Case No. S238544

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

UNITED AUBURN INDIAN COMMUNITY OF THE AUBURN RANCHERIA,

Appellant,

v.

EDMUND G. BROWN, JR., in his official capacity as Governor of the State of California, and DOES 1 through 50 inclusive,

Respondent.

On Review of a Decision of the Court of Appeal
Third Appellate District
Affirming the Judgment Dismissing the Action

APPELLANT'S OPENING BRIEF ON THE MERITS

Thomas F. Gede (SBN 99295)
Colin C. West (SBN 184095)
MORGAN, LEWIS & BOCKIUS LLP
One Market Street, Spear Tower
San Francisco, CA 94105
Telephone No. (415) 442-1000
Facsimile No. (415) 442-1001

Attorneys for Appellant
UNITED AUBURN INDIAN COMMUNITY OF THE AUBURN RANCHERIA

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

ISSUES PRESENTED

This Court granted Plaintiff-Appellant United Auburn Indian Community's Petition for Review on the following issue:

"May the Governor concur in a decision by the Secretary of the Interior to take off-reservation land in trust for purposes of tribal gaming without legislative authorization or ratification, or does such an action violate the separation of powers provisions of the state Constitution?"

The Court of Appeal, Third Appellate District, held the California Governor has the power to concur in a federal Indian gaming determination—a concurrence that legalizes class II and class III tribal gaming on off-reservation land. The Court ruled this power is an executive act, not a legislative one, because it performs a role in a federal program in which the legislature made a policy decision to participate. United Auburn Indian Community (UAIC) petitioned this Court for review of that decision, urging this Court to reverse and vacate the concurrence as void.

Three weeks after UAIC filed the Petition for Review, the Court of Appeal, Fifth Appellate District, ruled in *Stand Up for California! v. State of California*, 6 Cal. App. 5th 686 (2016). There, the court examined the Governor's concurrence in a similar off-reservation tribal gaming dispute and ruled, in three separate opinions, each with different reasoning, that the Governor's concurrence was invalid, as it exceeded his authority under the California Constitution. This Court has granted review in Stand Up!, but deferred further action pending consideration and disposition of a related issue in this case.

Given the two conflicting rulings of the Court of Appeal, the broader issue fairly raised in the question presented is this:

Does the Governor lack authority to concur in federal Indian gaming determinations, thereby permitting gaming on recently acquired Indian lands, whether as a violation of separation of powers or because it exceeds his authority under the prohibitions on gaming in the California Constitution?

INTRODUCTION

This Court is presented with a fundamental question of whether the governor can exercise a power not expressly granted in the California Constitution, a power which triggers significant consequences under federal law in this case, namely the legalization of off-reservation tribal gaming. As explained below, this Court should hold the Constitution does not empower the Governor to act here, as he or she is wholly without that power, and in any case, it would violate the state's separation of powers doctrine.

California's "fundamental public policy" has long been to prohibit gambling in the state. *Hotel Employees & Restaurant Employees Int'l v. Davis*, 21 Cal. 4th 585, 589 (1999) ("*Davis*"). That policy is embedded in the state constitution, which has historically prohibited or limited various types of gambling, and which in 1984 was amended to strip the legislature of all power "to authorize … casinos of the type currently operating in Nevada and New Jersey." Cal. Const. art. IV, § 19(e). A few years later, the United States Supreme Court effectively exempted Indian gaming from that prohibition. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) ("*Cabazon*"). Congress responded by enacting the Indian Gaming Regulatory Act ("IGRA"), which returned to California and other

states the power to regulate and prohibit most Indian gaming within their borders.

IGRA distinguishes between classes of gaming, ranging from class I (ceremonial tribal gaming for nominal stakes), to class II (bingo and non-banked card games), to class III (everything else, including slots and Vegas-style casino gambling). *See* 25 U.S.C. § 2703. IGRA also distinguishes among types of Indian lands where gaming can occur, principally according to when the underlying land became "Indian lands." The key date is October 17, 1988. For *pre*-1988 Indian lands, IGRA permits class I and class II gaming with minimal procedures, and permits class III gaming, but only if the tribe and the state enter into a "Tribal-State compact" that governs gaming on the land. *See* 25 U.S.C. § 2710(a)-(d). For most Indian lands acquired after 1988, IGRA absolutely prohibits class II and class III tribal gaming. Congress provided limited exceptions to that prohibition, the most notable of which is for off-reservation lands taken in trust after 1988. Under this exception, class II or III gaming can occur if the Secretary of the Interior makes a two-part determination (that gaming will be good for the tribe and not bad for the neighboring community) and if the governor of the state concurs in that determination. *See* 25 U.S.C. § 2719(b)(1)(A).

IGRA respects state sovereignty, and a string of federal-court decisions affirms that (1) whether to compact with a tribe[1] and (2) whether to concur in the Secretary's determinations are pure questions of state law

[1] While written in mandatory terms ("the State shall negotiate . . . in good faith," etc.), IGRA does not compel the state to participate if the state so chooses, nor can the tribe sue the state without its consent. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 76 (1996).

and policy, to be made without federal interference or influence, and that the powers to compact and concur must arise from state law. The state Constitution expressly grants the Governor power *to compact*, but it does not expressly grant the power *to concur*. A key question here is whether the Governor, consistent with the California Constitution and the separation of powers doctrine, has the power to concur in the secretarial determinations.

Whether the Governor can negotiate and execute a compact for gaming on land that is not Indian land is fairly included within this question on the facts here As discussed below, the Governor argued in this case, and in *Stand Up!*, that his power to concur was ancillary and incidental to his power to compact. However, if the Governor lacked authority to compact in this case, since the lands at issue were not Indian land, he certainly could not have a concurring power that was ancillary and incidental to a *non-existent* compacting power.

The answer to both questions is no. As for the first question, regarding concurring, neither the Constitution nor any statute grants the power to the Governor to concur. The power to concur is legislative, and the Constitution grants the Governor no power to concur. The Governor violates the separation of powers when he or she exercises legislative power without express constitutional authority. *See Lukens v. Nye*, 156 Cal. 498, 501 (1909) ("*Lukens*") ("As an executive officer, [the Governor] is forbidden to exercise any legislative power or function except as in the constitution expressly provided.").

The difference between executive power and legislative power is that the Governor can *execute* state policy but cannot *create* it. Gaming is a quintessentially legislative prerogative because whether and to what extent

to approve gaming are questions with significant, policy-laden ramifications the legislature is best suited to study and balance. That's one reason why the constitutional prohibition on gaming appears in Article IV of the California Constitution—the article governing *legislative* powers. Even when the people of California amended the constitutional prohibition on gaming in 2000, authorizing the Governor to negotiate compacts with tribes, they simultaneously limited that authority by subjecting all such compacts "to ratification by the Legislature." *See* Cal. Const. Art. IV, § 19(f). Compacting, which permits gambling in places the Constitution would otherwise prohibit, is an exercise of legislative power. Moreover, nothing in the Constitution, expressly or impliedly, authorizes the Governor to concur. Thus, where, as here, the Governor concurs absent legislative authorization, he violates the separation of powers.

Moreover, the Fifth District Court of Appeal in *Stand Up!* supports the proposition that this Court need not even examine whether there is a violation of separation of powers in order to invalidate his concurrence. That case held that the Governor lacks power to concur under the Constitution, either under the facts of that case (Justices Smith and Detjen) or wholly without power under all circumstances (Justice Franson).

As for the second, related, question regarding compacting, the Governor exceeds his constitutional authority when he or she purports to negotiate and execute a compact on land that is not Indian land. Compacting is an exercise of legislative power, since it, like concurring, is a policy-laden determination regarding an issue—gaming—that the Constitution expressly puts under the Legislature's control. The Governor "may exercise legislative power only in the manner expressly authorized by the Constitution." *Harbor v. Deukmejian*, 43 Cal. 3d 1078, 1084 (1987)

("*Harbor*"). And the Constitution permits the Governor to negotiate compacts for gambling only on "Indian lands." Here, the Governor negotiated and executed a compact for gaming on off-reservation land *before* that land was taken into trust for the Enterprise Rancheria of Maidu Indians of California. Because the Governor negotiated and concluded that compact for gaming on land that was *not* Indian land, he exceeded his authority.

Governor Brown had no power to concur and thereby allow not only off-reservation casino-style tribal gaming, but also un-compacted class II gaming, which was *not* the subject of the compacting power in Article IV, section 19(f). All three opinions in *Stand Up!* correctly hold the Governor did not have the power to concur in that case, and *Stand Up!* is fully applicable here. Nor did the Governor have the power to compact on the facts here. Accordingly, the lower courts' contrary holding in this case should be reversed.

STATEMENT OF THE CASE

I. Federal Law Concerning Indian Gaming

Regulation of Indian gaming is a joint federal, state, and Indian endeavor. Without state approval, federal law permits only low-stakes Indian gaming on historic Indian lands. Higher-stakes gaming, and any gaming on recently acquired off-reservation lands, requires state approval, and tribes must continually ensure that such gaming is conducted in accordance with law.

IGRA codifies this regulatory regime. One of IGRA's express purposes is "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). Before IGRA's enactment, Indian gaming was proliferating without adequate oversight. *See* 25 U.S.C. § 2701. After the United States Supreme Court stopped California's effort to regulate Indian gaming in *Cabazon*, 480 U.S. at 202, Congress adopted IGRA to provide a framework for joint federal, state, and tribal regulation.

IGRA divides games into three classes. Class I games are "social games solely for prizes of minimal value or traditional forms of Indian gaming" connected with "tribal ceremonies or celebrations." 25 U.S.C. § 2703(6). Class II gaming is bingo, games similar to bingo, and certain card games. *See id.* § 2703(7). Class III gaming covers all other forms of gaming, including casino-style gambling. *See id.* § 2703(8); *see also Keweenaw Bay Indian Community v. United States*, 136 F.3d 469, 473 (6th Cir. 1998) ("*Keweenaw*").

Tribes can conduct class I gaming without federal or state regulation. *See* 25 U.S.C. § 2710(a)(1). IGRA permits class II gaming only if a tribe adopts a gaming ordinance and only if the state generally permits similar games. *See id.* § 2710(b)(1). IGRA allows class III gaming only if the tribe adopts a gaming ordinance, the state permits similar games, and the tribe and state enter into a Tribal-State gaming compact. *See id.* § 2710(d)(1). Tribal-State compacts resolve significant policy issues, such as allocation of criminal and civil jurisdiction, taxation, and standards for operating casinos. *See id.* § 2710(d)(3).

Indian tribes can't just conduct gaming anywhere they like. Generally, these rules for class I, II, and III gaming apply to "Indian lands," meaning lands that are part of a tribe's reservation or are lands the United States already holds in trust for a tribe. *See id.* § 2703(4). Not all Indian

lands are subject to those rules. IGRA roughly divides Indian lands into two categories, historic Indian lands, and "after-acquired lands," which are lands acquired by the federal government for a tribe after October 17, 1988, the date of the passage of IGRA. The concern that tribes might try to acquire new, off-reservation land in locales that are more desirable for operating casinos drives this distinction.

IGRA, however, was not passed so that tribes could run casinos in downtown San Francisco or Los Angeles. *See Stand Up!*, 6 Cal. App. 5th at 737 (Franson, J. concurring and dissenting) (regarding "concern that [ ] tribal governments might acquire trust land in or near metropolitan areas and open bingo [class II] or casino facilities [class III] on that land"). Accordingly, on pre-1988 Indian lands, gaming can occur under the aforementioned rules for class II and III gaming, but for *post*-1988 Indian lands, such gaming can occur only if (1) "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," and (2) "only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination." *Id.* § 2719(b)(1)(A).[2]

---

[2] There are other, statutory exceptions from the gaming prohibition for lands taken into trust after 1988. Lands are not subject to the prohibition when taken in trust for a tribe newly acknowledged as a federally-recognized tribe; when restored to a tribe restored to federal recognition; or as the result of a settlement of land claims. *See* 25 U.S.C. § 2719(a)(1), (a)(2)(B), (b)(1)(B). These federal law exceptions, rarely occurring, share a common bond—they are for lands that have a physical, legal, or cultural connection to historical tribes that are newly acknowledged or restored.

The two primary means for states, under IGRA, to effectuate their public policies for Indian gaming—(1) negotiating and entering compacts, and (2) concurring in the Secretary's determination—are legally distinct and independent. A compact is an absolute prerequisite for class III gaming on all Indian lands, whenever acquired. The governor's concurrence is an absolute prerequisite for class II or III gaming on post-1988 lands, but not required for gaming on pre-1988 lands. The following table illustrates the relationship of compacts and concurrences, and what gaming is allowed, and where, when a state does one, the other, both, or neither:

	Compact	**No Compact**
Concurrence	Class I, II, and III gaming on any Indian land	Class I and II gaming on any Indian land
No Concurrence	Class I, II, and III gaming on pre-1988 Indian land	Class I and II gaming on pre-1988 Indian land

Federal courts have upheld IGRA's concurrence requirement in the face of federal constitutional challenges. *See Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States*, 367 F.3d 650 (7th Cir. 2004) ("*Lac Courte*"); *Confederated Tribes of Siletz Indians v. United States*, 110 F.3d 688 (9th Cir. 1997) ("*Confederated Tribes*"). Those courts have held that, far from offending state sovereignty in violation of the

---

However, for tribes with an established reservation, the means of obtaining a casino on an off-reservation casino is for the Secretary and a governor to agree that it will benefit the tribe and not harm the surrounding community.

federal constitution, IGRA advances state sovereignty. *See Lac Courte*, 367 F.3d at 663. Governors may, but are not required to, concur. *Id.* at 658; *see id.* at 661–662. Governors may take state interests and public policies into account when deciding whether or not to concur. *See id.* at 660. Also, IGRA does not empower governors "to act outside the strictures of the gaming policy that [his or her state] has already established through legislation and amendments to" the state constitution. *Id.* at 664; *see Confederated Tribes*, 110 F.3d at 697–698. "Thus, the Governor's decision regarding any particular proposal is not analogous to creating [a state's] gaming policy wholesale—a legislative function—but rather is typical of the executive's responsibility to render decisions based on existing policy." *Lac Courte*, 367 F.3d at 664; *cf. Confederated Tribes*, 110 F.3d at 696 (holding that federal power over Indian tribes is "a legislative function").

A final note about federal law: IGRA does not control the federal government's processes for taking land into trust for tribes. The Indian Reorganization Act ("IRA") does. *See* 25 U.S.C. § 5108. The IRA "authorizes the Secretary [of the Interior] . . . to acquire land and hold it in trust 'for the purpose of providing land for Indians.'" *Carcieri v. Salazar*, 555 U.S. 379, 381–382 (2009). Federal regulations explain how this authority is exercised. Among other things, the Secretary can take land into trust if he or she "determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing." 25 C.F.R. § 151.3.

In practice, the Secretary considers the IRA and IGRA at the same time—before land is taken into trust. That is, the Secretary considers the land's potential post-acquisition use for Indian gaming *before* the Secretary actually decides to acquire the land in trust. Thus, the Secretary asks the

governor to concur before deciding whether to take land into trust. *See Stand Up for California! v. U.S. Dept. of the Interior*, 919 F. Supp. 2d 51, 71 (D.D.C. 2013). This is done because the trust acquisition approval under 25 C.F.R. § 151.11 (off-reservation trust parcels) and 25 C.F.R. 292.16 and .18 (secretarial determination for gaming on post-1988 trust land) is predicated on the purposes for which the land is to be used and requires compliance with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, and other federal laws. If gaming is the proposed purpose of the trust acquisition, that acquisition depends on the gubernatorial concurrence; without the gubernatorial concurrence, the proposed trust acquisition must be reconsidered. In consequence, the gubernatorial concurrence not only triggers the lifting of the prohibition on class II and III tribal gaming for off-reservation parcels, but also triggers the approval process for the Secretary to take the off-reservation land in trust for gaming purposes.[3]

II. California's Law and Policy Prohibiting Gaming Within the State

In 1984, the people of California amended the state Constitution to prohibit casino-style gaming within the state. Section 19(e) was added to Article IV, and it simultaneously stripped the Legislature of "power to authorize" casino-style gaming and ordered the Legislature to "prohibit"

---

[3] The Secretary is separately empowered to take land in trust for the benefit of Indians and Indian tribes under 25 U.S.C. section 465, and associated regulations, and in non-gaming circumstances, such authority does not depend on a state governor. Assuming a post-1988 trust acquisition does not involve or obtain a gubernatorial concurrence for gaming, the Secretary may still take it in trust, but it will be ineligible for gaming. *See* Justice Detjen's discussion in *Stand Up!*, 6 Cal. App. 5th at 702 (Detjen, J., concurring and dissenting).

casino-style gaming. Subject to an exclusion discussed below, Article IV, Section 19(e) remains in full force today.

After IGRA's passage, California's voters approved an initiative that purported to authorize the Governor to negotiate compacts with Indian tribes for casino-style gaming; this Court invalidated the initiative, however, because it violated Article IV, Section 19(e). *See Davis*, 21 Cal. 4th at 589–90. That led to Proposition 1A, a successful effort in 2000 to amend Article IV, Section 19.

The Legislative Analyst's analysis of Proposition 1A discussed gaming only on existing Indian lands and did not mention gaming on lands acquired in trust after 1988. *See* Request for Judicial Notice ("RJN"), Exhibit A ("Ex. A"), March 7, 2000 Primary Election Voter Information Guide ("Voter Information Guide"), Analysis by the Legislative Analyst, at 4. The Ballot Pamphlet addressed post-1988 lands: supporters argued that the amendment was necessary for gaming on existing reservations to continue in accordance with federal law; opponents argued that the amendment would spread gaming to new lands. RJN, Ex. A, Voter Information Guide, *supra*, Argument in Favor of Proposition 1A, at 6; RJN, Ex. A, Voter Information Guide, Argument Against Proposition 1A, at 7. The supporters won out. Proposition 1A passed and added subdivision (f) to Section 19:

> "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."

Passage of the amendment had the effect of validating 57 Tribal-State compacts with tribes on their reservations or federally recognized lands.

III. Relevant Facts and Procedural History

The Enterprise Rancheria of Maidu Indians is based in Oroville. In 2002, the Enterprise Tribe submitted a request to the Department of the Interior to acquire land in Yuba County near Olivehurst—off-reservation land unconnected to the Tribe's historic land in Oroville. The Enterprise Tribe wants to build a large, off-reservation casino and resort complex at the Yuba Site. C.T. 0006:5-8; 00014:18-21.[4] Many years later, yet still before taking the Yuba Site into trust, the federal Assistant Secretary of Indian Affairs determined that gaming at the Yuba Site would be beneficial to the Enterprise Tribe and not harmful to the surrounding community. C.T. 00018:4-7.

Pursuant to IGRA, the Assistant Secretary notified the Governor of his determination about gaming at the Yuba Site. Governor Brown issued a concurrence with that determination on August 30, 2012. C.T. 00018:20-23. The same day, the Governor announced that he had also negotiated and executed a Tribal-State gaming compact with the Enterprise Tribe. C.T. 00019:8-10. The Governor submitted the compact to the Legislature for its ratification, per Art. IV, § 19(f). The Legislature never ratified the compact, and the compact expired on its own terms in July 2014. *See*

[4] "C.T." refers to the clerk's transcript.

Estom Yumeka Maidu Tribe of the Enterprise Rancheria of California v. California, 163 F. Supp. 3d 769, 771 n.5 (E.D. Cal. 2016).

UAIC is an Indian tribe with strong cultural ties to Yuba County. On its reservation lands, UAIC operates the Thunder Valley Resort and Casino, about 20 miles from the Yuba Site. In 2013, UAIC sued Governor Brown, alleging that he violated the California Constitution by (1) concurring in the Assistant Secretary's determinations without authorization and (2) negotiating and executing the compact with the Enterprise Tribe. C.T. 00019:23-00024:11.

The trial court granted the Governor's demurrer to the complaint without leave to amend and entered judgment dismissing the action on September 13, 2013. C.T. 00189-204; 00185-188. On October 13, 2016, the Court of Appeal, Third Appellate District affirmed. *See generally*, *United Auburn Indian Community of Auburn Rancheria v. Brown*, 4 Cal. App. 5th 36 (2016) ("*UAIC*"). Citing Article IV, Section 19(f)'s authorization of Tribal-State compacts, as well as statutes the Legislature has enacted to implement the Governor's compacting power, the Court of Appeal held that California has made the policy decision to "participate in IGRA," such that the Governor's concurrence for the Yuba Site merely *implemented* state policy and did not unconstitutionally "*create* state policy." *Id.* (emphasis added).

UAIC petitioned this Court for review on November 22, 2016. A few weeks later, a panel of the Fifth Appellate District issued a decision in conflict with the Third Appellate District's decision. *See Stand Up!*, 6 Cal. App. 5th at 686. All three justices in the Fifth Appellate District agreed that Governor Brown violated the California Constitution by issuing a concurrence for gaming by a different tribe (the North Fork Rancheria of

Mono Indians), but their rationales diverged. Justice Franson held that the Governor has power only to negotiate and enter Tribal-State compacts; power to concur is neither express, implied, nor part of the Governor's general executive powers. *Id.* at 756–760, 772 (Franson, J., concurring and dissenting). Justice Detjen assumed that the Governor's power to compact might imply a power to concur, but did not reach the question, having held that the Governor exceeded his compacting power (and, hence, any hypothetical concurrence power) by exercising it *before* the North Fork land was taken into trust. *Id.* at 713–15 (Detjen, J., concurring and dissenting). Finally, Justice Smith allowed for the same hypothetical assumption as Justice Detjen and held that the Governor's concurrence for North Fork was negated when the compact for North Fork was overturned. *Id.* at 699–700, 704–05. (Smith, J., lead opinion).

This Court granted UAIC's petition on January 25, 2017.

ARGUMENT

The California Legislature's power is plenary. *See Methodist Hosp. of Sacramento v. Saylor*, 5 Cal. 3d 685, 691 (1971) ("*Saylor*"). The Legislature's plenary power is protected in several ways. For one, constitutional restrictions on legislative power are "construed strictly," so the Legislature can do anything the Constitution does not expressly prohibit. *See State Personnel Bd. v. Department of Personnel Admin.*, 37 Cal. 4th 512, 523 (2005) ("If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action.") (internal citations omitted). *Accord People ex rel. Smith v. Judge of Twelfth Dist.*, 17 Cal. 547, 556 (1861) ("The Legislature has large powers . . . those who assert a limitation must find it in the

Constitution."). In addition, the Constitution expressly prohibits other government officials—the Governor among them—from exercising legislative power. "Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." Cal. Const. art. III, § 3.

The Governor can't legislate. He can't wield "the power to enact statutes"; he only can "execute or enforce statutes." *Lockyer v. City and County of San Francisco*, 33 Cal. 4th 1055, 1068 (2004); *see* Cal. Const. art. V, § 1 (power to "see that the law is faithfully executed"). The people or the Legislature adopt public policies, and the Governor sees that those policies are fulfilled. A Governor's policy preferences cannot override the Legislature's policy choices, let alone the people's policy choices codified in the California Constitution. That would be tantamount to gubernatorial legislation.

These are default rules, of course. The Constitution can expressly empower the Governor to exercise specific legislative powers that the separation of powers clause would otherwise forbid him to exercise. *See Lukens*, 156 Cal. at 501 ("As an executive officer, he is forbidden to exercise any legislative power or function except as in the constitution expressly provided."); *Harbor*, 43 Cal. 3d at 1084 ("Unless permitted by the Constitution, the Governor may not exercise legislative powers."); *Prof'l Eng'rs in California Gov't v. Schwarzenegger*, 50 Cal. 4th 989, 1015–16, 1041 (2010) ("*Professional Engineers*"). These limited transfers of legislative power to the Governor are essentially restrictions on the Legislature's plenary power, and like any other such restriction, they must be "construed strictly" so as to preserve the Legislature's plenary power. *See Saylor*, 5 Cal. 3d at 691 (internal quotations omitted).

Here, the Governor violated constitutional restrictions on his executive power by concurring in the Secretary's Section 2719 determination for the Enterprise Tribe.

I. The Governor Violated the California Constitution by Concurring.

A. The Governor Lacks Power to Concur.

No matter what analysis is applied to examine the gubernatorial concurrence, one thing is demonstrably clear: "the compacting responsibility is distinct from the concurrence authority in many ways—structurally, conceptually, and functionally." *Stand Up!*, 6 Cal. App. 5th at 766 (Franson, J., concurring and dissenting.). The two powers serve different purposes and have different consequences. The concurrence goes far beyond compacting; it actually triggers class II gaming that is *not* subject to the rules governing Tribal-State compacts. Consequently, the act of concurring (1) lifts the federal prohibition on all tribal gaming on the relevant lands, (2) triggers the off-reservation trust acquisition approval, and (3) permits a tribe to conduct gaming otherwise prohibited in California in a class II casino on the off-reservation parcel, all without a Tribal-State compact.

Federal law does not empower the Governor to concur in the IGRA-related determinations of the Secretary of Interior. IGRA leaves it to states to decide whether, when, and how a governor may concur. "If the Governor concurs, or refuses to concur, it is as a State executive, under the authority of state law." *Confederated Tribes*, 110 F.3d at 697; *see also id.* ("The concurrence (or lack thereof) is given effect under federal law, but the authority to act is provided by state law."); *id.* at 698 ("when the Governor responds to the Secretary's request for a concurrence, the

Governor acts under state law, as a state executive, pursuant to state interests").

The Governor has no express authority under California law to concur. The California Constitution does not authorize concurrences, nor does any California statute. *See Stand Up!*, 6 Cal. App. 5th at 697.

The Governor has argued that his authority to concur is either (1) implicit in his constitutional authority to compact or, as the Court of Appeal held, (2) one of the many undefined executive powers he may exercise. *See UAIC*, 4 Cal. App. 5th at 52 n.3. As explained below, neither proposition is sound.

1. Concurring and Compacting are Different and Mutually Exclusive Actions, so Authority for One Does Not Imply Authority for the Other.

Article IV, Section 19(f) gives the Governor power to compact with Indian tribes for class III gaming on reservations, then subjects those compacts to legislative ratification. The text of Section 19(f), as well as the extrinsic evidence of the voters' intent in approving it, confirm that the Governor's authority to compact does not encompass the distinct power to concur with secretarial determinations that gaming of any class should take place on post-1988 off-reservation lands.

And if there were any doubt about that conclusion, the rule that restrictions on legislative power must be "construed strictly" resolves the doubt against the Governor and in favor of the Legislature. *See Saylor*, 5 Cal. 3d at 691.

Section 19(f) says nothing about concurrences. Some have argued that Section 19(f)'s silence isn't dispositive because, supposedly, the concurring power is implied as "ancillary and incidental" to the compacting

power. *See UAIC*, 4 Cal. App. 5th at 52 n.3 (noting the trial court's holding to that effect); *see also Stand Up!*, 6 Cal. App. 5th at 698 (expressing agreement with the proposition that the concurring power "is found by implication in state law authorizing the Governor to negotiate and execute tribal-state compacts"). That argument lacks merit.

"Ancillary and incidental" powers are those reasonably necessary to exercising constitutional powers. *Parker v. Riley*, 18 Cal. 2d 83 (1941). For example, in *Parker*, the court addressed the constitutionality of a legislatively-created commission on interstate cooperation, which commission included members of the legislature as well as non-legislators. *Id.* at 87. The commission's purpose was to "create machinery of government through which the various states can exchange information and formulate proposals for mutual action to be submitted to their individual state governments." *Ibid.* The plaintiffs argued that the commission violated the separation of powers because if the commission's function was properly seen as legislative, having non-legislators on it infringed upon legislative powers. *Ibid.* This Court rejected plaintiffs' argument, holding that the commission's primary task was fact gathering and making recommendations, which was necessary for the Legislature to perform its primary duty of legislating. *Id.* at 90 ("Intelligent legislation upon the complicated problems of modern society is impossible in the absence of accurate information on the part of the legislators."). It was, moreover, proper for the Legislature to use non-legislators to assist in this task, since "any reasonable procedure for securing such information is proper." *Ibid.*

Under this standard, the power to concur is not ancillary and incidental to the Governor's power to compact here. To begin with, as discussed below, the Governor lacked the power to compact on the facts

here. *See infra* Part II. Thus, the governor could not have had a concurring power that was ancillary and incidental to a non-existent compacting power.

Moreover, the power to concur is not ancillary and incidental to the power to compact. Under IGRA, some Indian gaming needs a gubernatorial concurrence; some needs a tribal-State compact; and some needs both. *See supra* Part I; *see also Keweenaw*, 136 F.3d at 476 (rejecting that a tribe with a Tribal-State compact can skip obtaining a concurrence for off-reservation gaming and holding that the "two sets of approvals are of different natures"). To conduct class II gaming on post-1988 land, only a concurrence is needed; it is un-compacted gaming, regulated solely by the tribe and a federal agency, is typically housed in a casino, and has most of the attractions and attributes of full-scale casino gambling. To conduct Class III gaming on pre-1988 land, only a compact is needed and no concurrence is necessary. To conduct class III gaming activities on post-1988 land, both are needed. The compacting power stands alone and can be effectuated, and routinely is effectuated, by a governor who lacks a concurring power. In effect, a governor with compacting power, but no concurring power, is empowered only to approve class III gaming on pre-1988 lands; he is not empowered to authorize off-reservation, Vegas-style casinos on post-1988 lands. That distinction is certainly not irrational, as it's exactly the balance Arizona has struck. *See* Ariz. Rev. Stat. § 5-601(a), (c) (expressly authorizing the governor to compact and expressly prohibiting the governor to concur).

To exercise his compacting power, it's not necessary that the Governor also have the right to concur. *See* 2B Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 55.03 (5th ed. 1992) ("A

necessary implication within the meaning of the law is one that is so strong in its probability that the contrary thereof cannot reasonably be supposed."). Indeed, before Proposition 1A, the Governor negotiated and executed 57 compacts with tribes for on-reservation gaming. *See supra* Part I.A.1. The Governor issued no concurrences for those tribes because concurrences aren't necessary for on-reservation gaming. These structural and functional differences demonstrate why the concurrence power does not arise by implication from the compacting power.

Nor can it be said that the voters who approved Section 19(f) misbelieved that, in authorizing the Governor to compact, they also were authorizing the Governor to concur. As sketched out above and discussed in detail below, the extrinsic evidence surrounding passage of Proposition 1A—which amended the Constitution to add Section 19(f)—is focused on on-reservation gambling, which, unlike off-reservation gambling, needs no concurrence. The people of California did not want Indian gaming to expand beyond pre-1988 reservation lands, so they gave the Governor power only to compact and withheld from him the power to concur.

Before Proposition 1A in 2000, Proposition 5 was passed in 1998. Proposition 5 authorized California to enter into the Tribal-State compacts IGRA contemplates; Proposition 5 said nothing about gubernatorial concurrences. *Davis*, 21 Cal. 4th at 590. This Court struck down Proposition 5 because it was a statute and thus unconstitutional in light of the Constitution's overriding prohibition on Vegas-style gaming. *Id.* at 589–90. Proposition 1A was an attempt to cure Proposition 5's constitutional defects; it set out to accomplish what Proposition 5, as a mere statute, could not. And so, like Proposition 5, Proposition 1A spoke only of compacting, and said nothing about concurring or off-reservation gambling.

Indeed, in between *Davis* and Proposition 1A, California executed 57 Tribal-State gaming compacts. *See* K. Alexa Koenig, *Gambling on Proposition 1A: The California Indian Self-Reliance Amendment*, 36 U.S.F. L. Rev. 1033, 1043–1044 (2002). All were for on-reservation land for which IGRA requires a compact but does not require a concurrence. *See generally* Nicholas Kump, Note, *Chapter 51: Approval of Tribal-State Gaming Agreements Governing California's First Off-Reservation Casino*, 45 McGeorge L. Rev. 521 (2014). The Legislature's ratification of those compacts mentioned neither (1) off-reservation casinos nor (2) gubernatorial concurrences. *See* Assembly Bill No. 1385 (1999-2000 Reg. Sess.) (AB 1385); *see also Stand Up!*, 6 Cal. App. 5th at 742–743 (Franson, J., concurring and dissenting).

To summarize, neither the people of California, nor the Legislature, nor the Governor tried to approve any off-reservation gaming in the years leading up to Proposition 1A. Following that trend, the extrinsic evidence of voters' intent for Proposition 1A is equally focused on on-reservation gaming. The Attorney General's summary, and the Legislative Analyst's analysis, state that Proposition 1A's passage would permit gaming only on "Indian lands." *See* RJN, Ex. A, Voter Information Guide, *supra*, Official Title and Summary Prepared by the Attorney General, at 4 (Proposition 1A would permit "operation of slot machines, lottery games, and banking and percentage card games by federally recognized Indian tribes *on Indian lands* in California") (emphasis added); *see also* RJN, Ex. A, Voter Information Guide, Analysis by the Legislative Analyst, at 5 ("This proposition amends the State Constitution to permit Indian tribes to conduct and operate slot machines, lottery games, and banked and percentage card games on *Indian land*.") (emphasis added).

Of particular value here, Justice Franson's opinion in *Stand Up!* compellingly discusses the background and conclusions to be drawn from the passage of Proposition 5. *Stand Up!*, 6 Cal. App. 5th at 743–46 (Franson, J., concurring and dissenting).

Specifically, the proposition's proponents' arguments in the ballot pamphlets stated they supported passage "so we can keep the gaming we have *on our reservations*." RJN, Ex. A, Voter Information Guide, *supra*, Argument in Favor of Proposition 1A, at 6 (emphasis added). In response to opponents' worries that, after Proposition 1A, "[c]asinos won't be limited to remote locations" because "Indian tribes are already buying up prime property for casinos in our towns and cities," the proponents countered that "Proposition 1A and federal law *strictly limit Indian gaming to tribal lands*." RJN, Ex. A, Voter Information Guide, Rebuttal to Argument Against Proposition 1A, at 7 (emphasis added). As this Court has recognized, "ballot measure opponents frequently overstate the adverse effects of the challenged measure." *Legislature v. Eu*, 54 Cal. 3d 492, 505 (1991) ("*Eu*"). Thus, "it is the sponsors that we look to when the meaning of the statutory words is in doubt." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 585 (1988). This is particularly so when sponsors successfully rebut their opponents' arguments. *Eu*, 54 Cal. 3d at 505.

None of the extrinsic evidence mentions gubernatorial concurrences. In short, the language of Proposition 1A, and extrinsic evidence regarding what voters understood would result from its passage, (1) indicate that casino-style gambling would be limited to historical Indian lands, and (2) make no mention of gubernatorial concurrences. Article IV, Section 19(f) does not expressly or impliedly authorize the Governor to concur.

2. The Concurring Power Is Not An Inherent Executive Power Given the Constitutional Prohibition on Gaming.

The Governor argued below that he acts under existing constitutional authority in Article IV, Section 19(f), and that he simply implements the policy established in the Constitution by exercising his existing executive powers. The Court of Appeal held the Governor's concurrence was "one part of a federal program in which the Legislature has made the policy decision to participate." *UAIC*, 4 Cal. App. 5th at 49. As discussed in Part I.B., *infra*, in finding that the concurring power was an executive power, the Court of Appeal dismissed the notion it was a legislative power. The Court concluded it was unnecessary to examine whether the power was "ancillary and incidental" to the compacting power, because the concurrence was simply a "part" of a program in which the Legislature decided to participate. *Id.* at 39. In other words, the Court found the executive power derived from existing law and policy.

The Court of Appeal's conclusion flies in the face of the very constitutional provision that it assumes gives life to the "executive power" it posits. In fact, Article IV, Section 19 states a broad and far-reaching prohibition on gaming, including lotteries, bingo and casinos of the type "operating in Nevada and New Jersey." The Constitution then provides a narrow and specific exemption "notwithstanding" the prohibitions that authorize the Governor to "negotiate and conclude" Tribal-State compacts for casino-style games. No other power is granted to the Governor in Article IV, Section 19. The voters did not include any other power associated with this section, including the power to trigger the legality of off-reservation class II and class III tribal gaming. *Stand Up!*, 6 Cal. App.

5th at 768 (Franson, J., concurring and dissenting). The Governor cannot "derive" an "executive power" from an existing constitutional provision that does not authorize him to act in any way other than authorized. The concurrence power is therefore neither "inherent" nor derivative of existing law or policy.

It should also be noted that Section 19 prohibits lotteries, but "notwithstanding" the prohibition, allows for bingo regulated by cities and counties. Cal. Const. art. IV, § 19(c). When the Governor concurs in a secretarial determination, he triggers the lifting of the federal prohibition on tribal class II gaming, including bingo and certain card games. Given that tribally-operated bingo is not subject to a Tribal-State compact, the action of the Governor to permit bingo on off-reservation trust land is clearly beyond and directly contrary to the state constitutional powers given to him, namely to "negotiate and conclude" compacts.

3. The Court of Appeal in *Stand Up !* Holds the Governor Exceeded his Authority, Whether It Is Inherent Executive Authority or Not.

Two Justices in *Stand Up!* did not reach the question whether the concurring power might be an implied power; Justice Franson clearly holds that is it not. Justice Detjen agrees with Justice Franson that the authority to concur as a power is not inherent to the chief executive of the state. *Stand Up!*, 6 Cal. App. 5th at 718 (Detjen, J., concurring and dissenting). But ultimately, she found that because the land was not held in trust at the time the Governor negotiated the compact (a necessary condition, in her view), the Governor was not negotiating a compact for gaming "on Indian lands" and, "thus, exceeded any authority granted by Proposition 1A." *Id.* at Justice Detjen includes the exercise of the concurring power equally in

excess of the authority granted by Proposition 1A when the Governor compacted for gaming on lands which are not already in trust and thus, "not Indian lands." *Id.*

Following Justice Detjen's reasoning, Governor Brown's exercise of the concurrence here—with virtually identical facts as in *Stand Up!*—is also in excess of the authority granted by Proposition 1A. The Governor was not negotiating and executing a Tribal-State compact for gaming "on Indian lands," and thus, he exceeded the constitutional authority.

Similarly, Justice Smith in *Stand Up!* neither endorses nor rejects the argument made by the State and the Intervenor Tribe there that the concurring power was implied by the compacting power. *Id.* at 698 (Smith, J., lead opinion). Justice Smith holds the critical element is whether an approved Tribal-State compact exists, and "aver[s] only that any authority [the Governor] has to grant concurrences under IGRA is limited to land on which gambling will be subject to a state-approved compact." *Id.* at 704. Again, much like the facts in *Stand Up!*, the facts in the instant case demonstrate there was no approved Tribal-State compact for the Enterprise Rancheria, as the Legislature never ratified the Enterprise compact, and it expired of its own terms.

Thus, under the reasoning of any of the three opinions in *Stand Up!*, the Governor in the instant case did not have authority under the Constitution to concur with the secretarial determination for off-reservation gaming and trigger the chain of legal consequences under federal law.

B. By Concurring Without Authorization, the Governor Made Public Policy and Unconstitutionally Exercised Legislative Power.

As a whole, Article IV, Section 19 recognizes that whether, when, and how gambling can occur in California are characteristically legislative concerns subject to legislative power in the first instance. Article IV is the article of the Constitution on legislative powers. And Section 19 is focused on the Legislature's oversight of gaming policy. Every subsection speaks of the Legislature's power—over lotteries, horse racing, bingo, and casinos. *See* Cal. Const. art. IV, § 19(a)-(f). Even the subsection giving the Governor power to compact subjects those compacts "to ratification by the Legislature," thus cementing the Legislature as the branch of government with final say over gaming within the state. Cal. Const. art. IV, § 19(f). All of these things—the general prohibition on the Legislature's power to permit gambling; the specific grants of power to the Legislature to permit certain types of gambling; and the limited grant of compacting authority to the Governor—demonstrate that authority over gambling is a legislative power. *See Stand Up!*, 6 Cal. App. 5th at 719 (the language of Section 19 "is confirmation that the underlying authority to concur in the Secretary's determination to authorize Nevada- or New Jersey-style casinos on newly acquired lands is *inherently and wholly legislative.*") (emphasis added) (Detjen, J., concurring and dissenting).

That should come as no surprise. Gaming within a state implicates many policy issues—*e.g.*, law enforcement, land use, transportation and environmental impacts, water resources management and water quality, air quality, cultural resources issues, and social policy. And the core of the Legislature's power is the power to weigh competing interests and set public policy. *See Carmel Valley Fire Protection Dist. v. State*, 25 Cal. 4th

287, 299 (2001); *Connecticut Indemnity Co. v. Superior Court*, 23 Cal. 4th 807, 814 (2000). For the same reasons, courts in other states have concluded that power over gaming is presumptively legislative.[5]

The Governor's executive power is the power to carry out—literally, to execute—the state's public policies. And California public policy toward gambling is largely prohibitive. After Proposition 1A and Section 19(f) of Article IV, that public policy makes an exception for tribes conducting class III gaming on their own pre-1988 reservations. Thus, the

---

[5] *Fla. House of Reps. v. Crist*, 999 So. 2d 601, 616 (Fla. 2008) (concluding that the governor's execution of a compact authorizing types of Indian gaming that are prohibited under Florida law violates the separation of powers); *Taxpayers of Mich. Against Casinos v. Michigan*, 478 Mich. 99, 125–133 (2007) (holding that governor's unilateral amendments to Indian gaming compact constituted legislation because they "alter[ed] the legal rights and duties of persons outside the legislative branch, they supplant[ed] legislative action, they involve[d] determinations of public policy, and they [we]re not authorized by the Michigan Constitution"); *Panzer v. Doyle*, 271 Wis. 2d 295, 338 (2004) (holding that "entering into a tribal-state compact under IGRA, thereby committing the state to a particular position with respect to Indian gaming, involves subtle and important decisions regarding state policy that are at the heart of legislative power"), *overruled in part on other grounds by Dairyland Greyhound Park, Inc. v. Doyle*, 295 Wis. 2d 1 (2006); *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 823 (2003) ("Compacts addressing [the issues permitted to be addressed under IGRA] necessarily make fundamental policy choices that epitomize 'legislative power.'"); *State ex rel. Clark v. Johnson*, 120 N.M. 562, 573–74 (1995) (ruling that the governor's unilateral approval of an Indian gaming compact violated the New Mexico Constitution's separation of powers clause because it did not execute existing law, but rather was "an attempt to create new law"); *Narragansett Indian Tribe of Rhode Island v. State*, 667 A.2d 280, 282 (R.I. 1995) (deciding that the legislature, not the governor, has power to approve compacts under the state constitution); *Kansas ex rel. Stephan v. Finney*, 251 Kan. 559, 583 (1992) (holding that the power to bind the state to an IGRA compact is legislative in nature, explaining that many provisions of the compact "would operate as the enactment of new laws and the amendment of existing laws").

Governor is empowered to negotiate and execute compacts for on-reservation casinos, subject to ratification by the Legislature; the Governor's compacting power carries out and executes the public policy embodied in Article IV, Section 19(f). That narrow exception does not bespeak a broad and amorphous public policy "to participate in IGRA," such that *any* action the Governor takes vis-à-vis *any* Indian gaming on *any* land is executive action that implements state policy. *UAIC*, 4 Cal. App. 5th at 49; *see id.* at 51 ("[T]he act of concurring … is in the nature of an executive act because it involves the implementation of California's existing Indian gaming policy.").

Contrary to the Court of Appeal's assertion, *Lac Courte* doesn't hold that concurring is inherently an executive act. *See id.* at 51–52. *Lac Courte* holds that concurring is an executive act *only when done in accordance with legislatively established state policy*. In *Lac Courte*, the governor of Wisconsin refused to concur, "citing Wisconsin's general disapproval of off-reservation gaming and public policy of permitting only 'limited exceptions to the general prohibition against gambling.'" *Lac Courte*, 367 F.3d at 653. To circumvent the governor's refusal, the jilted tribe argued that IGRA Section 2719's concurrence requirement violated the federal constitution. The Seventh Circuit rejected all of the tribe's claims, including its claim that Section 2719 violates federalism principles by compelling a state governor to usurp state legislative power. *See id.* at 663–664. State legislatures get to dictate state public policy on gaming, and Section 2719 does not require state governors to act without regard to their legislatively-set public policies. *See id.* at 664–65. Thus, when Wisconsin's governor decided not to concur, he made no new policy; he was guided by the state legislature's preexisting policy and acted in a

manner "typical of the executive's responsibility to render decisions based on existing policy." *Id.* at 664.

That's all UAIC is arguing here—that the Governor's executive power is to act consistent with, not contrary to, California's expressed public policy on Indian gaming. And that policy prohibits gaming except on pre-1988 reservation lands. Since the Governor's concurrence for the Enterprise Tribe authorized off-reservation gaming on post-1988 lands, the Governor was not fulfilling California public policy. *See Stand Up!*, 6 Cal. App. 4th at 703 (rejecting argument that "the Governor is merely acting within existing California gambling policy when he concurs in a two-part determination by the Secretary of the Interior"); *see also id.* at 720 (Detjen, J., concurring and dissenting) (the "*United Auburn* [Court of Appeal's] reliance on *Lac Courte Oreilles* to conclude concurring has an executive characteristic under California law is misplaced"). Thus, the Governor was exercising legislative power when his concurrence allowed gambling in a place where the Constitution prohibits it.

Off-reservation Indian gaming implicates a host of other public policies, which reinforce the conclusion that the Governor's concurrence here was legislative policymaking rather than executive policy-implementing. By concurring without Constitutional authorization, the Governor changed the way in which California participates in IGRA. The concurrence also has massive land-use and tax-base consequences, insofar as the Yuba Site, once in trust for the Enterprise Tribe, ceases to be subject to California's civil, criminal, and tax jurisdiction. The Court of Appeal tried to respond to each of those other ways in which the concurrence makes policy. Its responses are unpersuasive:

- The Court of Appeal opined that, because the people and Legislature have already decided to participate in IGRA by authorizing the Governor to compact, the Governor's concurrence was a purely executive act pertaining to that participation. *See UAIC*, 4 Cal. App. 5th at 49 ("The Governor's concurrence . . . is only one part of a federal program in which the Legislature has made the policy decision to participate."). That's false. The Legislature has "exclusive power," not only "to determine *whether* … the state shall participate" in a federal program like IGRA, but also "*the manner* in which the state shall participate." 62 Ops. Cal. Atty. Gen. 781, 784 (1979) (emphasis added); *see also* 65 Ops. Cal. Atty. Gen. 467, 469 (1982) ("Under [the] separation of powers the decision of the State of California to participate in a federal program is essentially legislative and the Legislature has the exclusive power to determine *whether, the manner in which, and the conditions under which* the state shall participate.") (emphasis added).
- The Court of Appeal tried to distinguish land-use cases—*Mira Dev. Corp. v. City of San Diego*, 205 Cal. App. 3d 1201 (1988) ("*Mira*"), and *Arnel Dev. Co. v. Costa Mesa*, 28 Cal. 3d 511 (1980) ("*Arnel*")—as holding only that "zoning ordinances are legislative in nature." *UAIC*, 4 Cal. App. 5th at 49. Zoning ordinances may have been the subject of those cases, but both affirm the broader point that land-use decisions are legislative in character. *See Arnel*, 28 Cal. 3d at 523 ("the making of land-use policy [is] a legislative act"); *Mira*, 205 Cal. App. 3d at 1218 (zoning restrictions are legislative because they "make[] land use policy"). Furthermore, the Court of Appeal's contention that a gubernatorial concurrence is an adjudicative land-

use decision because it deals with one parcel of land also misses the mark. *See UAIC*, 4 Cal. App. 5th at 50. "A zoning decision … is legislative in nature even if made in the context of specific, relatively small parcels of private property." *Mira*, 205 Cal. App. 3d at 1218; *see Arnel*, 28 Cal. 3d at 516 (authorities holding that zoning is legislative draw "no distinctions based on the size of the area or the number of owners").

- Finally, the Court of Appeal rejected that the Governor's concurrence sets tax policy because the concurrence does not "determine[ ] *on a statewide basis* what property is and is not to be taxed." *UAIC*, 4 Cal. App. 5th at 50. As with the land-use cases discussed above, the scope of the concurrence isn't what matters; the nature of the concurrence is what matters. *See Jackson & Perkins Co. v. Stanislaus Cnty. Bd. of Supervisors*, 168 Cal. App. 2d 559, 564 (1959) (deciding "what was to be taxed and what to be exempted was purely a matter of legislative policy") (citations omitted); *Cullinan v. McColgan*, 80 Cal. App. 2d 976, 981 (1947) ("matters of policy in the field of taxation are neither for the executive nor the judicial departments but for the Legislature"). Here, the Secretary announced that taking the Yuba Site into trust for the Enterprise (which is what insulates that Site from state taxation, *see* 25 U.S.C. § 5108) was contingent on obtaining a concurrence from the Governor; thus, the Governor's concurrence was inextricably intertwined with tax policy.[6]

---

[6] To be sure, in general "the Secretary has the authority to take the land into trust for an Indian tribe, which would remove the property from the tax base, whether or not the Governor concurs." *UAIC*, 4 Cal. App. 5th at 50–

* * *

When the Governor exercises legislative power beyond his authority, he violates the separation of powers. *See Lukens*, 156 Cal. at 501 ("As an executive officer, [the Governor] is forbidden to exercise any legislative power or function except as in the constitution expressly provided."). That is, the Governor "may exercise legislative power only in the manner expressly authorized by the Constitution." *Harbor*, 43 Cal. 3d at 1084. Here, the Governor's concurrence was an exercise of legislative power, contrary to the gaming and compacting restrictions set out in the California Constitution. The concurrence is unconstitutional and must be vacated.

II. The Governor Has No Power To Negotiate A Compact For Gaming On Non-Indian Lands.

Even if power to concur could be implied from the Governor's power to compact, that wouldn't save the Governor's concurrence vis-à-vis the Yuba Site. The compacting power is available only *after* lands are taken into trust. *See Stand Up!*, 6 Cal. App. 5th at 710 (Detjen, J., concurring and dissenting). Yet here, the Governor both concurred *and* compacted on August 30, 2012—*before* the Yuba Site was taken into trust.

Article IV, Section 19(f) empowers the Governor 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.

---

51. But in *this* case, the Secretary chose not to take the Yuba Site into trust without a concurrence.

Cal. Const., art. IV, § 19(f). Read as a whole, this language is not a mere authorization to negotiate compacts, *the content or subject of which is gaming on Indian lands*. It instead conditionally authorizes compacting only with respect to lands that are Indian lands *at the time of negotiation*. The critical prepositional phrase "on Indian lands in California" modifies the nouns "operation" and "conduct," not the noun "compacts." *See Stand Up!*, 6 Cal. App. 5th at 509 (Detjen, J., concurring and dissenting) (sentence diagram). When the lands at issue are not Indian lands (because they haven't been taken into trust), there is no extant place for the "operation" and "conduct" of Class III games "in accordance with federal law," so the condition for the Governor's authority is unsatisfied.

Furthermore, the prepositional phrase "on Indian lands in California" in Section 19(f) would be superfluous if it simply described the content or subject of compacts. That's because IGRA already restricts Indian gaming to "Indian lands." *See* 25 U.S.C. §§ 2710, 2719. And the Tribal-State compacts that IGRA requires for Class III gaming are for "governing gaming activities *on the Indian lands of the Indian tribe*." 25 U.S.C. § 2719(d)(3)(B). Put differently, the drafters of Proposition 1A could have dropped the entire preposition phrase "on Indian lands in California," and relied entirely on the final phrase "in accordance with federal law," if their only intent were to describe the content or subject of the compacts that Section 19(f) permits.

The structure of Section 19 reinforces that conclusion. Section 19(e) is a blanket prohibition on casino gaming, and Section 19(f) is a limited exception to that prohibition. As between an interpretation of Section 19(f) that authorizes compacts for current and possible Indian lands, and an interpretation that authorizes compacts only for current Indian lands, the

narrower interpretation is preferable. The notion that Section 19(f) vests the Governor "with broad authority to negotiate any compact which could ultimately result in gaming on later-created Indians lands … is difficult to defend." *Stand Up!*, 6 Cal. App. 5th at 712.

The "broader social context" of Proposition 1A reinforces that conclusion, too. *Id.* at 713. Before Proposition 1A, the Governor had negotiated compacts only for tribes with established Indian lands, not subject to the concurrence requirement. Proposition 1A was the people's attempt to give the Governor necessary constitutional authority for those compacts to be valid. There's no evidence that Proposition 1A was also meant to give the Governor additional authority to negotiate speculative compacts for yet-to-be obtained off-reservation parcels.

Letting the Governor negotiate and execute compacts for lands that might or might not become "Indian lands" in the future presents serious practical problems. Lots of things can derail a fee-to-trust conversion—like environmental concerns, or federal courts might find some procedural corner-cutting. If Section 19(f) is as broad as the Governor claims (and includes the power to concur, which we decidedly contest), negotiations over a compact could take place many years before land is taken into trust (if it ever is). In the meantime, on-the-ground circumstances can change materially, and the current Governor might believe that some provisions in the compact are no longer good for California. The better balance is to read Section 19(f) as empowering the Governor to negotiate compacts only after the land is truly "Indian lands," that is, when it is almost certain that the bargained-for casino will be built and operated soon thereafter.

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Dated: March 27, 2017

MORGAN, LEWIS & BOCKIUS LLP

By: _____

Colin C. West
Attorneys for Appellant
UNITED AUBURN INDIAN
COMMUNITY OF
THE AUBURN RANCHERIA

CERTIFICATION OF COMPLIANCE

Pursuant to Rule 8.204(c)(1), California Rules of Court, the undersigned herby certifies that the Opening Brief of Appellant United Auburn Indian Community of the Auburn Rancheria contains 9,929 words, excluding tables and this certificate, according to Microsoft Word 2010, the computer program used to produce this brief.

Dated: March 27, 2017

MORGAN, LEWIS & BOCKIUS LLP

By: _____
Colin C. West
Attorneys for Appellant
UNITED AUBURN INDIAN
COMMUNITY OF
THE AUBURN RANCHERIA

CERTIFICATE OF SERVICE

I, Yvette Andrada, declare that I am a resident of the State of California, County of San Francisco. I am over the age of eighteen years and not a party to the within action; my business address is Morgan, Lewis & Bockius LLP, One Market Street, Spear Tower, San Francisco, California 94105.

On March 27, 2017, I caused the following document to be served:

APPELLANT'S OPENING BRIEF ON THE MERITS

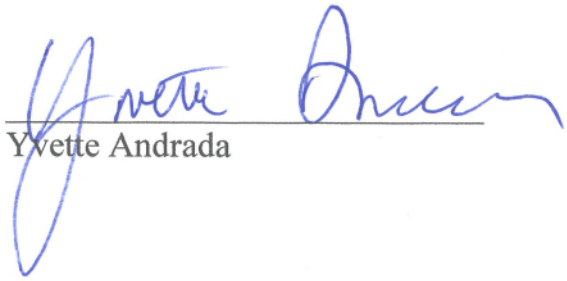
via U.S. Postal Service – by placing the document listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below:

Timothy M. Muscat
Office of the Attorney General
P.O. Box 944255
1300 I Street, Suite 125
Sacramento, CA

California Court of Appeal
Third Appellate District
914 Capitol Mall
Sacramento, CA 95814

Hon. Eugene L. Balonon
Sacramento Superior Court, Dept. 14
720 Ninth Street, Room 611
Sacramento, CA 95814

I declare under penalty of perjury, under the laws of the United States of America and the State of California, that the above is true and correct. Executed on March 27, 2017, at San Francisco, California.



Yvette Andrada