legislative from executive powers, the Tribe does not point to a single "constraint[] of existing policy" the Governor is "carrying out or acting within" when he concurs. [See NFRB at 37.]

In authorizing gaming at the Madera site, the Governor did not pursue any plan already adopted by the Legislature. He prescribed a new policy authorizing off-reservation gaming under "exceptional circumstances." [1AA Tab 6 at 88.] In making the unilateral decision to participate in the two-part determination, the Governor not only created the "exceptional circumstances" exception for the creation of new Indian lands for gaming, he also unilaterally defined what would constitute "exceptional circumstances" allowing for such off-reservation gaming.[7] These

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[7] As explained in the opening brief (at 34), the decision to participate in a federal program and the extent of that participation belongs to the Legislature. Section 19(f) is

decisions all require fundamental policy determinations that are the province of the Legislature. [AOB at 35-37.]

The Tribe further contends that the concurrence power is an executive power because it "bears a close resemblance to the traditional executive power to veto legislation. . . . As with the legislative veto, the concurrence power allows the Governor to reject the decision of the Secretary in its entirety." [NFRB at 38 n.11.] First, when the Governor vetoes a bill, he acts in a legislative capacity, *Harbor*, *supra*, 43 Cal.3d at 1087, under a delegation of legislative authority by the Constitution. Cal. Const., art. IV, § 10(a). Second, there is no basis for the Tribe's conclusion that the concurrence is like the veto because it is not a "creative legislative power." [NFRB at 38 n.11.] In fact, as the Governor's concurrence here demonstrates, granting a concurrence is very much a "creative legislative power." As discussed above, the Governor concurred on the basis of statewide benefits he could extract from the Tribe. In so doing, the Governor did far more than simply decide not to veto the

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consistent with this principle. Under federal law, states have no authority to regulate gaming on Indian land. *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. IGRA, however, offers the states some regulatory authority over such gaming to the extent they can negotiate for it with a tribe in a compact. While IGRA offers states this opportunity and strongly encourages compacting by compelling good faith negotiation of compacts, states are not required to ratify compacts and participate in the regulation of Indian gaming. *Yavapai-Prescott Indian Tribe v. State of Ariz.* (D. Ariz. 1992) 796 F.Supp. 1292, 1296. Section 19(f) properly reserves for the Legislature the power to decide whether to participate.

Secretary's two-part determination. Rather, he created new policies and benefits for the state in connection with off-reservation gaming.

Both the Governor and the Tribe also quote out-of-context statements from the decision in *Picayune Rancheria of Chukchansi Indians v. Brown* (2014) 229 Cal.App.4th 1416, to argue that the concurrence is an inherently executive power. As explained in the opening brief (at 37 n.12), however, the issue in *Picayune Rancheria* concerned only whether the Governor's concurrence was the act of a "public agency" subject to the requirements of CEQA. In finding that the concurrence was not subject to CEQA, the court recognized 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." 229 Cal.App.4th at 1425. Thus, the court held that "it is the Governor—not his office—who took the action" of concurring in the Secretary's determination. *Id.* at 1425.

In context, the court was merely stating that federal law looks to the Governor himself as the source of the concurrence, and the under state law the Governor acts as an individual, not as an "office" or "agency" for purposes of CEQA. That court did not even purport to speak to the question of whether federal law

created the concurrence authority or whether that authority is somehow "executive" in nature. Notably, every court to actually consider the issue has explicitly held that while the Governor's "concurrence (or lack thereof) is given effect under federal law, . . . the authority to act is provided by state law." *Confederated Tribes of Siletz, supra,* 110 F.3d at 697; see also *Lac Courte, supra,* 367 F.3d at 657. And here, there is no state law providing the Governor authority to act.

2. The Legislature has not delegated the Governor the power to concur

Without citing any specific statute delegating the concurrence power, the Tribe contends that even if the concurrence is legislative, "the Governor has been delegated three important constitutional and statutory roles—as head of the administrative state, the sole official organ of communication, and the chief executive officer (Cal. Const., art. V, §§ 1, 6; Gov. Code § 12012)—that individually and together support a finding that concurrence power is within the Governor's authority." [NFRB at 39.]

In making such arguments, the Tribe relies on a faulty premise, which would allow for "delegation" to be considered in its broadest sense—implied delegation. It invokes separation of powers doctrine, which authorizes, under some circumstances, one branch to take actions traditionally associated with another branch as long as no branch "materially impairs" the core

functions of another.[8] [NFRB at 40.] Yet, none of the recent Supreme Court cases addressing the limits on the Governor's powers relied on this doctrine. *Prof'l Eng'rs*, *supra*, 50 Cal.4th at 1041; *St. John's Well Child*, *supra*, 50 Cal.4th at 986; *Harbor*, *supra*, 43 Cal.3d at 1087. As those cases demonstrate, the Governor must ground his authority in a specific statute or constitutional provision and cannot act without such authorization simply by claiming that his conduct did not "impair" the Legislature's function. This Court's inquiry should end there.

Even under the Governor's and the Tribe's standard, however, the Governor lacked the authority to concur because the Governor did in fact deprive the Legislature of its constitutionally prescribed role of approving the Governor's actions relating to gaming on Indian land and unilaterally bound the state to the decision to allow off-reservation gaming.

a. The Governor is not authorized to concur as the head of the administrative state

In claiming that the Governor is authorized to concur as the head of the administrative state, with extensive powers to deal with Indian tribes, the Tribe fails to identify a single power

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[8] The Governor also relies exclusively on this doctrine to argue that the Governor has the freedom to undertake legislative or "quasi legislative" actions because he did not "materially impair" the core functions of the Legislature. [GRB at 13.] But like the Tribe, the Governor fails to cite a case addressing actions by the Governor.

related to the determinations involved in authorizing gaming on newly acquired land. In *Professional Engineers*, the Governor had been delegated extensive power over the terms of employment of executive branch employees. The question, however, was whether those delegations covered the particular action in question, and the court held that they did not. *Prof'l Eng'rs, supra*, 50 Cal.4th at 1025-1035. For this the Tribe has no answer. It simply argues that the Governor has been delegated some powers to deal with Indian tribes—the same argument that was rejected in *Professional Engineers*.

Instead of following or even distinguishing *Professional Engineers* or other California cases, the Tribe appropriates a case from another jurisdiction. In *United States v. 1,216.83 Acres of Land More or Less, In Klickitat County* (Wash. 1978) 574 P.2d 375, the Washington Supreme Court held that even without a statute authorizing the Governor to consent to the federal acquisition of land under the Migratory Bird Conservation Act ("MBCA"), state authorization "may be implied from the Governor's position as head of the executive branch of government." *Id.* at 379. Obviously, this court is not bound by a decades-old decision from Washington State. Moreover, the facts of the case and the federal and state statutes at issue there are distinguishable.

Contrary to the Tribe's assertion (NFRB at 41), the MBCA is not like IGRA. First, the MBCA requires both a general state consent and the consent of the governor or other appropriate

state agency. *1,216.83 Acres of Land, supra,* 574 P.2d at 376. The Washington Legislature had passed a statute granting the general consent. *Ibid.* The court did not address the extent to which the legislative authorization could be viewed as a delegation of the Governor's decision to consent, but the point is obvious. In granting the consent there, the Governor was acting pursuant to a specific policy that had already properly been made by the Legislature. The same cannot be said of the Governor's concurrence here.

Second, under the MBCA, land is condemned by the federal government for a public purpose—the protection of migratory birds that move between and among the states. A two-part determination under IGRA, by contrast, involves the authorization of gaming on newly acquired land for the private purpose of developing a casino for profit. This private purpose is fraught with concerns for the public's well-being, as well as that of other tribes, that require making fundamental policy determinations based the balancing of competing and statewide interests. Accordingly, the California Constitution limits the Governor to actions—like negotiating compacts—that are explicitly subject to the approval of the Legislature, the body tasked by California law with balancing such interests and making fundamental policy determinations. See *People v. Wright* (1982) 30 Cal.3d 705, 713.

Simply put, the Washington case offers no guidance or instruction for deciding whether the Governor has the power to

concur here. The Tribe merely cherry picks a quotation in support of its contention, and the court should reject any reliance on this case as instructive.

b. Government Code § 12012 is not a delegation of the concurrence power

The Tribe contends that section 12012, which defines the Governor as the "sole organ of communications" between the state and the federal government, contains no limitations, but rather tracks the language of the U.S. Supreme Court's description of the President "as the sole organ of communication of the federal government in the field of international relations." [NFRB at 43.] This is contrary to California courts' analyses of the Governor's powers, which are fundamentally premised on limitations.

Appellants agree with the Tribe that the Governor is the appropriate person to "act as the State's representative in communicating to the federal government the *State's determination* regarding whether to concur in a two-part determination." [NFRB at 43 (emphasis added).] But the state did not make that determination; the Governor did. And he did not do so within any existing policy. The state has not spoken on concurrences. The state has yet to determine under what circumstances it will allow off-reservation gaming under a two-part determination. Therefore, concurring is by no means merely communicating the state's decision.

c. Principles of cooperative federalism do not authorize the Governor to concur

In holding that the governor's concurrence provision of IGRA is constitutional, the Ninth Circuit invoked principles of cooperative federalism. Under these principles, the federal government may condition its own actions upon state approval. Such "contingent legislation" is constitutional as long as the appropriate state actor is not accorded significant federal authority. *Confederated Tribes of Siletz, supra,* 110 F.3d at 695, 697. Under those principles, the Ninth Circuit held that the concurrence is constitutional because even though the Governor's concurrence is given effect under federal law, when the Governor concurs, he must do so under the applicable state law. *Ibid.*

The Tribe, however, misappropriates this straightforward principle to claim that because there are a number of federal statutes that "include state actors in the regulatory process," "chaos would ensue" if an actual delegation of legislative authority were required before the Governor could act under those statutes. [NFRB at 46.] The Tribe's hyperbole is not warranted.

Though the Tribe floats a litany of federal statutes in its parade of horribles, it offers no discussion or citation as to how the Governor's authority under those federal statutes should be analyzed. Here, under the contingent legislation at issue—IGRA—the power to concur must derive from and be exercised according to state law. *Confederated Tribes of Siletz, supra,* 110

F.3d at 697; see also *Lac Courte, supra*, 367 F.3d at 657. Under California state law, the Governor must be authorized by the Constitution or by a statute enacted by the Legislature." *Prof'l Eng'rs, supra*, 50 Cal.4th at 1041. Appellants have shown that no such authorization exists here. The Constitution expressly limits the Governor's power to negotiating compacts subject to legislative ratification, Cal. Const., art. IV, § 19(f), and expressly reserves any authorizations of gaming for the Legislature. See generally *id.* § 19. For these, and the other reasons explained herein, the Governor's action requires an express delegation of the Legislature's authority. See *Prof'l Eng'rs, supra*, 50 Cal.4th at 1015.

Contrary to the Tribe's unsupported assertion, if this Court holds that the Governor lacks the authority to concur in the two-part determination, that holding will not necessarily undermine the validity of state acts under the myriad of federal statutes cited by the Tribe. In determining the propriety of state conduct under those statutes, a court would be required to apply the same analysis from *Professional Engineers*. That analysis here leads to the conclusion that the Governor was not authorized to act, but given different authorizing statutes, explicit state policies, or regulatory schemes, the outcome may well be different.

II

AB 277 Was Not a Statutory Ratification of the Concurrence

In the opening brief (at 39-44), appellants argued at length that AB 277 did not ratify the concurrence because, among other things, it did not address the concurrence at all. There is no need to repeat those arguments here, however, because even if AB 277 would have ratified the concurrence, that statute was never effective and is void ab initio. AB 277 is dead.

Under California law, the Legislature exercises its constitutional authority to ratify compacts by enacting a statute. Gov. Code § 12012.25(c). All parties to this case recognize that AB 277, which ratified the compact, was rejected by popular referendum on November 4, 2014.[9] [GRB at 14; NFRB at 47.] As the Governor concedes, "[b]ecause the voters rejected AB 277, neither the North Fork Compact nor its ratification statute ever went into effect." [GRB at 14.]

The North Fork Tribe does not dispute this, but nonetheless argues, "[t]hat the statute ratifying Compact was

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[9] The North Fork Tribe has challenged the validity of the referendum in a cross-complaint for declarative relief. [4AA Tab 36 at 747.] The Tribe argued that ratification of the compact is not a legislative act subject to referendum and that the referendum impermissibly conflicts with IGRA. [*Ibid.*] The trial court rejected these arguments and sustained the State's and the real party in interest's demurrers. [4AA Tab 36 at 766.] The Tribe filed an appeal, which is currently pending in this court. [4AA Tab 37 at 770-771.] As of this filing, the record on appeal is still being prepared.

later overturned by referendum makes no difference." [NFRB at 47.] Even the Governor, after stating that AB 277 is of no legal effect and citing significant authority in support of that claim, clings to the notion that in passing AB 277, the Legislature somehow ratified the concurrence. This is both illogical and contrary to law.

According to the Tribe, "[i]t is well established in both state and federal law that a legislature can retroactively authorize an act that may not have been authorized when taken." [NFRB at 48.] Notably, however, the authority on which the Tribe relies explicitly provides that legislative ratification is accomplished though enacting a statute. *Hoffman v. City of Red Bluff* (1965) 63 Cal.2d 584, 592 ("If the thing wanting or omitted which constitutes the defect is something the necessity for which the legislature might have dispensed with by prior *statutes*, or if something has been done, or done in a particular way, which the legislature might have made immaterial, the omission or irregular act may be cured by a subsequent *statute*."). In *Professional Engineers*—the primary case on which respondent's rely—as in every other case they cite, the unauthorized action was cured by statute. *Prof'l Eng'rs*, *supra*, 50 Cal.4th at 1043-1044.

Importantly, neither the tribe nor the state defendants can cite to any valid statutory provision even implicitly ratifying the Governor's concurrence. The Governor refers to the passing of AB 277 as an "explicit statutory ratification" and cites to

Government Code § 12012.59. [GRB at 30.] But there is no such *statute*; section 12012.59 does not exist because AB 277 never went into effect. Thus, the passing of AB 277 was not an explicit statutory ratification.

Neither the Tribe nor the Governor offers any reason or citation for concluding that an action of the Legislature that never went into effect under California law is still an explicit statutory ratification of the Governor's ultra vires action. The Legislature's action on AB 277 is now null and void. It did not ratify the compact; it certainly did not ratify the concurrence.

Conclusion

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

Dated: January 22, 2015

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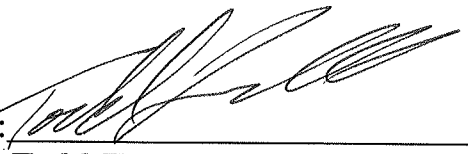
By: 
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Certificate of Word Count

The undersigned certifies that pursuant to the word count feature of the word processing program used to prepare this [brief/petition], it contains 8701 words, exclusive of the matters that may be omitted under rule 8.204(c)(3).

Dated: January 22, 015

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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 January 22, 2015, I served, in the manner indicated below, the foregoing document described as **Appellants' Reply 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.
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 22, 2015, at Costa Mesa, California.

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