CASE NO. F088551

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

PICAYUNE RANCHERIA OF THE CHUKCHANSI INDIANS, a Federally recognized Indian tribe,

Plaintiff and Respondent,

v.

EDMUND G. BROWN, JR., Governor of the State of California, et al.,

Defendant;

NORTH FORK RANCHERIA OF MONO INDIANS,

Defendant-Intervenor and Appellant.

REPLY BRIEF OF INTERVENOR-APPELLANT NORTH FORK RANCHERIA OF MONO INDIANS

On Appeal from the Superior Court for the State of California,
County of Madera, Case No. MCV062850, Hon. Michael Jurkovich

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INTRODUCTION

Picayune does not dispute that California state courts lack authority to block North Fork from gaming at the Madera Site. Indeed, it did not appeal from the denial of such relief below. Picayune's decision to abandon its claims for such relief in this litigation reflects that California state courts cannot grant Picayune any effectual relief—and is a tacit concession that the superior court's declaratory judgment here was an impermissible advisory opinion. Attempting to avoid that conclusion, Picayune theorizes that it could take the superior court's declaratory judgment to federal court, where Picayune would argue that the current state-law status of the Governor's 2012 concurrence precludes North Fork from gaming at the Madera Site. But judicial relief in hypothetical future litigation cannot save a present case from mootness. And in any event, there is no future federal litigation in which Picayune could rely on the superior court's declaratory judgment: Picayune already has litigated and lost its federal challenges to North Fork's ability to game, and the statute of limitations to challenge the federal actions authorizing North Fork to game has run. Picayune's suit is accordingly moot.

Moreover, even if a federal court *could* still adjudicate the propriety of the federal actions authorizing North Fork to game, a declaration about the current state-law status of the Governor's 2012 declaration would have no bearing on that legal issue. IGRA does not grant states the extraordinary power to unwind—in perpetuity—federal actions on behalf of tribes. Rather, federal actions taken in reliance on a gubernatorial concurrence that is facially valid at the time are lawful, full stop. Whatever later actions a state's

electorate may take to invalidate that concurrence *as a matter of state law* cannot unwind the federal government's authorization of a project as a matter of federal law.

Even if none of the justiciability points above applied, the superior court's decision was wrong on the merits. Binding California and federal law mandate the conclusion that Proposition 48 did not render the Governor's concurrence void "*ab initio*."

This Court should reverse.

ARGUMENT

I. The Superior Court's Decision Is An Improper Advisory Opinion

A. Even If The Concurrence's State-Law Status Were Relevant To North Fork's Ability To Game, The Issue Is Moot

The superior court properly recognized that it lacked jurisdiction to issue a declaration that "North Fork may not conduct class III gaming at the Madera Site," or an injunction prohibiting such gaming. (North Fork App. 64, 1062-1063 (App.).) Picayune did not appeal the denial of either form of relief—and for good reason. As North Fork explained (OB31), its ability to game at the Madera Site is governed exclusively by federal law and is a matter over which federal courts have exclusive jurisdiction.[1] Picayune does not argue otherwise.

Instead, Picayune argues that the superior court properly exercised jurisdiction to decide whether the Governor's concurrence was void "*ab initio*" as a matter of state law.

[1] "OB" refers to North Fork's opening brief; "AB" refers to Picayune's answering brief.

The superior court reasoned that, while "a ruling on this issue will not determine whether gaming is permitted" under federal law, "it will clarify whether the federal court may rely on the Governor's annulled concurrence in making that decision." (App. 1067.) That reasoning is flawed. Even assuming a declaration about the state-law status of the Governor's concurrence—rendered long after the Secretary of the Interior took the Madera Site into trust and issued secretarial procedures to authorize class III gaming at the site—could *ever* be relevant to evaluating the propriety of the Secretary's actions (and, for the reasons stated in Part I.B, it could not be), the issue in this case is now moot.

North Fork provided in its opening brief (OB38-45) a play-by-play account of Picayune's repeated failures in challenging (in federal court) the Secretary's 2012 and 2016 actions that authorize North Fork to conduct class III gaming at the Madera Site. Picayune conclusively lost each of its challenges in judgments that are now final. (See *Stand Up for California! v. U.S. Dept. of Interior* (D.D.C. 2016) 204 F.Supp.3d 212, 228, affd. (D.C. Cir. 2018) 879 F.3d 1177; *Picayune Rancheria of Chukchansi Indians v. U.S. Dept. of Interior* (E.D. Cal. Aug. 18, 2017) 2017 WL 3581735, at *13.) Moreover, the statute of limitations to challenge each decision has expired. (App. 243.) Accordingly, Picayune can no longer challenge the Secretary's actions, regardless of the outcome of this litigation. Because the superior court's declaration can have "no practical impact or provide the parties effectual relief" (*Committee for Sound Water & Land Development v. City of Seaside* (2022) 79 Cal.App.5th 389, 405), the court erred in adjudicating this case on the merits.

The State agrees. In Picayune's companion appeal against the Governor, the Governor explained: "[T]he pertinent questions have been resolved in federal court, the only forum that could grant Picayune the relief it seeks[.] Any further state law adjudication as to Governor Brown's 2012 concurrence will not affect whether class III gaming may take place at the Madera Site under federal law, foreclosing the effectual relief Picayune seeks." (Governor's Br. 21-22, *Picayune Rancheria of the Chukchansi Indians v. Brown* (Cal.App.5th Dist. May 5, 2025) No. F086849 (*Picayune Rancheria*).) The superior court should have dismissed Picayune's case on that basis.

Picayune's arguments to the contrary lack merit.

1. Picayune first contends that it "is not challenging any of the Secretary's past actions," but in the same breath it claims that this case "would remove one of the preconditions that is required for North Fork to offer gaming at the Madera site." (AB46-47.) That is untenable. Either Picayune *is* challenging North Fork's entitlement to game under federal law pursuant to the Secretary's 2012 and 2016 decisions, which it cannot do collaterally in state court litigation where the Secretary is not a party (*Big Lagoon Rancheria v. California* (9th Cir. 2015) (en banc) 789 F.3d 947, 952-954), or it *is not*, which means it does not seek effectual relief and this case must be dismissed. That is the fundamental problem with this litigation, which no amount of rhetoric can overcome.

2. Picayune next claims that the effect of the Governor's concurrence on North Fork's ability to game "is a *merits* issue, not a *mootness* issue." (AB47-48.) But that issue is decidedly not a merits question for this Court. As the California Supreme Court explained in *United Auburn Indian Community of Auburn Rancheria v. Newsom*

(2020) 10 Cal.5th 538 (*United Auburn*), "the Governor's 'concurrence (or lack thereof) is given effect under federal law.'" (*Id.* at p. 548, quoting *Confederated Tribes of Siletz Indians of Oregon v. United States* (9th Cir. 1997) 110 F.3d 688, 697 (*Confederated Tribes*).) In other words, the impact of the Governor's concurrence on North Fork's ability to game is a *federal* merits issue, reserved for *federal* courts. And it is precisely because Picayune has litigated and lost *the merits of its federal* challenges to the Secretary's 2012 and 2016 actions that the current case is moot.

The two cases upon which Picayune relies (AB48) are not to the contrary. First, in *Golden State Water Company v. Public Utilities Commission* (2024) 16 Cal. 5th 380, the California Supreme Court reiterated that "a case becomes moot when events 'render it impossible for a court, if it should decide the case in favor of plaintiff, to grant him any effective relief whatever.'" (*Id.* at p. 393, alterations omitted.) The plaintiff there sought to set aside a Public Utilities Commission (PUC) order terminating a favorable rate mechanism on the ground that the PUC had issued the order without proper notice. In turn, the PUC argued the litigation had been mooted by subsequent legislation requiring the PUC to "consider" mechanisms like those terminated by the order. The Supreme Court held that the plaintiff's challenge was not moot, as the legislation did not itself vacate the challenged order—a form of effective relief the Court could issue to address the plaintiff's immediate grievance. (*Id.* at pp. 393-394.)

By contrast, there is no effective relief available to Picayune here: Since filing this lawsuit in 2016, Picayune has lost multiple federal cases conclusively. These are, quintessentially, "events [that] 'render it impossible for a court, if it should decide the

case in favor of plaintiff, to grant [it] any effective relief whatever.'" (*Id.* at p. 393, alterations omitted.)

Picayune's other case (AB48), *Chafin v. Chafin* (2013) 568 U.S. 165, is equally fatal to its position. The Supreme Court there considered an international custody dispute under the International Child Abductions Reduction Act. After a district court ruled in favor of a child's mother, the mother immediately removed the child from the United States to Scotland. The Supreme Court held that this did not moot the case on appeal, because even if it was unclear whether the Scottish court hearing the mother's parallel custody proceedings abroad would directly order the child returned to the United States, the mother remained subject to the jurisdiction of U.S. courts and, if the ruling in her favor were reversed on appeal, she would be bound by a federal-court order commanding her to return the child to the United States. (*Chafin*, *supra*, 568 U.S. at p. 175 & fn. 1.) In addition, institutional considerations weighed against allowing a prevailing parent from mooting a custody case on appeal through strategic behavior that would have deprived the losing parent of his/her right to appellate review. (*Id.* at p. 179.) Here, by contrast, there are no parallel proceedings in federal court (as Picayune conclusively lost them years ago and the relevant statute of limitations has expired); this court lacks jurisdiction to enjoin tribal gaining on federal lands (and, in any event, Picayune abandoned its request for injunctive relief by not appealing its denial here); and the case was mooted by actions of federal officials (who are not parties to this case) taken in the ordinary course and by Picayune's own litigation strategy—*not* by North Fork.

3. Next, Picayune argues (AB49) that North Fork's position suggests it intends to game "regardless of whether it has legal authority to do so." That is false—and baseless. As explained (OB19-23), the Secretary of the Interior has issued secretarial procedures that *expressly authorize* North Fork to conduct class III gaming at the Madera Site under IGRA. (App. 527-528; App. 618.) Picayune previously sought to set aside those procedures on the ground that the Governor's concurrence was invalid. The U.S. District Court for the Eastern District of California rejected the challenge, holding: "The Secretary did not err by prescribing procedures under which North Fork could conduct class III gaming at the Madera Site." (*Picayune Rancheria of Chukchansi Indians, supra*, 2017 WL 3581735, at *13.) Picayune did not appeal. (See App. 987-995.) As North Fork's authorization to game is exclusively governed by federal law, and federal courts have uniformly rejected Picayune's challenges to that authorization, Picayune is in no position to question it here.

4. As noted, Picayune has abandoned its claims for state-court injunctive relief; now it argues (AB50-51) that a declaration could be relevant should it file "subsequent litigation following … state court litigation." But that is not the mootness standard. Unless an exception applies, a case becomes moot when there is no "'genuine and existing controversy, calling for present adjudication as involving present rights.'" (*Housing Group v. United Nat. Ins. Co.* (2001) 90 Cal.App.4th 1106, 1111.) A hypothetical future controversy does not suffice to defeat mootness.

Picayune claims (AB50) that *San Diego Police Department v. Geoffrey S.* (2022) 86 Cal.App.5th 550 (*SDPD*) supports its position. But Picayune misstates that case's

holding, which addressed a limited exception to mootness that has no bearing here. The appellant there appealed from the entry of a gun-violence restraining order that automatically expired during the pendency of the appeal. (*SDPD*, *supra*, 86 Cal.App.5th at p. 564.) The court held that "[a]n ***appeal*** from an expired restraining order is not moot if it could have collateral consequences in future proceedings." (*Ibid.*, emphasis added.) The court explained that this limited exception to mootness is warranted where "'a controversy may be so short-lived as to evade normal appellate review,'" which itself provides "'a strong reason to decide an issue although it is technically moot.'" (*Ibid*.) That limited capable-of-repetition-yet-evading-review exception has no application to this case, which is the antithesis of a "short-lived" controversy; more to the point, the core issue was mooted long before the superior court issued its summary judgment decision—not on appeal. There is no basis for expanding the exception, as Picayune would have it, to allow parties to evade well-established mootness principles in superior court in the first instance merely by speculating that a favorable ruling might have some bearing in as yet unfiled hypothetical litigation involving other parties.

In any event, Picayune has failed to identify any viable subsequent litigation in which a declaratory judgment on the state-law status of the Governor's concurrence would be relevant. There simply *is* no future case in which the state-law status could have collateral consequences. Picayune first invokes (AB50) the Eastern District of California litigation, which conclusively rejected Picayune's challenge to the secretarial procedures. But (as noted) Picayune did not appeal that ruling, which became final in

2017—nearly *eight years* ago. There are no further proceedings in which a declaratory judgment as to the state-law status of the concurrence would be relevant.

Picayune next speculates (AB51) that it might challenge the National Indian Gaming Commission's (NIGC) 2024 decision to approve a management contract governing gaming at the Madera Site. But the regulations governing the NIGC approval process foreclose any such claim, as they provide no occasion for the NIGC even to consider the tribe's underlying authorization to game (let alone the provenance of such authorization). (25 C.F.R. § 533.6.) Instead, the regulations limit the NIGC's review to the four corners of the contract and supporting materials to ensure the contract contains the necessary "[r]equired provisions"; does not contain any "[p]rohibited provisions"; and was submitted with the requisite supporting documentation. (*Id.* §§ 531.1, 531.2, 533.3, 533.6.) The *only* extrinsic ground upon which the NIGC can disapprove a management contract for class III gaming is if the NIGC chair "determines that a person with a financial interest in, or management responsibility for, a management contract is a person whose prior activities, criminal record, if any, or reputation, habits, and associations pose a threat." (*Id.* § 533.6(c).)

Picayune contorts the regulations (AB51) to invite a fresh inquiry into whether gaming is "conducted in accordance with IGRA," but that is simply not what the regulations say—and, tellingly, Picayune cites no authority to support its contra-textual argument. The relevant provision upon which Picayune relies states only that the contract include among its "[r]equired provisions" one "[p]rovid[ing] that all gaming covered by the contract will be conducted in accordance with [IGRA]." (25 C.F.R. §

531.1(a).) Picayune's reliance (AB51) on 25 C.F.R. § 533.7 does not save its argument, as it provides no basis for the NIGC to independently review the actions of other Interior Department officials in authorizing the gaming at issue. That provision states only that "[m]anagement contracts … that have not been approved by the Chairman *in accordance with the requirements of part 531* of this chapter and this part, are void." (*Id.* § 533.7, emphasis added.) As noted, part 531 is limited to the "Contents of Management Contracts," with no consideration of extrinsic criteria.

More broadly, Picayune's theory—i.e., that North Fork's authorization to game under federal law "depend[s] on the validity of the concurrence" under state law (AB50), and that the management contract is void "[b]ecause North Fork lacks a valid concurrence" (AB51)—makes no sense in the chronology of the litigation. In 2021, this Court squarely held the concurrence "is no longer valid." (*Stand Up for California! v. State* (2021) 64 Cal.App.5th 197, 201 (*Stand Up II*).) That ruling has been final for nearly four years, since well before the NIGC approved North Fork's management contract. (AB51 fn. 8.) If Picayune had any confidence in its federal claims, it could have acted upon them long ago.[2]

The same point also answers Picayune's speculation (AB51) that the NIGC itself could initiate litigation. That the NIGC approved North Fork's management contract in 2024—and has taken no adverse action against the project in the four years since this Court held the concurrence is "no longer valid" under state law—should quash any such

[2] To be clear and as explained, Picayune in fact has no viable claims.

speculation. In any event, Picayune cannot save its own case from mootness by pointing to hypothetical litigation brought by an entirely different party, let alone by the United States, which has consistently defended its decisions against Picayune's attacks. The mootness inquiry pertains only to "the rights of *the parties*," not others. (*Lenahan v. City of L.A.* (1939) 14 Cal. 2d 128, 134, emphasis added.) The "pivotal question in determining if a case is moot is therefore whether the court can grant *the plaintiff* any effectual relief," not a distinct entity like the NIGC. (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1574, emphasis added.) Picayune has not pointed to any authority suggesting otherwise.

B. The State-Law Status Of The Concurrence Has No Bearing On North Fork's Ability To Game As A Matter Of Federal Law

At its core, Picayune's entire case assumes that a declaration of the current state-law status of the concurrence has any bearing on North Fork's compliance with IGRA. It does not. (See OB38-44.)

All parties recognize that the Governor's concurrence is an historical fact—well within the Governor's constitutional authority (*United Auburn*, *supra*, 10 Cal.5th at p. 564)—and that the Secretary acted in reliance upon the concurrence long before *Stand Up II* and the superior court's ruling below. This Court has recited the relevant history: "By letter dated August 30, 2012, the Governor concurred in the Interior Secretary's determination …. In November 2012, the Interior Secretary, having made his two-part determination and obtained the Governor's concurrence, issued a decision approving North Fork's fee-to-trust application." (*Stand Up II*, *supra*, 64 Cal.App.5th at pp. 202-

203.) Picayune's case rests on the premise that a subsequent ruling regarding the status of the concurrence under state law would be "dispositive" (AB52) and provide a basis for unwinding the Secretary's decisions authorizing North Fork's gaming. That premise is wrong.

As North Fork has explained (OB38-44), the current state-law status of the historical concurrence is irrelevant to North Fork's ability to conduct class III gaming at the Madera Site. The Secretary's decision, which relied on the Governor's facially valid concurrence, must be evaluated at the time the decision was made. (See, e.g., *Leser v. Garnett* (1922) 258 U.S. 130; *United States v. Lawrence* (9th Cir. 1979) 595 F.2d 1149, 1151; *Oliphant v. Schlie* (9th Cir. 1976) 544 F.2d 1007, 1012, revd. on other grounds (1978) 435 U.S. 191; *Omaha Tribe of Neb. v. Village of Walthill* (D. Neb. 1971) 334 F.Supp. 823, affd. (8th Cir. 1972) 460 F.2d 1327.) Once the Secretary acted in reliance on the Governor's facially valid concurrence, the subsequent state-law status of that concurrence became irrelevant. Accordingly, any determination of the concurrence's state-law status in this case amounts to an advisory opinion.

Once again, Picayune's arguments to the contrary lack merit.

1. Picayune first argues (AB52-53) that if North Fork's position is correct, then *Stand Up for California! v. State* (2016) 6 Cal.App.5th 686 (*Stand Up I*), *Stand Up II*, and *United Auburn* also must have been impermissible advisory opinions. That is wrong. In *United Auburn*, the Supreme Court "granted review" of *Stand Up I* "to resolve the split" in the Court of Appeal on a fundamental question of California constitutional law regarding the separation of powers between the Governor and the Legislature.

(*United Auburn*, *supra*, 10 Cal.5th 538 at pp. 544, 548.) There was a live split of authority, and the question of whether the Governor has constitutional authority to concur under IGRA is a quintessential "issue of broad public interest that is likely to recur" that permits courts to exercise discretionary review despite justiciability issues. (*Ghost Golf, Inc. v. Newsom* (2024) 102 Cal.App.5th 88, 100; *id.* at p. 101 [invoking exception to mootness to address "evergreen" question of the Governor's power in a state emergency]; see also *Golden State Water*, *supra*, 16 Cal.5th at p. 394 ["[E]ven if the case were technically moot, we may decide the merits where … the public interest favors resolution of an important question."].) And the Supreme Court expressly directed this Court "to vacate its decision and reconsider the matter in light of *United Auburn*." (*Stand Up for California! v. State* (2020) 269 Cal.Rptr.3d 200.) But neither the superior court nor this Court was or is under any such command here, and the important questions presented in the *Stand Up* and *United Auburn* litigations have been resolved. All that remains is an academic question of state law over when, exactly, the concurrence became invalid. North Fork's federal-law right to game is in no way affected by the answer to that question.

2. Picayune next presents (AB53-54) an expansive, and flawed, view of the state's role under IGRA, relying on the mantra that IGRA is an example of "cooperative federalism." Certainly IGRA "seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme." (*Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California* (9th Cir. 2015) 813 F.3d 1155, 1160.) But the Ninth Circuit has

made clear that "the Governor *has a limited role* to play in the scheme," and that gubernatorial "authority under IGRA extends only to making *a single determination*"—i.e., whether to concur *before* the Secretary may take land into trust for gaming under 25 U.S.C. § 2719(b)(1)(A). (*Confederated Tribes*, *supra*, 110 F.3d at p. 698, emphasis added.) Picayune would convert this limited role—akin to a threshold veto—into a role for the state to act as a separate licensing body with continuous authority to shut down federally authorized gaming projects that operate on federal land. But Congress squarely rejected any such role for the states; instead, the concurrence function operates on a one-time basis as "a prerequisite to the [federal] Executive Branch's authority to act pursuant to § 2719(b)(1)(A)," while ensuring that "the Executive Branch retains control over IGRA's execution" thereafter. (*Lac Courte Oreilles Band of Lake Super. Chippewa Indians v. U.S. Dept. of Interior* (7th Cir. 2004) 367 F.3d 650, 657-658.) Indeed, to hold otherwise would raise the very same constitutional problems (under the Appointments Clause and non-delegation doctrine) that the Seventh and Ninth Circuits expressly avoided in *Siletz* and *Lac Courte Oreilles* by construing IGRA to limit the Governor's role to the singular function of concurrence prior to the Secretary's trust acquisition. (See *ibid.*)

3. Picayune next argues (AB55) that "[t]he dispositive role that state law plays under IGRA distinguishes it" from *Leser* and the retrocession cases upon which North Fork relies (OB41-45). But there is no distinction: In *Leser*, Article V of the U.S. Constitution granted states a "dispositive" role in the ratification of the Nineteenth Amendment, and in the retrocession cases, 25 U.S.C. § 1323 granted states a

"dispositive" role in retroceding the jurisdiction that Congress had ceded to them in Public Law 280, 18 U.S.C. § 1162. (See OB41-45.) The states' role was dispositive in the sense that Picayune uses the term here, because the relevant federal action (i.e., the ratification of the constitutional amendment, and the acceptance of retroceded jurisdiction) depended on the actions of state officials. Nor is there any merit to Picayune's related assertion (AB58-60) that these cases run afoul of *United Auburn* by encroaching on states' inherent authority to arrange their internal affairs. Under *United Auburn*, the Governor unquestionably has authority to concur under IGRA, and the state legislature unquestionably remains free to restrict the exercise of that authority in the future. But where, as here, the Governor lawfully concurred in the Secretary's determination, that concurrence is "'given effect under federal law,'" just as in *Leser* and the retrocession cases. (*United Auburn*, *supra*, 10 Cal.5th at p. 548.) In other words, across all three regimes—IGRA, Article V of the U.S. Constitution, and 25 U.S.C. § 1323—the states exercise a one-time function that is complete as a matter of federal law upon transmission of the results to the federal entity entrusted to receive them. The relevant lines of authority are in complete harmony.

4. Finally, Picayune's scattered suggestions (AB13, 43) that North Fork's intervention papers below undercut its position here are easily rebutted. When North Fork moved to intervene—in May 2016—North Fork explained that intervention was warranted because "if Picayune were to succeed in obtaining a declaration or writ of mandamus invalidating the Governor's concurrence, North Fork's project would be placed in jeopardy." That was certainly true, as an adverse ruling at the time could have

had adverse commercial consequences (i.e., for the project's ability to secure financing, which it has since secured). Moreover, at the time, the Secretary of the Interior had not yet issued secretarial procedures authorizing North Fork to conduct class III gaming, and an adverse ruling could have impeded that process even if it ultimately would not have had any legal bearing on the Secretary's issuance of them in July 2016.

II. The Concurrence Is Not "Void *Ab Initio*" Under California Law

On the merits, the superior court erred in holding that the Governor's concurrence was "void *ab initio*" as a matter of California law. Nothing in Picayune's response shows otherwise.

1. To start, Picayune cannot overcome the plain language of *United Auburn* and *Stand Up II* that recognizes the validity of the Governor's concurrence at the only time it mattered for this case: when the Secretary relied on it as part of the two-step determination. *United Auburn* stated unambiguously that "the Governor acted lawfully when he concurred in the Interior Secretary's determination" in the contemporaneous context of the concurrence at issue there. (*United Auburn*, *supra*, 10 Cal.5th at p. 544.) And in *Stand Up II*, this Court determined that the North Fork concurrence was "no longer valid," which necessarily implies a prior period of validity. (*Stand Up II*, *supra*, 64 Cal.App.5th at p. 201.) Contrary to Picayune's suggestion that North Fork relies on a "lone phrase" in *Stand Up II* (AB61), the Court's assessment of whether the Governor's concurrence "can be invalidated by subsequent action" (*Stand Up II*, *supra*, 64 Cal.App.5th at p. 210) makes sense as an inquiry only if the concurrence had been validly

in place beforehand. The Governor in Picayune's related appeal makes the same point. (See Governor's Br. 24-25, *Picayune Rancheria*, *supra*, No. F086849.)

2. As it did below, Picayune relies heavily on the meaning of "annulment" in the marital context—an idiosyncratic context not applicable here—to interpret *Stand Up II*'s references to the "annulment" of the concurrence. (AB38-39.) But nothing in the *Stand Up II* opinion suggested that it intended to draw on the concept of marital annulment or that doing so would make sense.

Even if the marital conception of "annulment" mattered in this unrelated context, Picayune gets it wrong. True, an annulled marriage is treated as "void from the beginning," but the very definition Picayune cites goes on to say that the rights of third parties remain unaffected. (*Black's Law Dict.* (12th ed. 2024).) The definition states, "a child born during the marriage is not considered illegitimate after the annulment," even though the marriage is treated as if it never existed. (*Ibid.*) The California Supreme Court has made the same point, explaining that the "relation back" aspect of a decree of annulment is "a mere legal fiction" that is "without application to the rights of third parties" who relied in good faith on the validity of a marriage pre-annulment; the Court cautioned that "courts have been especially wary lest the logical appeal of the fiction [of annulment] should obscure fundamental problems and lead to unjust or ill-advised results respecting a third-party's rights." (*Sefton v. Sefton* (1955) 45 Cal.2d 872, 875-876; see generally OB48-49; see also *American Surety Co. of N.Y. v. Conner* (N.Y. 1929) 166 N.E. 783, 786 [A "decree of annulment destroy[s] the marriage from the beginning as a source of rights and duties [citation], but it could not obliterate the past and make events

unreal."] (maj. opn. of Cardozo, C. J.).) Applying *Sefton* here, any analogous "annulment" of the concurrence would be a matter between the Prop 48 electorate and the Governor, "without application" to the third-party rights of the Secretary or North Fork. (*Sefton*, *supra*, 45 Cal.2d at pp. 875-876.)[3]

3. Picayune also fails to overcome the strong presumption against retroactivity. First, Picayune's assertion (AB63) that *Stand Up II* already addressed "the retroactivity question" is specious. The "retroactivity question" there was "*whether* the Governor's concurrence, once given, can be invalidated by subsequent action." (*Stand Up II*, *supra*, 64 Cal.App.5th at p. 210, emphasis added.) That inquiry is distinct from the question of *when* the invalidation took effect. Second, Picayune's claim that the presumption against retroactivity applies to statutes but not referenda (AB63-64) is without merit because the principles animating the presumption draw no such distinction. The presumption against retroactivity is

> deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly[.] For that reason, the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.'

[3] Picayune's reliance (AB39) on *Pierce v. Harrold* (1982) 138 Cal.App.3d 415, 434, and its progeny is equally misplaced. The court there "annulled" an election because it suffered from a defect that was present from inception (i.e., an ineligible candidate who misstated her residency). Here, by contrast, the California Supreme Court has made clear that "California law empower[ed] the Governor to concur" when he did so in 2012, such that the concurrence was not inherently defective.

(*McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 475, citing *Landgraf v. USI Film Products* (1994) 511 U.S. 244, 265.) These "[e]lementary considerations of fairness" apply with equal weight in the referendum context as in the statutory context. (*Ibid.*)

4. Picayune next points to the Court's statement in *Stand Up II* that "the goal of Proposition 48 was 'to reject class III gaming on … the Madera Site,'" and that it "impliedly expressed [the People's] will" to do so. (AB38, 40, quoting *Stand Up II*, *supra*, 64 Cal.App.5th at p. 216.) But the "People's will" cannot be an all-encompassing mandate to achieve an outcome that federal law does not allow. Picayune properly concedes that state law is preempted whenever it conflicts with federal law (AB67), but it understates the breadth of federal preemption. State law is preempted whenever it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Hines v. Davidowitz* (1941) 312 U.S. 52, 67.) Preemption applies regardless of whether the state law is rooted in statute or referenda (see *Arizona v. Inter Tribal Council of Arizona, Inc.* (2013) 570 U.S. 1 [holding that a state law enacted by voter initiative was preempted]), and applies with special force in the realm of Indian affairs, over which the federal government maintains plenary power. (*Seminole Tribe of Fla. v. Florida* (1996) 517 U.S. 44, 62 ["States … have been divested of virtually all authority over Indian commerce and Indian tribes."].) Here, any reading of Prop 48 that interferes with North Fork's authority to pursue gaming under federal law would plainly conflict with Congress's "purposes and objectives" under IGRA. While IGRA grants states a limited role, Picayune turns that concept on its head by contending that states

possess a perpetual right to shut down gaming projects authorized by federal law. IGRA affords states only an *initial* role in the two-step determination process, before the land is taken into trust under 25 U.S.C. § 2719(b)(1)(A); it does not vest them with the equivalent of an ongoing authority to revoke a tribe's gaming license.

5. In the alternative, Picayune argues (AB64) that "when an act is subject to referendum," "it *never* goes into effect prior to the vote, and only then if approved." *United Auburn* forecloses the argument that the Governor's concurrence was never in effect and would not have gone into effect unless the voters approved of the tribal-state compact—as discussed, the Court there held that "the Governor acted lawfully when he concurred in the Interior Secretary's determination." (*United Auburn*, *supra*, 10 Cal.5th at p. 544.) That would not have been the case if the Governor lacked the authority to formally concur prior to a referendum, as the concurrence that the Supreme Court considered in *United Auburn* had never been put to referendum, and the gaming at issue in *United Auburn* likewise proceeded without a ratified compact. *United Auburn* similarly recognized the Governor's authority to concur in other federal determinations without being constrained by speculative future referenda. (*Id.* at pp. 559-562 ["[T]he Governor has exercised [the power to concur under a federal scheme] throughout our state's history."].)

Picayune resists this conclusion, arguing (AB65) that *Stand Up II* addressed a new question left unanswered by *United Auburn* regarding the electorate's authority "to eliminate or invalidate a concurrence given by the Governor." That argument lacks cogency. *Stand Up II*'s holding that a Governor's concurrence can be revoked by

referendum does not conflict with or change *United Auburn*'s holding that a Governor has authority to concur under current state law and his concurrence is valid at the time it is made. Both can be (and are) true at the same time; Picayune creates friction where there is none.

6. Lastly, the practical implications of Picayune's position are alarming. Under Picayune's theory, any time a prior concurrence is declared invalid, a tribe's property interests and business enterprise under IGRA would be thrown into jeopardy. A sudden change of heart by voters or an antagonistic Governor could put a halt to any tribal gaming operation that depended on a state action (whether a concurrence or compact approval), even decades after the responsible state and federal officials took their respective actions and after a tribe had invested significant resources in developing a stable gaming business to support its government and tribal members. This profound uncertainty stands in direct opposition to Congress's purpose—and the government's fiduciary duty—to foster tribal self-determination and economic stability through gaming. The lack of any limiting principle in Picayune's theory confirms its infirmity.

Picayune tries to skirt the troubling implications of its theory by saying "the Court need not reach the issue," citing to inapposite cases about constitutional avoidance in federal law to suggest the Court should wait for the disastrous consequences to actually occur. (AB66.) But it is a necessary feature of judicial decision-making that courts consider the potential consequences of their holdings. While the immediate consequences of a ruling in Picayune's favor here would be academic for the parties to this case for reasons stated in Part I, such a ruling would have a broadly destabilizing

effect on every cooperative federalism regime by opening the door to endless efforts to unwind prior state actions and the federal programs that rely upon them.

CONCLUSION

The superior court's judgment should be reversed and the case remanded with instructions to grant summary judgment to North Fork.

DATED: June 16, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court Rule 8.204(c), I certify that this Intervenor-Appellant's Reply Brief is proportionally spaced, has a typeface of 13 points or more, and contains 5,922 words. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

DATED: June 16, 2025

/s/ Christopher E. Babbitt
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PROOF OF SERVICE

My business address is Wilmer Cutler Pickering Hale and Dorr LLP, 350 South Grand Avenue, Suite 2400, Los Angeles, CA 90071 USA. I am not a party to the instant case, and I am over the age of eighteen years.

On June 16, 2025, I caused the foregoing documents described as:

REPLY BRIEF OF INTERVENOR-APPELLANT

to be filed with ImageSoft TrueFiling ("TrueFiling") pursuant to California Rule of Court 8.212. Counsel for all parties will be electronically served by TrueFiling and/or via email, all parties having consented to service via email. The names and electronic service addresses of those served are:

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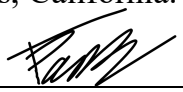
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 16, 2025 at Los Angeles, California.



Pavel Tantchev