BENJAMIN J. HORWICH (State Bar No. 249090)
MELINDA E. LEMOINE (State Bar No. 235670)
JOHN D. MAHER (State Bar No. 316157)
MUNGER, TOLLES & OLSON LLP
560 Mission Street, Twenty-Seventh Floor
San Francisco, California 94105-2907
Telephone: (415) 512-4000
Facsimile: (415) 512-4077

JEREMY S. KREISBERG (*pro hac vice forthcoming*)
MUNGER, TOLLES & OLSON LLP
1155 F Street N.W., Seventh Floor
Washington, D.C. 20004-1357
Telephone: (202) 220-1100
Facsimile: (202) 220-2300

BRADLEY A. BENBROOK (State Bar No. 177786)
BENBROOK LAW GROUP
400 Capitol Mall, Suite 2530
Sacramento, CA 95814
Telephone: (916) 447-4900
Facsimile: (916) 447-4904

Attorneys for Intervenor-Defendant
California Gaming Association

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA, SACRAMENTO DIVISION

YOCHA DEHE WINTUN NATION; VIEJAS BAND OF KUMEYAAY INDIANS; and SYCUAN BAND OF THE KUMEYAAY NATION, Plaintiffs, vs. GAVIN NEWSOM, GOVERNOR OF CALIFORNIA; STATE OF CALIFORNIA, Defendants.	Case No. 2:19-cv-00025-JAM-AC Hon. John A. Mendez **PROPOSED MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO STAY**
CALIFORNIA GAMING ASSOCIATION, Intervenor-Defendant.	[To Be Filed Concurrently with Motion to Dismiss or Stay, [Proposed] Order Granting Motion, and Declaration of John D. Maher]

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INTRODUCTION

Under the Indian Gaming Regulatory Act ("IGRA"), Pub. L. No. 100-497, 102 Stat. 2467 (1988), 25 U.S.C. §§ 2701–2721, States and Indian tribes may enter into compacts authorizing Nevada-style gaming at tribal casinos on Indian lands. The Plaintiff Tribes here have entered into such compacts with California, granting the Tribes the right to host Nevada-style card games that California law prohibits private entities from operating. The Tribes argue that California has breached those compacts. Compact litigation is not unusual; tribes have sparred with California over the scope of tribal gaming rights, or the State's right to money paid under a compact.[1]

But this case is different. The Tribes invoke their compacts not as a shield to protect their own right to offer their own games, but instead as a sword to attack private gaming long offered by non-Indians, off Indian lands. Such compact litigation is unprecedented. IGRA exists to "exists to "grant[] *states* some role in the regulation of *Indian gaming*" conducted on "*Indian lands*." *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 715 (9th Cir. 2003) (emphasis added). "Everything—literally everything—in IGRA affords tools … to regulate gaming on Indian lands, and nowhere else." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 795 (2014). It would turn IGRA on its head for compacts to become licenses for *tribes* to conscript a federal court into regulating *non-Indian* gaming conducted *off* Indian lands. The Tribes' extraordinary theory lacks support in the compacts' terms. And the teachings of judicial restraint, our traditions of equity, and our system of federalism all cry out to reject the Tribes' demand that this Court superintend how California regulators enforce California law against California businesses. The Complaint is misconceived, root and branch, and should be dismissed.

STATEMENT OF THE CASE

I. California's Regulation of "Banking Games"

Cardrooms are private establishments that offer a secure and regulated venue for legal gaming activities. *See* Cal. Bus. & Prof. Code §§ 19800 *et seq.* They are the oldest venue for

[1] *See, e.g.*, *Cachil Dehe Band of Wintun Indians v. California*, 618 F.3d 1066 (9th Cir. 2010) (number of slot machine licenses authorized by a compact); *Pauma Band of Luiseno Mission Indians v. California*, No. 16-cv-1713, 2017 WL 1166426, at *3 (S.D. Cal. Mar. 29, 2017) (whether a compact authorizes a State to use funds paid by the Tribes for certain purposes).

gaming in California, tracing back more than 150 years. California Gaming Association, *About CGA*, https://californiagamingassociation.org/about-cga/ ("CGA Background"); *see* Cal. Bus. & Prof. Code § 19801(b). Today, the State hosts dozens of cardrooms that employ tens of thousands of Californians and contribute hundreds of millions of dollars of tax revenue annually. CGA Background, *supra.* Cardrooms operate according to the State's "strict and comprehensive" regulatory framework for legal gambling. Cal. Bus. & Prof. Code § 19801(h). Two expert agencies—the California Gambling Control Commission ("Commission") and the California Department of Justice's Bureau of Gambling Control ("Bureau")—work in tandem to enforce that regulatory scheme. Compl. ¶ 30. These agencies are responsible not only for the licensing of all cardrooms in the State, but also the approval of all games played there. *See* Cal. Bus. & Prof. Code § 19826(g). Indeed, a cardroom cannot offer a game unless the Bureau has specifically approved it, in every detail of its wagering and play. *See* Cal. Code Regs. tit. 11, §§ 2070(b), 2071. The regulators can set standards for game-rule approvals through their general rulemaking powers, and they ensure that cardrooms are following the rules through their extensive supervisory and investigatory authorities. *See* Cal. Bus. & Prof. Code § 19826.

A primary emphasis of this regulatory scheme (and the Complaint) is the State's prohibition on "banking games." Under California law, "[b]anking game has come to have a fixed and accepted meaning: The 'house' or 'bank' is a participant in the game, taking on all comers, paying all winners, and collecting from all losers." *Sullivan v. Fox*, 189 Cal. App. 3d 673, 678 (1987). Many games played in Las Vegas and Atlantic City fit this mold: There is only one dealer at the table—an employee and representative of the casino, or "house," who takes on all comers. Players around the table can wager any amount they want (within house rules) against the house. And the dealer, as representative of the house, pays all winners and collects from all losers using the house's funds. California Penal Code § 330 has prohibited games played in this way since 1872. *Hotel Emps. & Rest. Emps. Int'l Union v. Davis*, 981 P.2d 990, 996 (Cal. 1999). In 1984, the State "elevate[d]" this "statutory prohibition[] … to a constitutional level," banning "casinos of the type currently operating in Nevada and New Jersey," while retaining the legal status of the casinos then operating in California—*i.e.*, those that "ha[ve] commonly been called a

'card room.' " *Id.* at 1003–05 (quoting Cal. Const. art. IV, § 19).

Indeed, cardrooms have long offered so-called "player-dealer games," which differ from those played in Las Vegas and Atlantic City. In a player-dealer game, each table has multiple seated player positions, none of which is occupied by the house. For each hand dealt, one player position is designated as the player-dealer position. The person seated in the player-dealer position wagers a fixed amount of his own funds (not the house's unlimited funds), and persons seated in the other player positions generally wager against the player-dealer position (not against the house). Critically, the opportunity to occupy the player-dealer position rotates to all seated table positions; it is not reserved solely for one player or entity, and it is never occupied by the house. Cardrooms offered such player-dealer games even before California's constitutional ban on the distinct set of games played in Nevada and New Jersey. *See* 2000 Cal. Legis. Serv. Ch. 1023 (A.B. 1416) (citing history of and appellate decisions describing play of such games).

California law has consistently recognized that player-dealer games are permissible. In *City of Bell Gardens v. County of Los Angeles*, 231 Cal. App. 3d 1563 (1991), for instance, the California Court of Appeal found "wholly lacking in merit" a claim that player-dealer games played in the way just described are banking games. *Id.* at 1570; *see id.* at 1566 (describing games in which the player-dealer position "rotates systematically among the players and each player has the opportunity to act as dealer for two consecutive rounds"). *Bell Gardens* followed a line of similar state appellate decisions. *See, e.g.*, *Huntington Park Club Corp. v. Cty. of L.A.*, 206 Cal. App. 3d 241, 249–50 (1988). The sole caveat comes from *Oliver v. County of Los Angeles*, 66 Cal. App. 4th 1397 (1998), which cautioned that a player-dealer game could become an impermissible banking game if a single "player with a significant amount of money to bet can hold the position of player-dealer for a long time." *Id.* at 1409. The California Legislature reacted to *Oliver* by, among other things, clarifying that a player-dealer game with continuous and systematic rotation of the player-dealer position is not a "banking game." Cal. Penal Code § 330.11. The Bureau, in turn, has long approved cardrooms' player-dealer games, which typically require the opportunity to act as player-dealer to rotate to a new player at least every two hands. Compl. ¶ 48.

II. IGRA and California's Exception for Tribal Casinos

Notwithstanding California's general prohibition on Nevada-style banking games, an exception for tribal casinos currently exists. In 1988, Congress enacted IGRA to create a regulatory framework for tribal gaming on Indian lands. IGRA provides that "class III" gaming activities—which include banking games—are "lawful on Indian lands only if such activities are," *inter alia*, "located in a State that permits such gaming for any purpose by any person, organization, or entity," and "conducted in conformance with a Tribal-State compact." 25 U.S.C. § 2710(d)(1). IGRA further "prescribes the permissible scope" of such a compact by limiting the subjects that it may address. *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997); *see* 25 U.S.C. § 2710(d)(3)(C).

In 2000, California addressed tribal banking games by constitutional provision. *See* Cal. Const. art. IV, § 19(f). Although the State retained its general prohibition on banking games, and thus seemingly did not "permit[] such gaming for any purpose by any person," courts held that tribes could host banking games pursuant to compacts with the State. *See Artichoke Joe's*, 353 F.3d at 731. (The California Gaming Association (the "Association") intends to argue, in future proceedings, that *Artichoke Joe's* was wrongly decided, but recognizes that it binds this Court.)

Plaintiffs here (collectively, the "Tribes") entered into such compacts in 2015 and 2016. Compl. ¶ 24. This Court may properly consider those compacts because they are referenced in the Complaint, central to the Tribes' claims, and unquestionably authentic. *Daniels–Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010). Each compact provided, "The Tribe is hereby authorized and permitted to operate … [a]ny banking … card game[]." Tribal-State Compact Between the State of California and the Yocha Dehe Wintun Nation § 4.1(b) (2016) ("Yocha Dehe Compact") (Maher Decl. Ex. 1); Tribal-State Compact Between the State of California and the Viejas Band of Kumeyaay Indians § 3.1(a)(2) (2016) ("Viejas Compact") (Maher Decl. Ex. 2); Tribal-State Compact Between the State of California and the Sycuan Band of the Kumeyaay Nation § 3.1(a)(2) (2015) ("Sycuan Compact") (Maher Decl. Ex. 3). Because existing law otherwise prohibited non-tribal entities from operating banked games, the preamble of each Compact recited that "the State and the Tribe recognize … the exclusive rights [that] the Tribe will

enjoy under this Compact create a unique opportunity for the Tribe to operate a Gaming Facility in an economic environment free of competition from the operation of … banked card games on non-Indian lands in California and that this unique economic environment is of great value to the Tribe." Yocha Dehe Compact at 2; Viejas Compact at 1; Sycuan Compact at 1; Compl. ¶ 24.

III. The Instant Controversy

Accepting the Complaint's allegations, when the Tribes entered into compacts allowing their own gaming, they were simultaneously trying to convince the State to shut down cardroom gaming. Tribal representatives complained to the State no later than 2012 that cardrooms were hosting illegal banking games. Compl. ¶ 65. They continued to press this case in letters to the State, at workshops and roundtables with regulators, and in meetings with multiple Attorneys General. Compl. ¶¶ 65–119. They continue to argue their case to the State today. Compl. ¶ 109.

The State has undertaken substantial efforts to address the Tribes' concerns. The State met with tribal representatives three times in 2012 following the April 2012 complaint. Compl. ¶ 67. In December 2012, the Bureau stated that it was "investigating and evaluating [the Tribes'] allegations as appropriate." Compl. ¶ 70. The Commission held a roundtable in June 2013 and a workshop in August 2013 to discuss the Tribes' complaints relating to cardrooms' relationships with organized entities that play in cardrooms, known as third-party proposition players ("TPPs"). Compl. ¶ 77. It held more meetings and formal hearings, and issued multiple sets of proposed revised regulations. Compl. ¶¶ 78, 86. The Bureau, meanwhile, also at the Tribes' urging, considered changes to rules affecting the "collection" fees cardrooms charge their patrons. Compl. ¶ 87. The Bureau hosted a roundtable in May 2014, proposed three different versions of new regulations in October 2014, and held a workshop on those proposals in January 2015. Compl. ¶¶ 88, 90–91. More recently, the Commission began to review cardrooms' advertisements (again, at the Tribes' behest), and the Bureau has apparently promised the Tribes that it will shut down cardroom games that bear some resemblance to blackjack. Compl. ¶¶ 117–118.

In addition to all of that, tribal leaders met with then-Attorney General Harris on their primary complaint—that the cardrooms' player-dealer games are illegal banking games under California constitutional, statutory, and decisional law. Subsequently, the Bureau suspended a

2007 letter that set forth standards for player-dealer games, and announced a moratorium on new game approvals. Compl. ¶¶ 97–98. The Bureau then met with tribal representatives to discuss potential regulatory actions that would meet their demands. Compl. ¶ 100. In 2016, the Bureau issued new guidelines, Compl. ¶ 107, and after those guidelines were invalidated in 2017 for failing to undergo the required formal rulemaking process, the Bureau committed in August 2018, to undertake such a process, Compl. ¶ 109. The Bureau's process is underway; it has held six workshops in 2018 and 2019, and has one more planned. *See* Bureau of Gambling Control, *Regulations*, https://oag.ca.gov/gambling/regulations. Both the Tribes and the Association have actively participated in that process. *See* Compl. ¶ 109 (tribes); Letter from Bradley A. Benbrook to Stephanie Shimazu (Feb. 5, 2019) (cardrooms), https://oag.ca.gov/sites/all/files/agweb/pdfs/gambling/comments-ca-gaming-020519.pdf.

But before the Bureau could do its job, the Tribes filed this lawsuit—bringing to this Court the very issues that the regulators are currently considering at the Tribes' behest. The Complaint's central objection is that cardrooms' player-dealer games are banking games: The Tribes protest the Bureau's interpretation and enforcement of the Penal Code, arguing that the Bureau must require player-dealer games to not only rotate the player-dealer position, but also mandate that each player *accept* the deal in turn. *See* Compl. ¶¶ 48–49; *but see* Cal. Penal Code § 330.11 ("[I]t is not the intent of the Legislature to mandate acceptance of the deal by every player if the [Bureau] finds that the rules of the game render the maintenance of or operation of a bank impossible by other means."). And the Tribes even insist that, *regardless of whether cardroom games comply with statutory and decisional law*, they still violate the California Constitution. In their words: "[B]oth *Oliver* and Section 330.11 were flawed" because "*[n]o amount of rotation* could legitimize the play of constitutionally-prohibited games such as blackjack." Compl. ¶ 37.

The Tribes pair these arguments with a broadside attack on cardroom business practices that attend their operation of player-dealer games. The Tribes argue that cardrooms violate California Business & Professions Code § 19984 by retaining an "interest" in "funds wagered, lost, or won," due to Bureau-approved contracts with TPPs. Compl. ¶ 57. The Tribes further contend that cardrooms violate California Penal Code § 337j(f) by not charging collection fees to

some players at the table. Compl. ¶ 55. And, the Complaint continues, the State has failed to police these allegedly unlawful practices to the Tribes' liking—that the Commission lacks the bureaucratic capacity for certain duties (Compl. ¶ 85), that the Bureau insists on conducting legally required economic analysis before revising its regulations (Compl. ¶¶ 42, 93), or that the State simply has gotten its enforcement priorities wrong (Compl. ¶¶ 73, 86, 94).[2]

The upshot, the Tribes say, is that the State has breached its compacts with the Tribes, as well as an implied covenant of good faith and fair dealing. The Tribes assert that "the State promised Plaintiffs the rights to conduct [banking games] exclusive of non-Indian competition." Compl. ¶ 126. As relief, the Tribes apparently demand this Court take over as regulator, enforcer, and legislator—that it tell California how to enforce its laws, order the Bureau and Commission to rewrite their regulations, and even order the State to rewrite its statutes to conform to the Tribes' reading of the California Constitution. *See* Compl. at 37 (praying for "an injunction directing the State to enforce its laws"; a "decree requiring specific performance of the State's obligation[s]").

ARGUMENT

First, the Tribes' Complaint should be dismissed. This Court cannot, and should not, volunteer for the unprecedented role of superintending California's gaming laws, regulations, and enforcement practices—especially when the text of the compacts compel no such action, and a wealth of principles cut against such intrusion into the State's responsibilities. *Second*, in the alternative, the Court should exercise its discretion to refrain from adjudicating this case while State officials—the Bureau, the Commission, or state courts—work to carry out their duties. They are engaged with the very issues before the Court. The product of their work—final player-dealer-game rules issued by the Bureau, for example—are necessary preconditions to assessing, even on the Tribes' own theory, whether the State has met its promises. Principles of comity and political accountability for those state officials likewise weigh in favor of letting the State complete its work. *Third*, if this Court decides to press ahead now, it should substantially limit the case in two

[2] The Tribes also object to cardroom gaming on a basis unrelated to the prohibition on banking games—that California Penal Code § 330 bans games that resemble blackjack because, banked or not, they are the illegal 19th Century game of "twenty-one." Compl. ¶¶ 59, 64. The Tribes say the Bureau promised to "shut down" those games, but has moved too slowly. Compl. ¶ 118.

respects: The compacts say nothing at all about exclusivity over the game of "twenty-one," and the Complaint fails to state a claim under the implied covenant of good faith and fair dealing.

I. The Complaint Fails to State a Claim for the Relief It Seeks

This lawsuit is extraordinary in every way. The Tribes would convert a compact dedicated, and limited, to an authorization of *tribal* gaming on *Indian land* into a warrant for this Court to become the superintendent of California law governing *non-tribal* gaming *off* Indian land.

Dismissal is appropriate under Rule 12(b)(6) where the plaintiffs' claims "lack … a cognizable legal theory," *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990), or where the relief sought is unavailable as a matter of law, *McCue v. S. Fork Union Elementary Sch.*, 766 F. Supp. 2d 1003, 1007 (E.D. Cal. 2011). This lawsuit fails on both scores. *First*, the State has not breached an enforceable promise in the Tribes' compacts. The Tribes point to no compact provision that requires California to enact new regulations or statutes governing non-tribal gaming, or enforce existing law in any particular way; their extravagant claim rests on nothing but more than the compact preambles' statement of fact that the Tribes can offer games that cardrooms cannot. *Second*, even if that were not so, the Tribes' claims nevertheless fail because the only relief the Tribes seek is unavailable. The Tribes ask this Court to write new laws or regulations for California, and to police the Commission's and Bureau's enforcement priorities. Every indication—from Congress, from traditions of equity, and from principles of state sovereignty—is that the Tribes' request is misconceived. Individually, and certainly in combination, all these considerations show that the Complaint fails to state a claim for the extraordinary relief it seeks.

A. The Compacts Do Not Authorize the Tribes' Requested Relief

The compacts lack any enforceable promise by the State to enact particular laws, or to interpret and enforce existing ones in particular ways against non-tribal entities. A promise in a Tribal-State compact is specifically enforceable only if "the terms of the contract are sufficiently certain to provide a basis for an appropriate order." *Pauma Band of Luiseno Mission Indians v. California*, 813 F.3d 1155, 1167 (9th Cir. 2015) (quoting Restatement (Second) of Contracts

§ 362).[3] Conversely, if the provision at issue is "tainted with [] vagueness and ambiguity [such] that it might be reasonably expected that substantial disagreement as to precise terms may arise," it is not "enforceable." *Lahaina-Maui Corp. v. Tau Tet Hew*, 362 F.2d 419, 425 (9th Cir. 1966). This rule ensures that "court[s] may not only know what to order but also be able to determine whether or not the resulting performance is in accord with the contractual duty." Restatement (First) of Contracts § 370 cmt. c; *see* Restatement (Second) of Contracts § 362 (similar).

The compacts lack *any* standards—let alone "sufficiently certain" ones—for the State to satisfy in enacting, interpreting, and enforcing gaming laws against non-tribal entities. The compacts do not commit the State to revise its statutes to meet the Tribes' interpretation of the California Constitution, or to promulgate new regulations to meet the Tribes' interpretation of the California Penal Code. Nor do the compacts require State regulators to disapprove game rules under defined circumstances or revoke existing game-rule approvals. The compacts say *nothing at all* about how state officials must interpret State law, when it must engage in regulatory activities, or what enforcement priorities it must adopt. There are thus no guideposts for evaluating whether the State has complied with its purported compact obligations toward non-tribal gaming, and no contractual basis for fashioning a remedial order. Specific performance is therefore unavailable.

The Complaint, in insisting otherwise, relies on the preamble to each compact (Compl. ¶ 24), which recites that "the State and the Tribe recognize [that] the exclusive rights [that] the Tribe will enjoy under this Compact create a unique opportunity for the Tribe to operate a Gaming Facility in an economic environment free of competition from the operation of … banked card games on non-Indian lands in California and that this unique economic environment is of great value to the Tribe." Yocha Dehe Compact at 2. The Tribes claim this recital compels the State to establish and enforce a zone of exclusivity that prevents non-tribal entities from operating games that fall within the Tribes' interpretation of "banking game" under State law.

This theory is wrong. To begin, the prohibition on banking games by non-tribal entities

[3] "General principles of federal contract law govern the Compacts, which were entered pursuant to IGRA." *Pauma Band*, 813 F.3d at 1163 (citation omitted). The Court may find such principles in the Restatement, or in "California contract law" if "there is no practical difference between state and federal law." *Id.*

does not originate from the *compacts*; it originates from *state law*. The Penal Code has proscribed banking games since the 19th Century, and the California Constitution has done the same since 1984. The compact preambles (which date to 2015 and 2016) simply reflect the state of the law at that time: They explain that, because the law exempts Tribes from the State's general prohibition on banked card games, compacting Tribes effectively have the sole right to conduct such games. *See Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1037 (9th Cir. 2010) ("[I]n the current legal landscape, 'exclusivity' is not a new consideration the State can offer in negotiations because the tribe already fully enjoys that right as a matter of state constitutional law."). Reciting this legal truism is a far cry from creating an *enforceable obligation* of the State to interpret or apply its general prohibition on banking games in any particular way. A contract imposing such a particularized obligation would not merely "recognize" background law, as the preamble does. Nor would it relegate the relevant language to the *preamble* of the contract, without ever specifying the State's obligations in the contract's terms. Rather, a contract that operated in the way the Tribes claim would *require* the State to *do* something under clearly defined circumstances. The preambles here (and the compacts more generally) do no such thing.

The backdrop to tribal-state negotiations when the compacts were entered in 2015 and 2016 confirms the most natural reading of the preambles. In 2015 and 2016, state-licensed cardrooms had long been openly operating player-dealer games. According to the Complaint, the Tribes and the State have engaged in a continuous dialogue about cardroom gaming from April 2012 to the present day—long before and long after the parties entered the compacts. *See supra*, pp. 5–6. That context alone refutes the Tribes' contention that compacts put an end to any debate about whether cardrooms' player-dealer games are banking games under California law. And it is especially implausible that the State committed, through a single reference to "banked card games" in the preamble of the compacts—and no reference at all to TPPs, to cardroom collection fees, or to the proscription of "twenty-one"—to resolve in precisely the way the Tribes desired the hotly disputed issues that the parties were then debating, and continued to debate.

If there were any remaining doubt, it should be resolved against finding a specifically enforceable obligation. As explained below, the law would not have permitted the Tribes to

obligate the State in an IGRA compact to shutdown cardrooms' player-dealer games: Such an obligation would violate IGRA and the due process rights of cardrooms. It would be unenforceable under basic principles of equity. And it would raise profound federalism concerns to invite a federal court to dictate to California the state laws it must pass and how it must enforce them. Rather than strain to read the compact preambles to make illegal and unenforceable promises with vast implications for the State's control over its own affairs, this Court should simply conclude that the compacts contain no specifically enforceable commitments to regulate the cardroom industry in any particular way.

Importantly, if the Tribes believe they are not receiving the benefit of their mutual bargain with the State, they may have a remedy other than specific performance. For example, if the Tribes signed the compacts, and gave substantial consideration, based on their understanding that the State would shut down cardrooms' player-dealer games, then perhaps the Tribes are situated to seek different equitable remedies, such as rescission. *See Pauma Band*, 813 F.3d at 1167 (explaining that where specific performance is unavailable, "the appropriate remedy is rescission and restitution"). The compacts, however, do not provide a basis for the Tribes to receive the only remedy they plead—specific performance of obligations stated nowhere in the compacts.

B. The Compacts Cannot Authorize the Tribes' Requested Relief

Even if the compacts reflected the State's and Tribes' shared expectation about how the State would regulate cardrooms, the Complaint still would not state a claim for the relief it seeks. That is so for at least six distinct but related reasons: (1) IGRA does not permit compacts to include enforceable obligations respecting gaming operations of non-tribal entities operating off Indian lands; (2) the requested relief would abrogate cardrooms' right to due process; (3) courts will not assume the prosecutorial role of enforcing a criminal law like California Penal Code § 330; (4) federal courts lack the power to enforce state law by directing the activities of state officials or ordering a State to enact further laws or regulations; (5) federal abstention principles counsel against adjudicating a suit so tightly bound up with state regulatory policy; and (6) an order of specific performance would contravene the rules traditionally observed by equity courts. Again, the Tribes' allegations and legal contentions (if they were sound) might support a claim for

rescission of the compacts—but specific performance is many bridges too far.

1. The Tribes' Requested Relief Is Contrary to IGRA

"IGRA prescribes the permissible scope of [Tribal-State] Compacts." *Cabazon*, 124 F.3d at 1056. But it says nothing about States and Tribes making enforceable promises about *non-tribal* gaming *off* Indian lands. Rather, it provides that a "Tribal-State compact negotiated under [IGRA] may include provisions relating to" seven topics. 25 U.S.C. § 2710(d)(3)(C). This list is "exhaustive"; if a subject does not fall within one of the seven specified topics, it is not a "permissible subject[] of negotiation" and a compact may not "cover" it. *Rincon Band*, 602 F.3d at 1028–29 & n.9. And IGRA's list of topics is read "restrictively"—ambiguities concerning whether a compact can include an obligation should be resolved against inclusion. *Id.* at 1028 n.9.

Read "restrictively" or not, IGRA says absolutely nothing about a State's enactment and enforcement of gaming laws against *non-tribal* entities *off* Indian lands. Topics (i)–(iv) and (vi) deal with the regulation or taxation of tribal gaming. Topic (v) permits the parties to include remedies for breach of contract, but does not enlarge the scope of those contractual promises. Topic (vii) is the broadest—a "'catch-all' provision," *Rincon Band*, 602 F.3d at 1028 n.9—under which compacts may address "other subjects that are *directly related* to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C)(vii) (emphasis added). But those "gaming activities" are *tribal* gaming activities—not the *non-tribal* gaming activities at issue here.

This focus on *tribal* gaming activities pervades IGRA. Textually, the referent of "gaming activity" in 25 U.S.C. § 2710(d)(3)(C) is the "gaming activity" on "the Indian lands" of the compacting Tribe described in 25 U.S.C. § 2710(d)(3)(A) and (B). Moreover, the six specific subjects that precede the catch-all provision deal only with *tribal* gaming activities (or do not address gaming activities at all). Such a catch-all provision "calls for the application of the maxim *ejusdem generis*, the statutory canon that '[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001) (citation omitted). That canon shows that the catch-all provision, like its neighbors, addresses only *tribal* gaming activities. Otherwise, it would "embrace" subjects

that are not only dissimilar to the rest of the list, but wholly foreign to it. *Id.* As the Supreme Court has explained, "[e]verything—literally everything—in IGRA affords tools … to regulate gaming on Indian lands, *and nowhere else*." *Bay Mills*, 572 U.S. at 795 (emphasis added).

California law, moreover, expressly recognizes this limitation on its compacting authority. The Legislature has empowered the Governor to execute Tribal-State compacts only "for the purpose of *authorizing* class III gaming … *on Indian lands*"—not for the purpose of *prohibiting* such gaming *off Indian lands*. Cal. Gov't Code § 12012.25(d) (emphasis added); *accord* Cal. Const. art. IV, § 19(f). The legislative ratifications of the compacts at issue reflect the same limitation. *See* 2015 Cal. Legis. Serv. Ch. 520 (A.B. 795) (introducing the ratification of the Sycuan Compact by stating that IGRA compacts serve "the purpose of authorizing certain types of gaming on Indian lands within a state"); 2016 Cal. Legis. Serv. Ch. 310 (S.B. 1313) (same for Yocha Dehe Compact); 2016 Cal. Legis. Serv. Ch. 229 (S.B. 404) (same for Viejas Compact).

In sum, neither Congress nor the California Legislature envisioned, or even permitted, Tribal-State compacts that impose enforceable obligations on the State to enact or enforce gaming laws against *non-tribal* entities operating gaming activities *off* Indian lands. To the extent the compacts include such obligations, they are unenforceable. *See Bassidji v. Goe*, 413 F.3d 928, 937 (9th Cir. 2005) ("[T]he principle that 'illegal promises will not be enforced in cases controlled by the federal law' … does not admit of exceptions.") (citations omitted).

2. Principles of Due Process Bar the Tribes' Requested Relief

The Tribes seek an order of specific performance that would compel California to violate established due process principles that protect cardrooms. It is blackletter contract law that specific performance is unavailable if the order would compel the defendant to violate federal or state law. *See* 5 Williston on Contracts § 12:1 (4th ed.); *Casady v. Modern Metal Spinning & Mfg. Co.*, 188 Cal. App. 2d 728, 732 (1961) (explaining that specific performance is unavailable where the party does not have "power lawfully to perform when required to do so") (citation omitted); *see also* Restatement (Second) of Contracts § 365.

Here, the order the Tribes seek would violate the cardrooms' due process right to be heard before being deprived of a valuable property interest—specifically, their interest in continued

approval of their player-dealer games. The California Constitution guarantees businesses a right of due process, which "requires" that the State revoke a business permit "only upon notice to the permittee, upon a hearing, and upon evidence substantially supporting a finding of revocation." *Bauer v. City of San Diego*, 75 Cal. App. 4th 1281, 1294 (1999) (internal quotation marks omitted). The Fourteenth Amendment affords similar protections. *See, e.g.*, *Barry v. Barchi*, 443 U.S. 55, 64–65 (1979). The order the Tribes seek, however, would deny the cardrooms their right to be heard before the State shuts down their player-dealer games, puts thousands of people out of work, and cuts off an essential source of tax revenue for many local governments. Worse yet, that order would be based on compacts that the cardrooms had no hand in shaping, and which were reached at a time when cardrooms had the express approval of state regulators to operate player-dealer games. Due process forbids peremptorily eliminating the cardrooms' right to offer such games. Indeed, the *most* this Court could properly order is something that the State has already set in motion—an orderly regulatory process under the California Administrative Procedure Act, Cal. Gov't Code, §§ 11340 *et seq.*, that considers, consistent with due process, the positions of the Tribes, the cardrooms, and the public.

3. Courts May Not Order Specific Performance to Enforce a Penal Law or Regulate a Prosecutor's Discretion

"[T]raditionally equity will not enjoin a crime." *United States v. Guest*, 383 U.S. 745, 769 n.4 (1966). But that is exactly what the Tribes pray for—"an injunction directing the State to enforce its laws prohibiting the play in card rooms of banking card games and twenty-one," Compl. at 37, prohibitions found in Section 330 of the California Penal Code. For as long as § 330 has existed, California Civil Code § 3369 has provided that "[n]either specific nor preventive relief can be granted to enforce … a penal law, except in a case of nuisance or as otherwise provided by law." Accordingly, "when [California] criminal activity is at issue," specific performance is unavailable unless the California Legislature has provided "a [statutory] definition of prohibited conduct along with a provision specifically authorizing equitable relief to restrain the defined conduct." *Leider v. Lewis*, 394 P.3d 1055, 1065 (Cal. 2017). Indeed, the California Supreme Court has twice rejected attempts to enforce criminal gambling statutes

through injunctive relief instead of criminal penalties. *See People v. Lim*, 118 P.2d 472, 476–77 (Cal. 1941); *Nathan H. Schur, Inc. v. City of Santa Monica*, 300 P.2d 831, 835–36 (1956); *Leider*, 394 P.3d at 1061–64 (reaffirming vitality of *Lim* and *Schur*). And federal courts have long recognized these same principles. *E.g.*, *Barnett v. Washington Mut. Bank, FA*, Nos. 03-753, *et al.*, 2004 WL 2857283, at *2 (N.D. Cal. Oct. 12, 2004) (referring to § 3369 and "the traditional rule that courts of equity cannot use injunctions to enforce penal laws").

This rule of equity is a close cousin of courts' refusal to override the prosecutor's "discretion to determine whom to charge, what charges to file and pursue, and what punishment to seek." *Dix v. Superior Court*, 807 P.2d 1063, 1066 (Cal. 1991) (citation omitted). That principle is doubly relevant here. First, "[f]oremost among the prerogatives of sovereignty is the power to create and enforce a criminal code." *Heath v. Alabama*, 474 U.S. 82, 93 (1985). Second, respect for the prosecutor's or regulator's role avoids entangling courts with cases that are not fit for judicial resolution. Federal courts do not tell state prosecutors which side to take on a disputed issue of state law. And the Supreme Court "has recognized on several occasions over many years that an agency's decision not to prosecute or enforce" is "general[y] unsuitab[le] for judicial review." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (explaining this principle in the federal administrative law context); *see Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("[T]he decision whether or not to prosecute, and what charge to file … generally rests entirely in [the prosecutor's] discretion."). That is because "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise," including deciding what action suits the agency's priorities and overall policies. *Chaney*, 470 U.S. at 831.

Against all this wisdom, the Tribes ask this Court to involve itself in the type of case that is most unsuitable for judicial review. This suit is, at bottom, an effort by the Tribes to enforce California Penal Code § 330—*e.g.*, its prohibition on "banking games"—according to their interpretation of the law. Enforcing a criminal proscription is the responsibility of the sovereign that created it—California—and not a matter to be ceded by contract to the Tribes. Indeed, California law *prohibits* the Legislature from "abrogat[ing] the state's police power" through contract, *Int'l Ass'n of Plumbing etc. Officials v. Bldg. Standards Comm'n*, 55 Cal. App. 4th 245,

254 (1997), thereby ensuring that yesterday's officials cannot deprive today's officials of the power to enact and enforce state law. *Cf. Rincon Band*, 602 F.3d at 1038 n.18 ("We are unaware of any authority that would permit a court to enjoin a [state] *constitutional amendment* on the grounds that it violated [a tribe's] *contract*."). Moreover, the Tribes' express ground for taking matters into their own hands is that California (they say) has not properly prioritized the enforcement of its own laws. But deciding whether to enforce criminal laws against a particular actor, or how to prioritize regulatory efforts, are exactly the decisions that involve a "complicated balancing" of factors that courts are unequipped to review. *Chaney*, 470 U.S. at 831.

4. A Federal Court Cannot Issue the Order the Tribes Seek

These sovereign state interests pose an especially acute obstacle to this federal court granting the relief the Tribes seek. "[O]ur Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). "[T]he power to make decisions and to set policy" is, indeed, "what gives the State its sovereign nature." *FERC v. Mississippi*, 456 U.S. 742, 761 (1982). It "follow[s] that the ability of a state legislative (or … administrative) body—which makes decisions and sets policy for the State as a whole—to consider and promulgate regulations of its choosing must be central to a State's role in the federal system." *Id.* Thus, the Supreme Court "never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations." *Id.* at 761–62; *cf. Washington v. Washington State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 695 (1979) ("Whether [a state agency] may be ordered actually to promulgate regulations having effect as a matter of state law may well be doubtful."); *City Council of City of Santa Barbara v. Superior Court*, 179 Cal. App. 2d 389, 394–95 (1960) ("The commanding of specific legislative action is beyond the power of the courts for it would violate the principle of division of powers of the three governmental departments."). The Tribes ask this Court to cross that line and order the State of California to promulgate new interpretations of its laws, to enforce that interpretation against the cardroom industry, and to enact new laws in line with the Tribes' interpretation of the California Constitution. It is one thing for California to generally waive its sovereign immunity from suits under the compacts. It is something else entirely to claim, as the Tribes do, that California has

altogether abdicated its sovereignty to decide what its laws are and how they will be executed.

Certainly, federal courts have the power to order state officials to conform their conduct to *federal* law, "and even to displace local enforcement of [such] orders if necessary to remedy … violations of federal law found by the court." *Washington*, 443 U.S. at 695–96. The Supreme Court has approved that undertaking in cases of "*state recalcitrance*" in the enforcement of *federal* law, *id.* at 695 (emphasis added)—when a state persists in ignoring a federal treaty, *see id.*, or in violating the fundamental constitutional rights of its citizens, *see, e.g.*, *Hutto v. Finney*, 437 U.S. 678 (1978) (Eighth Amendment rights of prisoners); *Milliken v. Bradley*, 433 U.S. 267 (1977) (Equal Protection right to school desegregation). But the Tribes do not ask this Court to enforce the supremacy of federal law announced in treaty obligations or the Bill of Rights. Rather, they ask the Court to compel California officials to tailor California law to expand the Tribes' economic monopoly. "It is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). The only arguable connection to federal law here—through IGRA—is severed by the fact that the purported obligation at issue is not even a proper subject of an IGRA compact. *See supra*, pp. 12–13. Moreover, California is not recalcitrant; it is actively undertaking regulatory processes that will confront the Tribes' concerns.

5. Federal Abstention Principles Counsel Judicial Restraint Here

These concerns about unwarranted federal intrusion into state affairs are part of a constellation of abstention-based considerations that counsel against recognizing a cause of action here. Abstention doctrines instruct federal courts not to adjudicate certain types of cases. These doctrines "are not rigid pigeonholes into which federal courts must try to fit cases," but instead "reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 n.9 (1987).

A primary consideration informing the federal abstention doctrines is "the notion of 'comity,' that is, a proper respect for state functions." *Younger v. Harris*, 401 U.S. 37, 44 (1971). Federal courts endeavor not to "unduly interfere with the legitimate activities of the States." *Id.* That is particularly so when federal court intervention would implicate "complex state

administrative processes," *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 362 (1989) (*NOPSI*), have an "impermissibly disruptive effect on state policy," *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 815 (1976), or "establish the basis for future intervention that would be … intrusive and unworkable," *O'Shea v. Littleton*, 414 U.S. 488, 500 (1974). Likewise, federal courts are more likely to abstain when the federal issue before it is of "minimal federal importance" because it turns solely on questions of state law. *NOPSI*, 491 U.S. at 360. Indeed, the Supreme Court's abstention cases have specifically cautioned against addressing "difficult and unsettled questions of state law." *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 236 (1984).

This Court should not recognize a tribal cause of action that would thrust the Court into the very thicket that these abstention principles fence off. California has developed a comprehensive regulatory framework for cardroom gaming administered by two expert agencies that—among a wide range of related duties—license all cardrooms, approve all cardroom games, and investigate violations of the law. *See supra*, p. 2. This complaint proposes upending that scheme by shifting responsibility for interpreting and applying California gaming law from the expert regulators to this Court. The Tribes' theory has no apparent limits on how often and how minutely they may invoke this Court's jurisdiction. Can they sue whenever they believe a California cardroom is violating California gaming law, whenever they believe the Bureau has approved a game it should not have, and whenever they are dissatisfied with the enforcement priorities of the Bureau or Commission? Such a system of judicial superintendence would collapse under its own weight, potentially stalling any and every action (or inaction) by California gaming regulators in federal court. Worse yet, those suits would come with the indignity of a federal court telling state officials how to carry out state law. *Cf. Pennhurst*, *supra*.

Such considerations might have less force if the state-law issues here were straightforward. But the opposite is true. Cardrooms have been operating the player-dealer games at issue here for decades. In accordance with the longstanding view of the California Court of Appeal, the California Legislature has codified the legality of such games. The Bureau, in turn, has never issued a rule or other guidance indicating that player-dealer games are illegal banking games, or

prohibited under the State's ban on "twenty-one," and until recently it had consistently approved such games. The Bureau is now formally considering whether it needs to revise any of its longstanding views. The issues are extremely complicated with a long history—witness the dozens of pages in the Tribes' Complaint alone, or the lengthy comment the Association has provided to the Bureau, Letter from Bradley A. Benbrook to Stephanie Shimazu (Feb. 5, 2019), https://oag.ca.gov/sites/all/files/agweb/pdfs/gambling/comments-ca-gaming-020519.pdf. In short, this is the opposite of the easy case already controlled by an on-point holding of the California Supreme Court.

6. Equity Does Not Afford the Tribes' Requested Remedy

Finally, even setting aside everything above, the Tribes request the wrong remedy. Equity courts decline to order specific performance if "the character and magnitude of the performance would impose on the court burdens in enforcement or supervision that are disproportionate to the advantages to be gained from enforcement and to the harm to be suffered from its denial." Restatement (Second) of Contracts § 366. Courts are especially likely to find that balance wanting when "the duty to be enforced [is] continuous and reach[es] over a long period of time, requiring constant supervision by the court." 25 Williston on Contracts § 67:22 (4th ed.).

Here, the burdens of federal-court intervention far exceed any possible benefits. As just explained, accepting the Tribes' invitation to oversee California's gaming agencies would disrupt an important area of state regulation and policymaking—with no end in sight to the entanglement between this Court and those regulators. The burdens on this Court far outweigh any harm in allowing the Tribes to simply press their case before expert state regulators and, if necessary, state courts. That is especially so because the Bureau is already considering many of the issues that the Tribes would have this Court adjudicate, providing a ready forum for their arguments. And, as explained above, p. 11, the Tribes may well have other remedies available to them—removing any possible need for this Court to become entangled in California law enforcement.[4]

[4] The Tribes' prayer for declaratory relief adds nothing. It presents the same problems, and is barred for the same reasons, as their prayer for an injunction. *See Green v. Mansour*, 474 U.S. 64, 72–73 (1985) (cataloging Supreme Court cases that "held that a declaratory judgment is not available" for the same reasons that an injunction would impermissibly intrude into state affairs).

II. If This Court Does Not Dismiss This Case, It Should At Least Defer Adjudication

If this Court does not outright dismiss this case, it should stay it until completion of the State processes for addressing the subjects of this litigation (including the completion of any resultant state-court litigation challenging the state regulators' decisions). A stay is warranted under either the primary jurisdiction doctrine or this Court's inherent power to control its docket.

A. "The primary jurisdiction doctrine allows courts to stay proceedings or to dismiss a complaint without prejudice pending the resolution of an issue within the special competence of an administrative agency." *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008). The doctrine is typically invoked when a "court determines that an otherwise cognizable claim implicates technical and policy questions that should be addressed in the first instance by the agency with regulatory authority over the relevant industry rather than by the judicial branch." *Id.* "[N]o fixed formula exists for applying the doctrine of primary jurisdiction," *Davel Commc'ns, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1086 (9th Cir. 2006) (citation omitted), which is ultimately "prudential," *Clark*, 523 F.3d at 1114, and "committed to the sound discretion of the court," *Syntek Semiconductor Co. v. Microchip Tech. Inc.*, 307 F.3d 775, 781 (9th Cir. 2002).

The Ninth Circuit has thus explained that a stay is appropriate when "a claim 'requires resolution of an issue of first impression, or of a particularly complicated issue … committed to a regulatory agency,' … and if 'protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme.'" *Clark*, 524 F.3d at 1114 (quoting *Brown v. MCI WorldCom Network Servs.*, 277 F.3d 1166 (9th Cir. 2002)). "[T]he doctrine applies in cases" presenting an issue "within the jurisdiction of an administrative body having regulatory authority" that exists "pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority" that in turn "requires expertise or uniformity in administration." *Id.* at 1115 (quoting *Syntek*, 307 F.3d at 781).

If this case proceeds at all, it should proceed only after a stay that allows state officials time to complete their work—knowing this Court will be watching, and may someday study and benefit from their efforts. For example, if the Tribes were correct that their compacts include an enforceable promise by the State to prohibit cardrooms from offering any "banking game" under

California law, then the issue before this Court would be whether the cardrooms' player-dealer games are, in fact, banking games under California law. That is a highly technical, policy-laden question—one that *no* court has comprehensively resolved. It requires an evaluation of precisely what a "banking game" entails, and what sets of rules a player-dealer game can have without falling into that prohibited category of games. Letters submitted to the Bureau during its current regulatory process underscore the complexity of these determinations. *See, e.g.*, Maher Decl., Ex. 4 (Association comment letter to Bureau raising numerous technical issues).[5] And the overarching questions for the regulators include the confounding issues of reconciling, on the one hand, decades of approval of cardrooms' player-dealer games—from the courts, the Legislature, and the regulators—and the widespread reliance interests that come with it, with, on the other hand, the Tribes' newfound objections to such games.

The California Legislature has recognized that these complexities—and their importance to a California industry supporting tens of thousands of jobs and hundreds of millions in tax revenue, *see supra*, p. 2—demand that expert regulators design a coherent sets of rules. Accordingly, in establishing a comprehensive regulatory scheme for gaming, *see supra*, p. 2, the Legislature *expressly* delegated the issues in this case to the Bureau and Commission. For example, the law entrusts the Bureau with the responsibility to review and approve intricate sets of game rules. *See* Cal. Bus. & Prof. Code § 19826(g). The Bureau has rulemaking power, *id.* § 19826(f), and California Penal Code § 330.11 recognizes an especially great need for the Bureau's expertise in determining whether "the rules of [a] game render the maintenance of or operation of a bank impossible." In short, even before the Tribes had entered their compacts, state law explicitly tasked the Bureau with defining when the games at the center of this case are legal. No issue could be better suited for regulatory review in the first instance. And looking to state regulators is

[5] Such issues include, for example, the role of "backline" wagers, through which multiple patrons wager on the player-dealer position, eliminating any possibility that the game is an illegal banking game because *multiple persons* are taking on *multiple persons*, rather than one-against-many. They also include the question of what it means for a game to last a "long time" under *Oliver*, and what number of hands may be played before the player-dealer position must be offered to a new player under California Penal Code § 330.11. The Association has likewise addressed the rules governing player-dealer games in a letter it submitted to the Commission in connection with a proceeding respecting cardroom advertising regulations. *See* Maher Decl., Ex. 5.

particularly appropriate here because *those regulators are already working on the relevant issues*. *See supra*, pp. 5–6. In fact, the Director of the Bureau recently testified to a California Senate committee that the Bureau "plan[s] to have draft regulations available for public review and discussion in the next few months," and that it would proceed independent of pending litigation. Maher Decl., Ex. 6 at 6; *see id.* at 10–11. Thus, although the Ninth Circuit has cautioned that "a court should not invoke primary jurisdiction when the agency is aware of but has expressed no interest in the subject matter of the litigation," *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 761 (9th Cir. 2015), or where a stay would otherwise result in a wasteful and substantial delay, *see id.*, precisely the *opposite* is true here.

"[E]fficiency," *id.* at 760, also favors a stay. It is unclear that this Court could intelligently adjudicate the state-law questions the Tribes raise until the Bureau and/or Commission have filled in (or declined to address) the regulatory details the Tribes claim are missing. *See, e.g.*, Cal. Penal Code § 330.11 (instructing Bureau to make findings with respect to banking). Moreover, if the Court were to act now, its decision may well be rendered obsolete. In the extreme, the regulators could propose to ban the player-dealer games at issue. More likely, the regulators could announce a more nuanced regime whose adequacy might still be the subject of tribal objections, but which would undoubtedly present new and different questions than those presented in the Complaint.

Finally, comity and political accountability favor staying proceedings. Politically accountable officials are actively considering the Tribes' concerns. In doing so, those officials make difficult policy judgments, evaluate the economic and political context, and come to their own view on unsettled questions of state law. This Court should give the State the latitude to render a decision reached after meaningful review, and allow the citizens of California to hold their officials accountable for their choices.

B. Alternatively, this Court should exercise its "inherent power" to "stay proceedings pending before it" in order to "control the disposition of the causes on its docket in a manner which will promote economy of time and effort for itself, counsel, and litigants." *Viggiano v. Johnson*, No. 14-7250, 2016 WL 5110500, at *1 (C.D. Cal. June 21, 2006) (citing *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 878 n.6 (1998); *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir.

1962)). It is especially appropriate to use that power when there are pending administrative "proceedings which bear upon the case"—even if "such proceedings are [not] necessarily controlling of the action before the court." *Levya v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 863–864 (9th Cir. 1979). Thus, "[a] stay pending the outcome of an administrative proceeding that might render the relief sought in district court unnecessary is a proper exercise of the court's discretion in controlling the disposition of causes on its docket and avoiding unnecessary duplication of judicial machinery." *V.V.V. & Sons Edible Oils Ltd. v. Meenakshi Overseas LLC*, No. 2:14-cv-2961, 2016 WL 1268008, at *4 (E.D. Cal. Mar. 31, 2016). The Court can enter a stay under its inherent power even if it finds that the primary jurisdiction doctrine does not precisely apply. *See Sun Pac. Mktg. Coop., Inc. v. DiMare Fresh, Inc.*, No. CIV-F-06-1404, 2007 WL 1174651, at *4–5 (E.D. Cal. Apr. 19, 2007) (doing precisely that).

All of the reasons above favor an exercise of this Court's "broad discretion" to enter a stay. *V.V.V. & Sons.*, 2016 WL 1268008, at *4. Certainly, courts also weigh the burdens of a delay before granting a stay. *See CMAX, Inc.*, 300 F.2d at 268. But here the Tribes will suffer no undue burden: They can immediately make the vast majority of the Complaint's arguments in the Bureau's regulatory forum—a forum *the Tribes themselves* created by bringing their arguments to multiple Attorneys General over a seven-year span. Likewise, it is too late for the Tribes to now claim an urgent need to resolve this issue. Cardrooms have hosted player-dealer games for decades, yet the Tribes said nothing about it to the State until 2012 (according to the Complaint). Since then, the Tribes have opted not to file a lawsuit until 2018, amidst the most substantial regulatory activity in many years. Meanwhile, the Tribes have enjoyed record gaming revenues, and their Complaint does not so much as mention the monetary impact that they believe cardrooms' player-dealer games have had on tribal casinos. Any burdens from a stay are far outweighed by the benefits of waiting for the regulators' judgments.[6]

[6] The Bureau's and Commission's present regulatory attention is finite, so it may not be directed at some issues raised around the margins of the Complaint—for example, whether any cardrooms improperly receive an interest in wagered funds due to their contracts with TPPs, or whether any cardroom's collection rate structure is improper. *See supra*, pp. 6–7. But those issues pose no obstacle to this Court's issuance of a stay. As an initial matter, it is unclear how these issues could

III. Regardless of How the Court Proceeds, It Should Dismiss Parts of the Complaint

A. This Court Should Dismiss Claims About Blackjack and "Twenty-One"

The Tribes allege that California has breached a duty to guarantee the Tribes an exclusive right to host blackjack games, which they associate (albeit erroneously) with the outlawed 19th Century game of "twenty-one." *See, e.g.*, Compl. ¶¶ 1, 10, 59, 64, 112. But nothing in the compacts says anything about a tribal monopoly over blackjack or "twenty-one." Even if the compacts reflected an enforceable agreement as to state regulation of banking games, such a tribal monopoly would extend only to *banked* versions of those games; the compacts do not even arguably address tribal monopolies over *non-banked* versions of blackjack, "twenty-one," or any other card game. Because California cannot have breached a compact term that does not exist, the Tribes' claims related to blackjack and "twenty-one" should be dismissed with prejudice.

B. This Court Should Dismiss the Tribes' Implied-Covenant Claim

1. If this Court dismisses the Tribes' breach-of-compact claim, the claim for breach of the implied covenant of good faith and fair dealing falls with it. A breach of the implied covenant "must arise from the [contractual] language used or it must be indispensable to effectuate the intention of the parties." *Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 562 (9th Cir. 2016). The implied covenant is a "gap filler" designed for "circumstances not contemplated by the parties at the time of contracting," one that cannot "give rise to new obligations not otherwise contained in the contract's express terms." *United States v. Basin Elec. Power Coop.*, 248 F.3d 781, 796 (8th Cir. 2001) (citations omitted); *see Yost v. Nationstar Mortg., LLC*, No. 13-0745, 2013 WL 4828590, at *10 (E.D. Cal. Sept. 9, 2013). In turn, if the compacts' actual terms do not support the Tribes' expansive claims, then an ancillary doctrine that fills the compacts' unanticipated interstices is surely no substitute. "[T]he implied duty of good faith and fair dealing cannot expand a party's contractual duties beyond those in the express contract or create duties

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plausibly survive dismissal. If anything, the discussion above, pp. 8–11, applies with *greater* force to these issues because the compacts say *absolutely nothing* about TPPs or collection fees. *See also infra*, p. 24 (making a similar point respecting the Tribes' arguments concerning "twenty-one"). Alternatively, if, as the Tribes contend, these issues implicate the larger "banking game" debate (Compl. ¶ 43), then they cannot be decoupled from the central "banking game" issue that the Bureau is actively considering. Either way, these fringe matters should be dismissed or stayed.

inconsistent with the contract's provisions." *Dobyns v. United States*, 915 F.3d 733, 739 (Fed. Cir. 2019) (citation omitted). Here, nothing in the compacts supports the Tribes' claim that they can oversee gambling regulation across California—that is a gap too wide for the implied covenant to fill.

The duty of good faith and fair dealing "exists because it is rarely possible to anticipate in contract language every possible action or omission by a party that undermines the bargain." *Metcalf Constr. Co. v. United States*, 742 F.3d 984, 991 (Fed. Cir. 2014). But recognizing the nature of the underlying bargain "keep[s] the duty focused on 'honoring the reasonable expectations created by the autonomous expressions of the contracting parties.'" *Id.* (quoting *Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1152 (D.C. Cir. 1984) (Scalia, J.)). The implied-covenant claim here founders on its assumption that the Tribes' "reasonable expectations" included attaining control over the content, interpretation, and enforcement of California's laws regulating the off-Indian land gaming activities of non-Indians. Such an expectation would be unwarranted because, when the Tribes entered the compacts, California regulators had long approved player-dealer games, and the parties were engaged in discussions over those very games. Because there is no *express* promise in the compacts to alter the existing state of affairs, there is no basis to find an *unexpressed* obligation to upend its prevailing approach to cardroom gaming.

2. The result is the same even if the Tribes' breach-of-compact claim survives. Given the breadth and detail of IGRA and the compacts, the implied-covenant claim is suspect; federal courts "should be reluctant to use federal common law to supplement comprehensive legislation." *Cleveland v. Beltman N. Am. Co.*, 30 F.3d 373, 380 (2d Cir. 1994). And regardless, a duty of good faith is not "an everflowing cornucopia of wished-for legal duties." *Basin Elec.*, 248 F.3d at 796 (citation omitted). Here, the only conduct alleged to constitute bad faith is California's failure to concur in the Tribes' interpretation of California's own laws. Even if California's reading was in error, nothing in the compacts or the law establishes a legal duty not to disagree on complex issues of state law administered by expert regulators.

CONCLUSION

The Complaint should be dismissed without leave to amend, or the case should be stayed.

DATED: _____, 2019

MUNGER, TOLLES & OLSON LLP
BENJAMIN J. HORWICH
MELINDA E. LEMOINE
JOHN D. MAHER
JEREMY S. KREISBERG

By: [Proposed Memorandum]
BENJAMIN J. HORWICH

BENBROOK LAW GROUP
BRADLEY A. BENBROOK

By: [Proposed Memorandum]
BRADLEY A. BENBROOK

Attorneys for Intervenor-Defendant California Gaming Association