*In the*

# Court of Appeal

*of the*

# State of California

**FIFTH APPELLATE DISTRICT**

**F086849**

PICAYUNE RANCHERIA OF THE CHUKCHANSI INDIANS,

*Plaintiff-Appellant,*

v.

EDMUND G. BROWN, JR.,

*Defendant-Respondent,*

NORTH FORK RANCHERIA OF MONO INDIANS,

*Intervener.*

APPEAL FROM THE SUPERIOR COURT OF MADERA COUNTY
HON. MICHAEL J. JURKOVICH · NO. MCV072004

# APPELLANT'S OPENING BRIEF

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APPELLANT/ PETITIONER: Picayune Rancheria of the Chukchansi Indians

RESPONDENT/ REAL PARTY IN INTEREST: Edmund G. Brown, Jr.

## CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

*(Check one):* [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

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2. a. [X] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
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| (2) | |
| (3) | |
| (4) | |
| (5) | |

[ ] Continued on attachment 2.

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Date: March 6, 2025

Navi Singh Dhillon
(TYPE OR PRINT NAME)

(SIGNATURE OF APPELLANT OR ATTORNEY)



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## INTRODUCTION AND SUMMARY OF ARGUMENT

This is a protective and narrow appeal. It follows a decision of this Court: *Stand Up for California! v. State* (2021) 64 Cal.App.5th 197, 202 (*Stand Up II*).

The dispute concerns an *off-reservation* casino proposed by the North Fork Rancheria of Mono Indians of California (North Fork) in Madera County — the Madera Site. North Fork wants to offer class III gaming. Because the North Fork site was purchased long after 1988 (with financial support from backers in Las Vegas), North Fork cannot offer class III gaming under federal law unless an exception applies. Relevant here, North Fork needed a valid Governor's concurrence to offer such gaming. (*Stand Up II*, 64 Cal.App.5th at 201.) This is all set out in the Indian Gaming Regulatory Act (IGRA; 18 U.S.C. §§ 1166-1167; 25 U.S.C. § 2701, et seq.). IGRA represents a cooperative federalism scheme such that it affords a state the power to veto (through the issuance or rejection of a Governor's concurrence) gambling on certain federal lands which, like the Madera Site, are held in trust by the federal government. And, importantly, IGRA defers to state law on the administration of that power and the legal status of a concurrence. (*Stand Up II*, 64 Cal.App.5th at 202.) The Court is familiar with this background, having previously addressed the application of this law as to the Madera Site when concluding the People of California "annulled" the 2012 concurrence given by Governor Brown. (*Id.* at 216.)

After losing in this Court, North Fork refused to stop proceeding with its proposed casino project, taking the extreme view that the holdings of this Court in *Stand Up II* were irrelevant because the concurrence nevertheless remained in effect prior to its rejection by millions of voters. Picayune disagreed, urging the Governor and North Fork to acknowledge the People had "annulled" the concurrence, meaning it never had any legal effect. It is unclear why the Governor did not agree. North Fork refused because it wants to build its project, asserting the concurrence had legal effect for some period of time. (1 Appellants' Appendix [AA] 16.)[1]

Years of litigation followed *Stand Up II*. As shown by North Fork's related appeal, the Court below ruled in favor of Picayune, concluding that the vote of the People had annulled the concurrence. That ruling is compelled by this Court's decision in *Stand Up II* and California law. More specifically, the People's exercise of their constitutional police and referendum power annulled Governor Brown's concurrence such that it never had legal effect but rather was rendered void *ab initio*. (*Id.*). Judgment was entered in favor of Picayune on that issue. (*Id.*)

So why then does Picayune care *vis-à-vis* the Governor? The law has been declared, the concurrence has been annulled, and the general law here

[1] Citations to Appellant's Appendix (AA) are formatted as follows: [Volume] AA [page range].

does not turn on what parties are in the room, whether that is North Fork, the Governor, or both.

This appeal is a protective measure. North Fork boldly intends to proceed with operation of its casino despite the annulment, meaning that more litigation may be necessary. As discussed in the background below, federal courts addressing challenges to other IGRA preconditions previously declined to reach the validity of the Governor's concurrence, seeing it as a state law issue that needed to be resolved in a state forum where the Governor could be joined. (See *Stand Up for California! v. U.S. Dep't of the Interior* (D.D.C. 2016) 204 F.Supp.3d 212, aff'd. (D.C. Cir. 2018) 879 F.3d 1177; *Picayune Rancheria of Chukchansi Indians v. U.S. Dep't of the Interior* (E.D. Cal., Aug. 18, 2017, No. 1:16-CV-0950-AWI-EPG) 2017 WL 3581735.) This and other litigation followed in California courts where the Governor could be and was joined. And while the Court below has already held that the annulment means the Governor's concurrence was void *ab initio* as a matter of *California* law, it did so after it had dismissed the Governor (the Respondent). The Court below also concluded that while *it* could resolve the state law question (the concurrence never had effect), it remained for a *federal* court to actually enjoin North Fork from gaming:

> The validity of the Governor's concurrence for any purpose is still a live issue because a valid concurrence is necessary for gaming to be allowed under IGRA . . . . The Federal Court has previously declined to rule on the legality of gaming on this site pending resolution of the concurrence issue by the state

> court. . . . Because a ruling resolving this specific issue directly impacts the federal court's ability to determine whether gaming is permitted on this specific piece of property, it would not be merely an abstract or academic dispute. A ruling on this issue will not determine whether gaming is permitted, but it will clarify whether the federal court may rely on the Governor's annulled concurrence in making that decision.

(Picayune's Req. for Jud. Notice, Ex. A at 18.) Although a matter for another day following remand in the related appeal, Picayune contends the lower court had ample power to enjoin North Fork for violating the law.

Put differently, the Court below understood that its charge was to resolve the state law issue as to the annulment of the Governor's concurrence and what it meant as a matter of California law. But it reached that conclusion after having dismissed the Governor—whose concurrence was negated—as having no further interest in the suit (mootness) and believing no writ could reach the Governor. (5 AA 1004.)

Picayune thus faces the possibility (albeit remote) of a feedback loop—a loop it hopes will never come to fruition and would conflict with the law, but which it nevertheless must guard against. Namely, should North Fork continue to pursue its casino (which it is currently doing[2]), Picayune may need to take its existing judgment and declaration of state law to state

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[2] Linsey Lewis, *Groundbreaking Ceremony Held for California Casino, Resort to be Managed by Las Vegas-based Company*, LAS VEGAS TRIB. (Sept. 11, 2024), *available at*: https://www.lasvegastribune.net/post/groundbreaking-ceremony-held-for-california-casino-resort-set-to-be-managed-by-las-vegas-based-comp.

or federal court and argue, in effect: "We now have the state law issue resolved. The Governor's concurrence never had legal effect; the People annulled it rendering it void *ab initio*, and therefore an IGRA precondition for gaming at the Madera Site is missing. North Fork stands in clear violation of IGRA." But the risk is that the federal court declines to consider the issue altogether because the Governor was not party to the judgment and cannot be joined (as before) due to his sovereign immunity—thereby creating a situation where Picayune was told by a federal court to go to state court to get an answer (which it did), only to be unable to present that answer to a federal court because the Governor was not party to the merits analysis (having been let out of the state court case earlier at his own request). Picayune disputes that this is the law but appeals here out of an abundance of caution.

Picayune certainly believes it would have the better of any appeal to Federal Rule of Civil Procedure 19 in any future federal forum given that the Governor effectively opted out of this dispute.[3] By his own words, "[t]he

[3] Although not an issue for this Court, federal appellate authority recognizes that when a litigant effectively opts out of dispute, no other party can claim such a party is indispensable. (See, e.g., *U.S. ex rel. Morongo Band of Mission Indians v. Rose* (9th Cir. 1994) 34 F.3d 901, 908 ["Therefore, Miller's voluntary dismissal indicates that Miller himself did not feel that it was necessarily in his interest to remain a party in this action. . . . We believe that these facts provide a solid basis for a conclusion that Miller's interests would not be prejudiced by his absence."]; *United States v. Bowen* (9th Cir. 1999) 172 F.3d 682, 689 ["Here, Sterilization Systems was aware of this action and chose not to claim an interest. That being so, the district court did

Governor agrees that the concurrence is ineffective. As such, the [*United Auburn Indian Cmty. of Auburn Rancheria v. Newsom* (2020) 10 Cal.5th 538] and *Stand Up II* cases fully adjudicated, and foreclosed further questions on, the legality and effectiveness of Governor Brown's concurrence[.]" (5 AA 934.) In other words, the law is the law, and the Governor had nothing further to say.

That brings us to a core issue on appeal: whether the dispute was moot as it relates to the Governor. The answer is no.

The California Supreme Court has just last year confirmed that mootness should not be easily found. "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 effect[ive] relief whatever.'" (*Golden State Water Co. v. Pub. Utilities Com.* (2024) 16 Cal.5th 380, 393 [citations omitted].) "A case is not moot," by contrast, "if the parties retain a concrete interest in the outcome." (*Id.* [citation omitted].) Thus, where a suit is pending challenging government action, and an intervening statute is passed that gives much of the relief sought in the action, the case is nevertheless not moot if some sliver of relief, however small, remains to be granted. (*Id.*)

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not err by holding that joinder was 'unnecessary.'"]; *ConnTech Dev. Co. v. Univ. of Conn. Educ. Props., Inc*. (2d Cir. 1996) 102 F.3d 677, 683 ["Connecticut has clearly declined to claim an interest in the subject matter of this dispute."].)

Here, the Court below incorrectly dismissed Picayune's causes of action against the Governor on mootness grounds. A live dispute very much exists, as shown by the fact that North Fork stubbornly contends it can continue with its casino project. Contrary to what the Court below believed, the Governor should have remained in the case given the subject of the dispute was his concurrence and he would not acknowledge it never had any legal effect. Further, after ruling in favor of Picayune on the status of the concurrence, the Court below, sitting in an equitable posture in a mandamus action, had ample authority to issue a writ directing the Governor to take appropriate steps to inform interested parties (North Fork, the U.S. Secretary of Interior) that the concurrence never had any legal effect due to the vote of the People.

In the pages below, Picayune identifies three reversible errors: First, contrary to the analysis of the Court below, the First Amended Complaint pled an "actual controversy" such that the case is not moot because relief could have been granted (as it was against North Fork), and Picayune properly pled a declaratory relief cause of action against the Governor. Second, the Court below erred in concluding that in the face of an annulment of a Governor's action, no traditional mandamus claim will lie to require the Governor to take appropriate curative steps. Third, and relatedly, the Court below erred in denying leave to amend on Picayune's writ claim.

We ask that the Court grant this appeal.

## COMBINED STATEMENT OF FACTS AND PROCEDURAL HISTORY

Picayune's claims against the Governor were dismissed below in the context of pleadings challenges. Accordingly, the summary that follows predominantly relies on the allegations in Picayune's Complaints for Declaratory Relief and Petition for Writ of Mandate. This Court has also confirmed many of the relevant facts in its decision in *Stand Up II.* Thus, where appropriate, Picayune cross-references *Stand Up II* as well as the pleadings filed before dismissal.

### I. NORTH FORK'S CASINO PROJECT

Picayune is a federally recognized Indian tribe that holds Rancheria lands located in Coarsegold, Madera County, California. (1 AA 11.) Picayune operates a casino on its Rancheria lands, which the tribe uses to support its members in a variety of ways, such as by providing education, housing, and healthcare services. (2 AA 217.)

North Fork is a federally recognized Indian tribe. (1 AA 168; see *Stand Up II*, 64 Cal.App.5th at 202.) In March 2005, North Fork submitted a fee-to-trust application to the Bureau of Indian Affairs within the U.S. Department of the Interior, requesting that the Department take into trust for North Fork's benefit a 305-acre parcel in Madera County (as noted above, the Madera Site). (1 AA 168-170, 202; see *Stand Up II,* 64 Cal.App.5th at 202.) North Fork seeks to build and operate a large casino on the Madera

Site. (1 AA 170; see *Stand Up II*, 64 Cal.App.5th at 202.) The Madera Site is approximately 26.4 miles from Picayune's Rancheria lands. (1 AA 11, 2 AA 217, 4 AA 762-763; see *Stand Up II*, 64 Cal.App.5th at 202.) Picayune has long opposed North Fork's proposed off-reservation casino because it would cause significant harm to Picayune and its members. (1 AA 17.)

## II. THE GOVERNOR'S CONCURRENCE

Again, covering ground this Court already dealt with in *Stand Up II*, IGRA provides "a statutory basis for the operation of gaming by Indian tribes[.]" (25 U.S.C. § 2702, subd. (1).) IGRA affirmatively *prohibits* class III gaming (i.e., Las Vegas-style gambling [see 25 U.S.C. § 2703, subd. (8)]) on lands taken into trust by the federal government after October 17, 1988, unless an exception applies. (25 U.S.C. § 2719, subds. (a), (b).) One such exception, set forth at 25 U.S.C. section 2719, subd. (b)(1)(A), is the one on which North Fork seeks to rely for the Madera Site.

To invoke that exception, North Fork must satisfy three separate conditions:

> 1. For the Secretary of the Interior to "determine[] that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community" (25 U.S.C. § 2719, subd. (b)(1)(A);
>
> 2. For the Governor of the State in which the Class III gaming is to occur to concur in the Secretary's conclusion (25 U.S.C. § 2719, subd. (b)(1)(A)); *and*
>
> 3. A valid Tribal-State compact or valid Secretarial Procedures (25 U.S.C. § 2710, subd. (d)(1)(C)).

This Court and others already recognize that each condition must be met and is separate. (*Stand Up for California!*, 204 F.Supp.3d at 250 ["each is a separate requirement for gaming to take place on newly-acquired, non-reservation lands" (fn. omitted)]; *Stand Up II*, 64 Cal.App.5th at 216). "One of those conditions—the Governor's concurrence—is the subject of this litigation." (*Stand Up II*, 64 Cal.App.5th at 201.)

On September 1, 2011, the Secretary issued a two-part determination for North Fork's proposed casino project. (1 AA 13; see *Stand Up II*, 64 Cal.App.5th at 202.) Approximately one year later, on August 30, 2012, then-Governor Brown issued a letter concurring in the Secretary's two-part determination (as noted above, the "Governor's concurrence").[4] (1 AA 13, 21-22; see *Stand Up II*, 64 Cal.App.5th at 202.) The very next day, on August 31, 2012, the Governor and North Fork executed a tribal-state gaming compact for North Fork's proposed casino project, though the Governor expressed reservation in doing so. (1 AA 13, 21, 25-144; see *Stand Up II*, 64 Cal.App.5th at 203.)

[4] Gavin Newsom assumed the governorship on January 7, 2019, and is substituted as the defendant in this action in place of former Governor Brown. (Code Civ. Proc., § 368.5; *Cornejo v. Lightbourne* (2013) 220 Cal.App.4th 932, 936, fn. 2.)

## III. PROPOSITION 48 REJECTS NORTH FORK'S PROPOSED CASINO PROJECT

Under the California Constitution, tribal-state gaming compacts are "subject to ratification by the Legislature." (Cal. Const., art. IV, § 19, subd. (f).) Accordingly, the compact expressly stated that it would not become effective until, among other things, "[t]he Compact is ratified in accordance with State law[.]" (1 AA 13.) On or about June 27, 2013, the Legislature passed Assembly Bill No. 277 (AB 277) to ratify the compact. (*Id.*)

In July 2013, Stand Up for California! asked the Attorney General to provide a title and summary for a proposed statewide referendum rejecting AB 277. (See *Stand Up II,* 64 Cal.App.5th at 204.) At the 2014 General Election, sixty-one percent (61%) of Californians voted to reject AB 277. (1 AA 14; *Stand Up II,* 64 Cal.App.5th at 205.) "As a result, AB 277 never went into effect." (1 AA 14; see *Stand Up II*, 64 Cal.App.5th at 205.)

## IV. PICAYUNE FILES SUIT AGAINST THE GOVERNOR, AND NORTH FORK INTERVENES

In March 2016, Picayune commenced this action to secure a judgment declaring the Concurrence "did not take effect and is not in effect" and to obtain a writ of mandate directing the Governor "to vacate and set aside the concurrence and to take all action as may be necessary to notify the Secretary that the concurrence did not take effect and is not in effect[.]" (1 AA 18.) North Fork was granted leave to intervene on July 8, 2016. (1 AA 180.) In seeking intervention, North Fork took the position that "[i]f Picayune were

to succeed in obtaining a declaration or writ of mandamus invalidating the Governor's concurrence, North Fork's gaming project would be placed in jeopardy." (1 AA 160-61.)

North Fork and the Governor each filed demurrers to Picayune's Complaint. (1 AA 145, 178.) On December 2, 2016, the Court below sustained the demurrers. (1 AA 183.) Given concurrent appellate proceedings raising similar questions, however, the Court promptly vacated its order sustaining the demurrers and stayed proceedings pending resolution of those related proceedings. (1 AA 191.)

## V. *UNITED AUBURN* AND *STAND UP!* HOLD THAT PROPOSITION 48 ANNULLED THE GOVERNOR'S CONCURRENCE

In March 2013, Stand Up for California! and Barbara Leach filed a complaint in the Superior Court for the County of Madera challenging the Governor's authority to issue the Concurrence. (*Stand Up for California! v. State of Cal.* (2016) 6 Cal.App.5th 686, 693, abrogated by *United Auburn,* 10 Cal.5th 538 (*Stand Up I*).) As in this litigation, North Fork was granted leave to intervene and, along with the Governor, demurred to Picayune's complaint. (*Id*. at 693.) Also as in this litigation, the Court below sustained the defendants' demurrers in March 2014. (*Id*.) Plaintiffs timely appealed, and in December 2016 this Court issued the decision in *Stand Up I,* concluding that, in the circumstances presented, the Governor lacked authority to concur and thus the Concurrence was invalid. (*Id.* at 705.)

Shortly before this Court's decision in *Stand Up I*, the Third Appellate District was presented with a similar appeal involving a different parcel. (See *United Auburn Indian Cmty. of Auburn Rancheria v. Brown* (2016) 4 Cal.App.5th 36, aff'd. *United Auburn*, 10 Cal.5th 538.) The Third Appellate District reached the opposite conclusion as this Court, concluding the Governor could concur in some circumstances. (See *id*. at 42.) Petitions for review were filed in both cases. (*Stand Up II*, 64 Cal.App.5th at 206.) The California Supreme Court granted review in both cases but "deferred consideration [of *Stand Up I*] pending the outcome of *United Auburn.*" (*Id*.)

On August 31, 2020, the California Supreme Court issued its decision in *United Auburn*. "The Supreme Court held 'that current California law permits the Governor's concurrence in the Interior Secretary's determination to allow class III gaming on Indian land taken into trust for an Indian tribe after IGRA was enacted[,]'" but also held such power "isn't an indefeasible one[.]" (*Stand Up II,* 64 Cal.App.5th at 207, 209 [quoting *United Auburn,* 10 Cal.5th at 564].) After issuing *United Auburn*, the Supreme Court transferred the *Stand Up* case back to this Court with instructions to vacate its decision and reconsider the matter in light of *United Auburn*, which it did. (*Stand Up II,* 64 Cal.App.5th at 201.)

In *Stand Up II*, this Court determined that the People "reject[ed] [] class III gaming at the Madera site" through their vote on Proposition 48. (*Stand Up II,* 64 Cal.App.4th at 216.) Thus, this Court held that "the people's

rejection of Proposition 48 impliedly expressed their will to annul the Governor's August 30, 2012 concurrence for the Madera site." (*Id.*) The State and North Fork each petitioned the Supreme Court for review of this Court's *Stand Up II* decision. (North Fork's Petition for Review, filed in *Stand Up for California! v. State of California*, No. S269471 (Cal.) on June 22, 2021; Governor's Petition for Review, filed in *Stand Up for California! v. State of California*, No. S269471 (Cal.) on June 22, 2021.) On September 1, 2021, the Supreme Court denied the petitions for review. (Supreme Court of California's Order Denying North Fork's and the Governor's Petitions for Review, entered in *Stand Up for California! v. State of California*, No. S269471 (Cal.) on Sept. 1, 2021.)

## VI. THE COURT BELOW SUSTAINS THE GOVERNOR'S DEMURRER

Following this Court's decision in *Stand Up II*, this case came back to life in the Court below, and Picayune filed a motion for judgment to reduce *Stand Up II*'s analysis to a binding judgment. (1 AA 194.) Both the Governor and North Fork opposed Picayune's motion and filed their own motions for judgment on the pleadings, confirming there was disagreement as to the impact of the People's vote. (3 AA 594, 613, 634, 646.)

Picayune argued *Stand Up II*'s ruling that the Concurrence was annulled compelled a finding that Proposition 48 rendered the Concurrence void *ab initio*—that is, it was never valid and never had legal effect as a

matter of California law. (1 AA 209.) The Governor and North Fork argued that Proposition 48 did not render the Governor's concurrence void *ab initio*, and the Governor argued the question was moot given that *Stand Up II* was clear that the concurrence is not *currently* effective. (3 AA 610-12, 630-32, 653-56.)

On July 15, 2022, the Court below issued a Tentative Ruling (July 2022 Tentative) denying Picayune's motion and granting the Governor's and North Fork's motions. (4 AA 660.) The gist of the July 2022 Tentative was that the causes of action in Picayune's Complaint were mooted by the decisions in *Stand Up II* and *United Auburn*. (4 AA 675.)

The Court below held a hearing on the cross-motions on September 9, 2022. (Reporter's Transcript (filed on Nov. 15, 2024) [RT] at 62.) The Court was not inclined to change its ruling but was willing to entertain Picayune's request for leave to amend its Complaint to address the concerns raised in the July 2022 Tentative. (*Id.* at 121.) Per the Court below's direction, on October 21, 2022, Picayune filed a motion for leave to file a First Amended Complaint and Petition. (4 AA 678.) Both the Governor and North Fork opposed. (4 AA 680, 721.)

On December 12, 2022, the Court below issued a Tentative Ruling (December 2022 Tentative) on Picayune's motion to amend its Complaint. (4 AA 736.) In that ruling, the Court was inclined to grant Picayune's motion in part, allowing Picayune leave to file a First Amended Complaint for

Declaratory Relief but denying Picayune leave to file a First Amended Petition for Writ of Mandate. (4 AA 737.) The Court reasoned that its earlier analysis on mootness was narrow, and that on Picayune's causes of action for declaratory relief it would grant leave and address challenges to the sufficiency of those causes of action in the context of pleading challenges rather than on leave. (4 AA 752-53.)

The Court then held a hearing. (See RT at 139.) After the hearing, the Court adopted its December 2022 Tentative and entered an order granting Picayune leave to file a First Amended Complaint for Declaratory Relief but denying Picayune's motion for leave to file a First Amended Petition for Writ of Mandate without leave to amend and sustaining the Governor's demurrer with prejudice to Picayune's mandamus cause of action. (4 AA 757.) On December 28, 2022, Picayune filed its First Amended Complaint. (4 AA 761.)

Both the Governor and North Fork filed demurrers to Picayune's First Amended Complaint. (5 AA 898, 921.) Picayune opposed. (5 AA 943, 964.) As before, the principal dispute was whether Proposition 48 operated retroactively such that the Concurrence was void *ab initio*. (5 AA 918, 933, 960, 981-82.) Picayune took the position that the Governor's concurrence was never effective but rather had been rendered void *ab initio* and that its allegations pleaded a live controversy. (5 AA 960, 981-82.) For its part, North Fork continued to take the opposite position that, even after

Proposition 48, the concurrence was at one point valid. (5 AA 918.) The Governor appeared to support North Fork's view that the Concurrence was effective for some undefined period of time (5 AA 933) but mostly argued that Picayune failed to allege an "actual controversy" against the Governor because the Governor "has no legal duty or authority to take further action" regarding the concurrence given his acknowledgment that the concurrence was ineffective going forward. (5 AA 937-38; see also 5 AA 997-98.)

On July 5, 2023, the Court below issued a Tentative Ruling (July 2023 Tentative) on the Governor's and North Fork's demurrers that proposed sustaining the Governor's demurrer on mootness grounds but overruling North Fork's demurrer. (5 AA 1011.) After a hearing, the Court below adopted its July 2023 Tentative and entered an order sustaining the Governor's demurrer to the First Amended Complaint and overruling North Fork's demurrer to the First Amended Complaint. (5 AA 1014.)[5]

## VII. FEDERAL COURTS DIRECT PICAYUNE TO RAISE CHALLENGE TO GOVERNOR'S CONCURRENCE IN STATE COURT

The background above describes the litigation in *this* Court system. The Governor, however, has previously cited to federal court litigation where Picayune challenged certain federal approvals regarding the Madera Site to

[5] As noted in the introduction, the litigation continued as to North Fork, resulting in the Court below concluding that the Governor's concurrence never went into effect and was void *ab initio*. (Picayune Req. for Jud. Notice, Ex. A at 18-21.)

suggest this case is moot. (5 AA 935 ["The lack of effectual relief sought in Picayune's FAC is clearly shown by the federal litigation initiated by Picayune regarding the Madera Site."].) The Governor is mistaken. This Court was aware of the federal court litigation when it decided *Stand Up II* (*Stand Up II*, 64 Cal.App.5th at 205 [describing the cases in the District of Columbia and Eastern District of California]), and those federal courts deferred to this Court system where the Governor could be joined for resolution of this state law issue.

In December 2012, Picayune, Stand Up for California!, and others sued the Department of the Interior and the Bureau of Indian Affairs in the District of Columbia, challenging certain federal approvals and acts by the Secretary of the Interior. (*Stand Up for California!,* 204 F.Supp.3d at 212.) Among other claims, Picayune argued that the Department's decision to take the Madera Parcel into trust for North Fork violated IGRA because it relied on the Governor's invalid concurrence. (*Id.* at 235.) In a decision the D.C. Circuit later affirmed (*Stand Up for California! v. U.S. Dep't of Interior* (D.C. Cir. 2018) 879 F.3d 1177, 1186), the District Court concluded that it could not resolve the validity of the concurrence, reasoning that "the Court agrees with the plaintiffs that a Governor's authority to concur in an IGRA two-part determination is an issue of state law, but disagrees with the plaintiffs that this Court may address the validity of the Governor's concurrence under California law." (*Id.* at 251.) The Court continued: "[T]he State of California

is missing from this lawsuit, and any challenge to the validity of the Governor's concurrence may not proceed in the State's absence." (*Id.*) Because the Governor could not be joined, the court reasoned, it would dismiss any claim predicated on the invalidity of the Governor's concurrence. (*Id.* at 254 ["plaintiffs' claims in ***any way*** involving the Governor's concurrence must be dismissed due to the absence of an indispensable party." (emphasis added)].)

In a subsequent suit challenging federal approvals, the Eastern District of California agreed with the D.C. courts that the Governor was a necessary party. (*Picayune Rancheria of Chukchansi Indians,* 2017 WL 3581735, at *10 ["[t]he State of California remains a necessary party for the same reasons articulated by the District of Columbia district court"].) The Court expressly pointed to the fact that this Court's decisions in *Stand Up I* were not yet final and were proceeding *with* the Governor in this court system. (*Id.* at *9-10.)

## STATEMENT OF APPEALABILITY

This appeal arises from the Court below's July 17, 2023 order sustaining the Governor's demurrer to Picayune's First Amended Complaint for Declaratory Relief. (5 AA 1013.) Given the Court below's December 2022 order denying Picayune leave to amend its mandamus cause of action against the Governor and granting the Governor's motion for judgment on the pleadings on that cause of action (4 AA 757), the Court's July 2023 order

disposed of Picayune's sole remaining claim against the Governor. It was therefore immediately appealable.

As Eisenberg explains, "[i]n multiparty actions, a 'piecemeal' judgment or order that leaves no issue remaining to be determined as to one of the parties is considered final as to that party and thus appealable." (Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group 2024 Update) ¶ 2:91 "[I]n a single plaintiff's suit against two defendants (D1 and D2), a judgment or order resolving all issues between plaintiff and D1 is immediately appealable even though the action is still pending against D2[.]" (*Id.* [citation omitted].) This principle has been applied by California courts on numerous occasions. (See *Aixtron, Inc. v. Veeco Instruments Inc*. (2020) 52 Cal.App.5th 360, 389; *Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 437; *Heshejin v. Rostami* (2020) 54 Cal.App.5th 984, 991.)

Following California's "'one shot' rule" — "if an order is appealable, appeal must be taken or the right to appellate review is forfeited[,]" (*In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 761, fn. 8) — and consistent with authority treating rulings on a demurrer like the Court below's July 17, 2023 order "as a judgment of dismissal since the court sustained respondents' demurrers without leave to amend[,]" (*TruConnect Commc'ns, Inc. v. Maximus, Inc*. (2023) 91 Cal.App.5th 497, 505, fn. 3 (citation omitted); *Wilson v. Sharp* (1954) 42 Cal.2d 675, 677 [order granting motion to strike

appealable]), Picayune filed a timely notice of appeal on September 7, 2023. (5 AA 1020; see also Cal. Rules of Court, rule 8.104(a).)

## STATEMENT OF ISSUES

1. Did the Court below commit prejudicial error in sustaining the Governor's demurrer to Picayune's declaratory relief cause of action even though Picayune pleaded an actual controversy and there was relief the Court could have awarded?

2. Did the Court below commit prejudicial error in denying Picayune leave to amend its original Complaint to state a writ of mandate cause of action against the Governor when nothing on the face of the Complaint suggested amendment would be futile?

3. Did the Court below commit prejudicial error in granting the Governor's motion for judgment on the pleadings as to Picayune's original mandamus cause of action even though existing mandate law confirms mandate will lie to undo past acts held void?

## STANDARDS OF REVIEW

### 1. An Order on a Demurrer or Motion for Judgment on the Pleadings Is Reviewed *De Novo*

On appeal from a judgment sustaining a demurrer, this Court reviews independently whether Picayune "allege[d] facts sufficient to state a cause of action under any possible legal theory[,]" and will do so "without deference to the legal conclusions of the pleader or the trial court." (*Gutierrez v.*

*Carmax Auto Superstores Cal.* (2018) 19 Cal.App.5th 1234, 1242, as mod. on denial of rehg. (Feb. 22, 2018).)

Because a motion for judgment on the pleadings based on a failure to state a cause of action is akin to a general demurrer, the same standard of review as a demurrer applies: de novo. (*Tarin v. Lind* (2020) 47 Cal.App.5th 395, 403).

**2. An Order Denying Leave To Amend Is Reviewed for Abuse of Discretion.**

This Court reviews a denial of leave to amend the pleadings for abuse of discretion. (*Record v. Reason* (1999) 73 Cal.App.4th 472, 486). "[D]enial of leave to amend [an original complaint] constitutes an abuse of discretion if the pleading does not show on its face that it is incapable of amendment." (*Ventura Coastal, LLC v. Occupational Safety & Health Appeals Bd.* (2020) 58 Cal.App.5th 1, 33 [alterations added; quoting *Gami v. Mullikin Med. Ctr.* (1993) 18 Cal.App.4th 870, 877].)

## ARGUMENT

In the context of *this* Madera Site, *this* Court has already held that "California courts routinely recognize their duty to jealously guard the right of the people to the initiative and referendum." (*Stand Up II*, 64 Cal.App.5th at 213.) Here, the People annulled a concurrence with retroactive effect so as to "reject class III gaming on the 305-acre Madera site[.]" (*Id.* at 216.) The Governor below disagreed regarding the impact of the annulment and

convinced the Court below that as to his Office there was nothing the Court could do. (1 AA 181; 4 AA 660; 5 AA 985.)

Respectfully, the Court below erred in those conclusions even when it later rightfully concluded (in the ongoing causes of action against North Fork), that "[t]hrough the People's vote on Proposition 48, the Governor's concurrence has been annulled rendering it void *ab initio*, and as such the Governor's concurrence never took effect and is not in effect." (Picayune Req. for Jud. Notice, Ex. A at 2.) Through this protective appeal, Picayune seeks reversal of the Court's decisions discussed below and the inclusion of the Governor in a judgment that both recognizes the effect of the People's annulment of his conclusion *and* orders him to take curative steps.

## I. THE DISPUTE WITH THE GOVERNOR WAS FAR FROM MOOT.

Picayune begins with its declaratory relief cause of action against the Governor, which pleaded what the law requires. The Court below sustained a demurrer to that cause of action on the ground the cause of action was moot and, respectfully, did so in error.[6] On appeal, this Court looks at the Governor's demurrer *de novo* and does "not consider the trial court's reasoning[.]" (*Herzberg v. County of Plumas* (2005) 133 Cal.App.4th 1, 19,

[6] As noted in section I.C, *infra* should this Court agree that Picayune's declaratory relief cause of action against the Governor was not moot (and thus the demurrer should have been overruled) then the Governor's prior sustained demurrer to Picayune's writ cause of action should also be reversed.

fn. 12.) By any measure, Picayune has pleaded what is necessary to state a claim.

The controlling pleading standards are well established. "[T]o state a cause of action for declaratory relief, a plaintiff need plead only two elements: (1) "a proper subject" and (2) "an actual, present controversy[.]" (*Californians for Native Salmon etc. Assn. v. Dep't of Forestry* (1990) 221 Cal.App.3d 1419, 1427 [reversing trial court]; see also 5 Witkin, Cal. Procedure (6th ed. 2024 Update) Pleading, § 849.)

Here, Picayune alleged both. As to the proper subject: "The construction or validity of a statute or ordinance is a proper subject for declaratory relief." (5 Witkin, Cal. Procedure (6th ed. 2024 Update) Pleading, § 857.) Put differently, "[a]n action for declaratory relief lies when the parties are in fundamental disagreement over the construction of particular legislation[.]" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79 [citation omitted].) In that vein, the interpretation of initiatives or referendums has been held to be a proper subject of declaratory relief. (*City & County of San Francisco v. All Persons Interested in Matter of Proposition C* (2020) 51 Cal.App.5th 703, 710 [affirming grant of declaratory relief interpreting initiatives].)

Picayune has alleged that Proposition 48—a referendum that exercised the People's retained legislative power to "approve or reject statutes" (see *Stand Up II*, 64 Cal.App.5th at 212-13 [quoting Cal. Const., art.

II, § 9, subd. (a)])—annulled the Governor's concurrence, rendering it void *ab initio* such that it never went into effect. (See, e.g., 4 AA 762, 765-769.) Addressing the impact of Proposition 48 on a disputed question is plainly a proper subject of a declaratory relief cause of action. Neither the Governor nor the Court below suggested otherwise. Thus, Picayune pleaded this element.

It was the *second* element—an actual, present controversy—on which the Governor demurred and the Court below relied in sustaining that demurrer. For its part, in paragraph 39 of its FAC, Picayune pleaded the controversy *expressly* (excerpted):

> An actual controversy has arisen and now exists between Picayune, the Governor and North Fork concerning the effectiveness and legal status of the Governor's concurrence including the parties' rights and duties with respect thereto in light of Proposition 48. Picayune asserts that in light of the People's vote on Proposition 48, the Governor's concurrence never went into effect and is not in effect. . . . ***The Governor and North Fork disagree***.

(4 AA 769 (emphasis added)].) Under hornbook law, those allegations must be taken as a true. (*Smith v. County of Kern* (1993) 20 Cal.App.4th 1826, 1830 ["In evaluating whether an appellant may be able to state a cause of action, [a]ll allegations are taken as true even though their proof appears unlikely . . . ." (citation omitted)].) And Picayune pleaded that the Governor disagreed with the impact of the annulment of his concurrence.

From a pure pleading perspective—which is, of course, what demurrers look to—the element was pleaded, the Governor's demurrer should have been overruled, and the sustaining of that demurrer was prejudicial. (*Warren v. Kaiser Found. Health Plan, Inc.* (1975) 47 Cal.App.3d 678, 684-85 [prejudicial error to sustain demurrer to declaratory relief claim that is facially plausible].) As this Court's own analysis vis-à-vis North Fork also shows, the fact that the People rendered the Governor's concurrence void *ab initio* was not only plausible; it was correct. (Picayune Req. for Jud. Notice, Ex. A at 2.)

### A. The Governor's Arguments in His Demurrer Are Unavailing

Notwithstanding Picayune's allegations in the FAC, the Governor demurred, arguing mootness. (5 AA 933.) The Governor's arguments were (1) an acknowledgment that there was an actual controversy at one time but that the case had lost its controversy in light of *Stand Up II*; and (2) the Governor's view that the Court need not reach the void *ab initio* question because "the state law adjudication sought in the FAC . . . will not affect the class III gaming status of these lands under federal law[.]" (5 AA 933-34).

Each of these arguments should have failed.

***First***, the Governor contended that a valid controversy existed when this case began, but he argued that the *Stand Up II* and *United Auburn* decisions intervened, mooting the case. (5 AA 933-34.) Not so. California

law recognizes that if "a substantial issue remains" despite an intervening event, "the case is not moot, and too narrow a view of the object of the proceeding must be avoided." (3 Witkin, Cal. Procedure (6th ed. 2024 Update) Actions, § 33 [collecting cases like *Terry v. Civil Serv. Comm'n* (1952) 108 Cal.App.2d 861; *City of Plymouth v. Superior Court* (1970) 8 Cal.App.3d 454; and *Moore v. Wells Fargo Bank, N.A.* (2019) 39 Cal.App.5th 280]; see also *Polster v. Sacramento Cnty. Off. of Educ.* (2009) 180 Cal.App.4th 649, 658 [citing 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 33, for the proposition that a "case is not moot where [a] substantial issue remains to be decided"].)

Indeed, the law confirms that for an intervening event to moot a pending case, it must do so *completely*. (See, e.g., *Honan v. Title Ins. & Tr. Co.* (1935) 9 Cal.App.2d 675, 678 ["In order to constitute a moot question that would warrant the granting of a motion to dismiss the entire complaint, it must affect the entire subject-matter of the pleadings and be 'completely moot[.]'"].) "[W]here there is left any material or vital question for determination" despite an intervening event, a controversy is not moot. (*Hartke v. Abbott* (1930) 106 Cal.App. 388, 395.) Stated differently, "where a court can afford the party at least some relief, even if not all the relief originally requested, the court should not dismiss a case as moot." (*City of Cerritos v. California* (2015) 239 Cal.App.4th 1020, 1031 [citing *Hartke*, 106 Cal.App. at 395].)

The California Supreme Court itself applies these rules to claims seeking declaratory relief. In *Eye Dog Found. v. State Bd. of Guide Dogs for Blind*, the Court explained that if "despite the happening of the subsequent event, there remain material questions for the court's determination[,]" the declaratory relief claim is not moot, because "the court must do complete justice once jurisdiction has been assumed[.]" ((1967) 67 Cal.2d 536, 541 [citation omitted].) And importantly, the relief "granted may encompass future and *contingent* legal rights." (*Id.* [emphasis added].)

Here, as alleged, material questions remained disputed. While Picayune firmly agrees with the Governor that *Stand Up II* (a decision the Governor was party to) controls, Picayune's FAC confirmed that the Governor *disagreed* that the "annulment" effectuated by Proposition 48 rendered the 2012 concurrence void *ab initio*, such that it *never* had effect under California law. (4 AA 769.) Indeed, Plaintiff's FAC prayed, in part, precisely for that declaration: "A judicial declaration to the effect that through the People's vote on Proposition 48 the Governor's concurrence has been annulled rendering it void *ab initio*, and as such the Governor's concurrence never took effect and is not in in effect[.]" (4 AA 770.) Simply applying the "intervening events" law shows that *some* relief *could have been* awarded—the confirmation that the annulment rendered the Governor's concurrence as void *ab initio*—and thus there was no mootness. Indeed, the Court below itself proved that some relief could have been awarded when it

later *awarded* that very same relief, albeit on Picayune's declaratory relief cause of action against North Fork. (Picayune Req. for Jud. Notice, Ex. A at 2.)

***Second***, the Governor argued that the prior federal court litigation (challenging federal actions) rendered the case moot as academic because Secretarial Procedures (in lieu of a compact) had issued. (5 AA 936 ["Even assuming for the sake of argument that Governor Brown's concurrence was void *ab initio*, the Secretarial Procedures would remain valid."].)

Respectfully, the Governor's argument is mistaken as a matter of substantive law and, more importantly, incorrect as a matter of mootness law. Substantively, as discussed already, the Governor's concurrence is a *separate* condition necessary to conduct gaming on the Madera Site. (See *supra* at Section II; *Stand Up II*, 64 Cal.App.5th at 201 ["One of those conditions—the Governor's concurrence—is the subject of this litigation."].) Independent of the requirement for Secretarial approval, or that for a compact or secretarial procedures (see *Stand Up II,* 64 Cal.App.5th at 201), "[t]he effect of the [Governor's concurrence] provision is that the Governor must agree that gaming should occur on the newly acquired trust land before gaming can in fact take place." (*Confederated Tribes of Siletz Indians of Or. v. United States* (9th Cir. 1997) 110 F.3d 688, 696.)

But in terms of mootness—or "actual controversy"—law, the more important point for reversal is that the Governor's argument is not a mootness

argument. It is a *merits* argument about what he believes IGRA means or should mean. Courts are very clear that there is a difference between the two. The California Supreme Court in *Golden State Water Co.*, for example, looked to the United States Supreme Court's analysis in *Chafin v. Chafin* ((2013) 568 U.S. 165). And *Chafin* is instructive not just on how the Governor's argument was errant, but also how the Court below erred in concluding that, vis-à-vis the Governor, Picayune's request was academic.

In *Chafin*, the issue was a custody dispute of international dimensions. As the Chief Justice explained the issue presented, "the Hague Convention on the Civil Aspects of International Child Abduction generally requires courts in the United States to order children returned to their countries of habitual residence, if the courts find that the children have been wrongfully removed to or retained in the United States." (*Chafin*, 568 U.S. at 168.) "The question is whether, after a child is returned pursuant to such an order, any appeal of the order is moot." (*Id*.)

After receiving an order from a federal district court that her child habitually resided in Scotland, a mother took the child to Scotland and custody litigation continued there in the Scottish court system. (*Chafin,* 568 U.S. at 170-71.) The father appealed the federal court order, and the question became whether the case was moot because the child was in Scotland. When the mother argued mootness on the theory that the district court lacked authority to issue a re-return order (e.g., "return the child back from Scotland

where I ordered her to go"), the Supreme Court said no: "Ms. Chafin argues that this case is moot because the District Court lacks the authority to issue a re-return order either under the Convention or pursuant to its inherent equitable powers." (*Chafin*, 568 U.S. at 174.) "But that argument—which goes to the meaning of the Convention and the legal availability of a certain kind of relief—***confuses mootness with the merits***." (*Id.* [emphasis added].)

Put differently, the fact that someone has an alternative argument on why they should win (correct or not) does not make that argument a mootness argument. The controversy remains, and the case is not moot. (*Chafin,* 568 U.S. at 174 ["Mr. Chafin's claim for re-return—under the Convention itself or according to general equitable principles—cannot be dismissed as so implausible that it is insufficient to preserve jurisdiction, . . . and *his prospects of success are therefore not pertinent to the mootness inquiry*." (emphasis added)].)

Nor did the fact that additional relief may be sought through a different court system affect the mootness analysis. Instead, the Court reasoned that "[a]s to the effectiveness of any relief, Ms. Chafin asserts that even if the habitual residence ruling were reversed and the District Court were to issue a re-return order, that relief would be ineffectual because Scotland would simply ignore it. But even if Scotland were to ignore a U.S. re-return order, or decline to assist in enforcing it, this case would not be moot. The U.S. courts continue to have personal jurisdiction over Ms. Chafin,

may command her to take action even outside the United States, and may back up any such command with sanctions." (*Chafin*, 568 U.S. at 174–75 [citations omitted].) The Court continued, "[c]ourts often adjudicate disputes where the practical impact of any decision is not assured." (*Id.* at 175.)

And, again, just last year (after the Court below ruled), the California Supreme Court followed and endorsed *Chafin* (quoting it as its own). (See *Golden State Water Co.*, 16 Cal.5th at 394 ["The practical difference between these remedies may well be limited, but we consider it 'enough to save this case from mootness.'" (*Chafin*, *supra*, 568 U.S. at p. 176)."].) Thus, merits arguments (even though here they are wrong regardless) cannot be considered in the mootness analysis, and the fact that a judgment must be given effect in another forum also does not impact the mootness argument. The Governor's anticipated arguments to the contrary are simply mistaken.

### B. The Reasoning of the Court Below Was Also Flawed

Although this Court will review independently whether Picayune "allege[d] facts sufficient to state a cause of action under any possible legal theory[,]" and will do so "without deference[,]" (*Gutierrez*, 19 Cal.App.5th at 1242 [citations omitted]), to the degree the Governor seeks to repeat the Court below's reasoning sustaining his demurrer to Picayune' s declaratory relief cause of action, that reasoning too is, respectfully, mistaken.

Recognizing that the dispute was *live* between Picayune and North Fork (5 AA 1010 ["[I]t is clear that Picayune has alleged an 'actual controversy' exists between [Picayune and North Fork], and may pursue a claim for Declaratory Relief"]), the Court below concluded that there was no "actual controversy" between Picayune and the Governor because the question was merely an "academic dispute." (5 AA 999.) The Court reached that conclusion notwithstanding the pleaded disagreement between Picayune and the Governor (4 AA 769) and did so in reliance on four cases (in the main): *Monterey Coastkeeper v. Cent. Coast Reg'l Water Quality Control Bd*. (2022) 76 Cal.App.5th 1; *Newland v. Kizer* (1989) 209 Cal.App.3d 647; *Building a Better Redondo, Inc. v. City of Redondo Beach* (2012) 203 Cal.App.4th 852; and *Connerly v. Schwarzenegger* (2007) 146 Cal.App.4th 739. The cited authority is inapplicable here.

*Monterey Coastkeeper* is an apples-to-oysters comparison. There, Petitioners sought a declaration that a particular water board "ha[d] failed to address nonpoint source pollution and protect public resources[,]" and through a declaratory relief action sought to change the board's policy. (76 Cal.App.5th at 14.) The Court agreed with the Board that no declaratory relief claim would lie "to force the State Board to exercise its discretion in a particular manner[.]" (*Id.*) But that is not what Picayune seeks through its declaratory relief claim against the Governor. Instead, Picayune sought a declaration of the impact of the People's annulment on the Governor's

concurrence and confirmation that as a matter of state law that annulment meant that the Governor's concurrence was void *ab initio*—it never had effect—and that no one could say otherwise in the future. (4 AA 770.) Apples to oysters.

In *Newland v. Kizer*, the Plaintiffs were "Medi-Cal recipients residing in the Vista Golden Age nursing home." (209 Cal.App.3d at 650.) They were given notice that the home "was losing its Med-Cal funding and that they would have to move within 30 days." (*Id.*) Plaintiffs sought declaratory relief that, under a particular statute, the court "should have ordered the Department [of Health Services] to extend the [statute's] 30-day notice period by an additional 60 days in cases of Medi-Cal decertifications[;]" (*id.* at 656-57,) but while the suit was pending, the "home received Medi-Cal recertification." (*Id.* at 657.) The Department contended, given that the nursing home was recertified and there was no threat of decertification, no declaratory relief was needed for these Plaintiffs. (*Id.*) The Court of Appeal agreed.

Here, by contrast, there is an allegation that North Fork intends to continue with its project, that it intends to rely on the Governor's concurrence to do so, *and* that such continuation will injure Picayune. (4 AA 768, 769.)[7] The dispute remains.

[7] North Fork's own appeal from the judgment bears this out (see Appeal No. F088551), as do publicized post-hearing events. (*Lewis*, *supra*, at fn. 1.)

*Building a Better Redondo* and *Connerly* are admittedly closer, but both share a common feature that renders them inapposite. In *Building a Better Redondo*, a party "sought an order compelling appellants to submit a local coastal program amendment to public vote in compliance with a recently enacted charter amendment requiring any 'major change in allowable land use' to be approved by City voters." (203 Cal.App.4th at 855). The trial court agreed and issued a writ of mandate. (*Id.*) The City complied with the mandate (putting the issue to a vote) but nonetheless appealed, and the question became mootness. (*Id.*) The Court of Appeal held that "Appellants' postjudgment acquiescence in the judgment rendered the issues in their appeal of the judgment moot." (*Id.* at 866). The Court explained, "an action that originally was based on a justiciable controversy cannot be maintained on appeal if *all the questions* have become moot by subsequent acts or events." (*Id.* [emphasis added].)

In *Connerly v. Scwarzenegger*, the dispute was over the effect of Proposition 209's amendment to the California Constitution and its effect on a later legislative attempted work around. "Ward Connerly, as a taxpayer and citizen of California, filed a lawsuit in December 2003 against the Governor and Attorney General (defendants), seeking two remedies: (1) a judicial declaration that [an enacted statute] is invalid as in conflict with article I, section 31 [Proposition 209], and (2) a permanent injunction preventing defendants from implementing or enforcing [the later enacted

statute]." (146 Cal.App.4th at 742.) "While [the] lawsuit was pending, [the Court of Appeal] decided *C & C Construction, Inc. v. Sacramento Municipal Utility Dist*. (2004) 122 Cal.App.4th 284, in which we held that [the later enacted statute's] definition of 'discrimination' was ineffective because it conflicted with the plain meaning of that term set forth in article I, section 31 [Proposition 209] and interpreted by the California Supreme Court." (*Id.* at 742.) "The Supreme Court denied review in *C & C Construction* and the parties [in *Connerly*] agree[d] that section 8315 is, *for all purposes*, invalid and unenforceable." (*Id.* [emphasis added].) "Defendants readily acknowledged in the trial court and on appeal that *C & C Construction* constituted a binding appellate pronouncement that the statute is unconstitutional." (*Id.* at 747.)

Picayune understands why the Court below may have reached to *Redondo* and *Connerly*. The Governor, as the Court below recognized, "states in his Demurrer that the 'concurrence is ineffective' and that 'the *United Auburn* and *Stand Up* cases fully adjudicated and foreclosed further questions on the legality and effectiveness of Governor Brown's concurrence[.]'" (5 AA 997.) And thus this case appeared similar.

But in both *Redondo* and in *Connerly*, there was an agreement on "*all"* issues. In *Redondo*, the Court noted by its reasoning that "*all* the questions ha[d] become moot[,]" (203 Cal.App.4th at 866 [emphasis added]), by the government's acquiescence. And, in *Connerly*, there was already party

agreement that "*for all purposes*" the later-enacted statute was "invalid and unenforceable." (146 Cal.App.4th at 742 [emphasis added].) Here, Picayune's FAC pleaded the *opposite*—that there was party disagreement on at least one issue (4 AA 769) — and the Court below actually acknowledged that "Picayune's FAC essentially indicates that the Governor has a 'difference of opinion' regarding the breadth of the outcome of the passage of Proposition 48 and the opinion in *Stand Up II*[.]" (5 AA 999.) This should have changed the analysis, at least insofar as *mootness* and an *actual controversy* are concerned.

There *was* disagreement on the law, and it was not "impossible for [a] court, if it should decide the case in favor of [Picayune], to grant [it] any effect[ive] relief whatever." (*Golden State Water Co.*, 16 Cal.5th at 393 [citation omitted].) The Court could simply have resolved the disagreement and declared the law. (Picayune Req. for Jud. Notice, Ex. A at 2.) Put differently, even though the Governor *agreed* that his concurrence was invalid, the pleaded disagreement that the People's annulment rendered the Concurrence void *ab initio* meant the case was not "completely moot." (*Honan*, 9 Cal.App.2d at 678.)

Moreover, whether the concurrence was rendered void *ab initio* is not merely an academic or abstract inquiry. This question, rather, is part of a very live dispute that this Court itself already witnessed a part of in *Stand Up II*. Looking to authority the Court below cited, the test in evaluating whether

an issue is academic or abstract is to look to whether it is capable of "definitive and conclusive relief by judgment within the field of judicial administration, as distinguished from an advisory opinion upon a particular or hypothetical state of facts." (*Newland*, 209 Cal.App.3d at 657.) Here, there is a live dispute over the Madera Site; the facts are known; and the question is and was one of judicial construction: Given the annulment of the Governor's concurrence by the People through Proposition 48, did the concurrence ever have effect as a matter of California law? Considering North Fork's plans and federal court direction that state law determinations relating to the validity of the Governor's concurrence be resolved in state court where the Governor could be joined (see *supra* at 19-21), that question was neither academic *nor* abstract.

The very "purpose of a declaratory judgment is 'to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation.'" (*City of Tiburon v. Nw. Pac. R.R. Co.* (1970) 4 Cal.App.3d 160, 173 [reversing dismissal of declaratory relief claim].) Where, as here, "'a case is properly before the trial court, under a complaint which is legally sufficient and sets forth facts and circumstances showing that a declaratory adjudication is entirely appropriate, the trial court may not properly refuse to assume jurisdiction; and if it does enter a dismissal, it will be directed by an appellate tribunal to entertain the action.'" *Id.* [quoting *Columbia Pictures Corp. v. De Toth* (1945) 26 Cal.2d 753, 762; see also *Native Salmon,* 221

Cal.App.3d at 1427 [reversing trial court's sustaining of demurrer because complaint "sufficiently set forth an actual controversy"].)

Here, Picayune alleged an actual controversy, and the Court below was wrong in sustaining a demurrer to its declaratory relief claim against the Governor on mootness grounds. Given the live dispute outlined above, this Court should correct this prejudicial error. (*Warren*, 47 Cal.App.3d at 685.)

### C. The Court Below Also Erred in Sustaining the Governor's Demurrer to Picayune's Cause of Action for a Writ of Mandamus

The Court below also erred in dismissing Picayune's writ cause of action as moot. It suffices to say that if Picayune's declaratory relief cause of action against the Governor was not moot (and it was not), a writ cause of action (separate from its merits) is also not moot and, for like reasons, a live controversy remains. The California Supreme Court has already held as much in *Di Giorgio Fruit Corp. v. Department of Employment*, wherein it stated that "[t]hese are not cases in which the parties are no longer interested in the legal issue involved . . . and *DiGiorgio's suggestion that the issue could be determined in a declaratory relief action demonstrates that here is a continuing controversy ripe for decision."* ((1961) 56 Cal.2d 54, 58 [internal citation omitted; emphasis added].) Thus, Picayune now turns to the leave and merits questions on that writ cause of action.

## II. THE COURT BELOW ABUSED ITS DISCRETION IN DENYING PICAYUNE'S MOTION FOR LEAVE TO AMEND THE WRIT PETITION

Over a series of orders, the Court below dismissed Picayune's writ claim (for a combination of mootness and merits reasons, see 5 AA 985) and denied Picayune leave to amend even though the writ claim was contained within its original complaint. Picayune addressed mootness above, and it will briefly address the Court's merits analysis below. (See, *infra,* Section III.) But it starts with the Court below's denial of leave, because nothing on the face of Picayune's original complaint suggested its writ claim could not be cured (to the degree there were any defects) by amendment. Accordingly, the Court below abused its discretion in denying Picayune leave.

California's law is anchored in the judicial philosophy of "allow[ing] resolution of actions on the merits in furtherance of substantial justice between the parties." (*Dieckmann v. Superior Court* (1985) 175 Cal.App.3d 345, 352 [collecting cases].) "If the plaintiff has not had an opportunity to amend the complaint in response to the demurrer, leave to amend is liberally allowed as a matter of fairness, unless the complaint shows on its face that it is incapable of amendment." (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 747 [collecting cases].) And this same standard applies to motions for judgment on the pleadings. (*Tukes v. Richard* (2022) 81 Cal.App.5th 1, 27 ["We consider a request for leave to amend when reviewing judgment following a motion for judgment on the pleadings in the

same way as when reviewing judgment following a demurrer." (citation omitted)].)

"[F]or an original complaint, regardless whether the plaintiff has requested leave to amend, it has long been the rule that a trial court's denial of leave to amend constitutes an abuse of discretion unless the complaint 'shows on its face that it is incapable of amendment.'" (*Tarrar Enters., Inc. v. Associated Indem. Corp.* (2022) 83 Cal.App.5th 685, 688.)

For example, in *Eghtesad v. State Farm Gen. Ins. Co.* (2020) 51 Cal.App.5th 406, the Court of Appeal reversed a denial of leave to amend. There, the plaintiff had failed to request leave to amend in the trial court but did request leave on appeal. (*Id*. at 411.) The defendant, State Farm, "argue[d] that [Plaintiff] bears the burden of demonstrating the existence of specific facts in the appellate record that, if alleged in an amended complaint, would state viable causes of action and that [Plaintiff] failed to meet his burden because rather than arguing specific facts with support in the record, he relied upon vague assertions made for the first time in his appellate briefing." (*Id.* at 413.) The Court of Appeal *rejected* that argument: "We need not reach State Farm's argument because, as reflected in our discussion above, when confronted with an original complaint *we focus not on what facts the plaintiff shows he can allege in an amended complaint,* but rather on whether anything in the original complaint forecloses amendment." (*Id.*

at 413-14 [emphasis added, reversing trial court order denying leave to amend].)

Here, the Court below erred in denying Picayune leave to amend its writ claim when it held (incorrectly) that Picayune's *proposed amended petition* failed to state viable claims for relief. (4 AA 741.) Consistent with *Tarrar Enterprises* and *Eghtesad*, the Court below should have instead directed its analysis towards the question of whether anything in Picayune's *original* complaint and writ petition precluded amendment. When it did not, the Court below erred in a way that *Tarrar Enterprises* and *Eghtesad* confirm is prejudicial. (See *Tarrar Enters., Inc.,* 83 Cal.App.5th at 689 [reversing trial court order sustaining demurrer because denial of leave to amend original complaint "was error"]; *Eghtesad*, 51 Cal.App.5th at 411].)

The Court below explained its decision by suggesting that "the Court undoubtedly has discretion to deny leave to amend where a proposed amendment fails to state a valid cause of action or defense." (4 AA 740.) But, respectfully, that reasoning confirms that the Court applied the wrong standard. As to original complaints, the standard is exacting—leave to amend could be denied only if the face of the original Complaint affirmatively precludes relief. That finding was not (and could not) be made here.

## III. WRIT RELIEF SHOULD HAVE BEEN AVAILABLE TO CURE THE GOVERNOR'S ABUSE OF DISCRETION

As just shown, the Court below applied the wrong standard in deciding whether to allow Picayune leave to amend its writ claim. That error was a prejudicial one, not only because nothing on the face of Picayune's complaint precluded amendments, which led to an improper dismissal with prejudice, but also because in fact Picayune could (and did) state a viable writ of mandate claim against the Governor both in its original complaint and as proposed.

While the Court granted the Governor's motion for judgment on the pleadings as to Picayune's writ claim on mootness grounds, it denied leave based on its conclusion that leave would be futile. (4 AA 739, 751.) Picayune has already explained why the claim is not moot (see *supra*). Below, Picayune demonstrates why California law confirms that a mandate claim would lie.

Recall the context. This case raises questions of state law in the context of IGRA's complex cooperative federalism scheme. (4 AA 764 ["Under the two-part determination exception, the general prohibition against gaming on after-acquired land does not apply when the Secretary "determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, *but only if the Governor of the*

*State in which the gaming activity is to be conducted concurs in the Secretary's determination."* (emphasis added)].) As discussed above, because of when the federal government took the Madera Site into trust, North Fork could offer gaming on that site only if the Governor of California concurred. (See *id.*; 25 U.S.C. § 2719, subd. (b)(1)(A)].) And the California Supreme Court confirmed federal law did not and could not give the Governor the power to concur. Rather, that power needed to come from state law: "What IGRA does not resolve is whether the Governor has a legal basis to concur; gubernatorial power arises from state constitutional and statutory authority. Although the Governor's concurrence (or lack thereof) is given effect under federal law, … the authority to act is provided by state law." (*United Auburn*, 10 Cal.5th at 548 [citation omitted].)

Here, there is no dispute that Governor Brown took steps to concur in 2012, but then the People annulled that concurrence through their vote on Proposition 48, showing a desire "to reject class III gaming on the 305-acre Madera site taken into trust in February 2013." (*Stand Up II*, 64 Cal.App.5th at 216.) The Governor conceded below that his predecessor's concurrence was no longer valid (albeit disputing it was void *ab initio* [4 AA 769]), but he failed to take any steps to notify federal officials of the annulment and that the concurrence was never effective as a matter of California law. (4 AA 768.) The Governor claimed he had no duty to do so, and thus no claim for mandate would lie, and the Court below agreed. (4 AA 745; see 4 AA 731.)

This was error. Where a prior government act has been annulled (or, as here, rendered void *ab initio*), mandamus will lie to undo the voided act, and Picayune expressly sought that relief in its original complaint.

Picayune's original complaint alleged that "the concurrence did not take effect" in the wake of Proposition 48, yet "the Governor maintains that the concurrence was and is effective, or he has failed and refused to acknowledge that the concurrence was and is ineffective." (1 AA 16.) Picayune therefore requested a writ of mandate "to promptly notify the Secretary that the concurrence was and is ineffective." (1 AA 18.)

California law, in turn, confirms these allegations were sufficient to allege a claim for a traditional writ of mandate under Code of Civil Procedure section 1085. The California Supreme Court has long recognized both "the established principle that mandamus may issue to compel the performance of a ministerial duty *or* to correct an abuse of discretion[,]" (*Glendale City Emps' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 344), *and* that "mandate is a flexible writ[.]" (*Inglin v. Hoppin* (1909) 156 Cal. 483, 488.) This is because mandamus "is an equitable, not a legal remedy." (*Cal. Assn. for Health Services at Home v. State Dept. of Health Servs.* (2007) 148 Cal.App.4th 696, 705; see Civ. Code, § 3523 ["For every wrong there is a remedy."].) And as such, "[m]andate proceedings, although not of equitable origin, are governed by equitable principles. [Citation.] Equity molds its decree by the configurations of substantial justice as perceived by the

chancellor." (*County of Inyo v. City of Los Angeles* (1976) 61 Cal.App.3d 91, 96; see also *Cal. Corr. Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1157.) Indeed, a court's ability to craft appropriate relief is inherent in its charge "to correct" an abuse of discretion.

Here, read permissively (as the law requires, see *Gutierrez,* 19 Cal.App.5th at 1242), Picayune's Original Complaint stated a section 1085 mandamus claim *either* under the ministerial duty line theory *or* on an abuse of discretion authority.

As to the former, this Court has already concluded that the People *annulled* Governor Brown's 2012 concurrence and did so "retroactively." (See, e.g., *Stand Up II,* 64 Cal.App.5th at 212 [under heading "Retroactive annulment[:]" "we conclude the people of California retained the authority to annul a concurrence in the Interior Secretary's two-part determination after it has been issued by the Governor."]; *id.* at 216 ["the people's rejection of Proposition 48 impliedly expressed their will to annul the Governor's August 30, 2012 concurrence for the Madera site"].) In other words, the People retroactively withdrew the power of the Governor to concur as to the Madera Site, and his concurrence therefore breached a ministerial duty he had *not* to concur. His prior issuance of the concurrence to the Secretary

violated that duty and mandamus will lie to correct it, including by informing the Secretary the concurrence was invalidly issued.[8]

Likewise, there is no dispute that mandamus will lie "to correct an abuse of discretion." (*Khan v. L.A. City Emps.' Ret.t Sys.* (2010) 187 Cal.App.4th 98, 105; see 4 AA 746.) The repeated use of the phrase "to correct" is critical, as the verb "correct" is defined as "to make or set right."[9] California courts are not limited to only ruling on the legality of a prior decision but may also order reasonable steps to unwind or "correct" that unlawful decision.

As one example, this Court has the power to mandate that lower courts take appropriate actions to give practical effect to the decisions of this Court. (See *Lunsted v. Superior Court* (2024) 100 Cal.App.5th 138, 151 ["Let a writ

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[8] In the proceedings below, the Governor cited *Bussard v. Department of Motor Vehicles* (2008) 164 Cal.App.4th 858 for the proposition that mandamus law can only consider acts under the circumstances at the time. But *Bussard* only addressed continuances. (*Id.* at 864). It did not address the People's reserved constitutional powers or the flexible writ that may enforce them. Indeed, the point of ruling something void *ab initio* is to go back in time and confirm the duties. (Cf. *LA Sound USA. Inc. v. St. Paul Fire & Marine Ins. Co.* (2007) 156 Cal.App.4th 1259, 1266 ["When a policy is void *ab initio*, it is 'as though it had never existed.'"]). So here, when the People annulled the Governor's concurrence as to the Madera Site, they rendered it and his power to issue it as to this Site as if they "never existed." (See, e.g., *In re Lund's Estate* (1945) 26 Cal.2d 472, 481-82 ["A marriage annulled is held to be void ab initio; a decree of nullity is a determination that the marriage never existed as a valid marriage."]).

[9] *Correct*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/correct (last visited Feb. 11, 2025).

of mandate issue, directing the superior court to vacate its order denying Lunsted's motion to quash and to reconsider the motion in a manner consistent with this opinion."]; *People v. Superior Court* (2018) 28 Cal.App.5th 223, 243 ["Let a writ of mandate issue directing the superior court to (1) vacate its order of March 29, 2018, (2) enter a new order denying defendant's motion to compel production of the STRmix software program, the program source code, and ESR's internal validation studies, and (3) conduct further proceedings consistent with this opinion with respect to the STRmix user manual."].) And such orders are appropriate notwithstanding that a decision by this Court often invalidates the lower court's action as a matter of law.

Even the Court below acknowledged that California courts may order agencies to "set aside" unlawful decisions, describing such relief as a "generic remedy" in mandamus cases. (4 AA 749 [citing *Hoffman v. State Bar of Cal.* (2003) 113 Cal.App.4th 630, 639-640.) Yet the court failed to appreciate that, as a practical matter, setting aside a prior decision entails two concepts: (i) that the agency take no further action in furtherance of its prior decision, and (ii) that the agency take appropriate steps to ensure that determination is not acted on by others. This is well understood in contexts like the California Environmental Quality Act, where a mandate to "set aside" an unlawful decision often requires that an agency take *additional*, *formal* action to rescind a prior project approval. (See, e.g., *McCann v. City of San*

*Diego* (2023) 94 Cal.App.5th 284, 290 [finding a city complied with an order to "set aside" project resolutions by adopting a new resolution (Resolution No. 314160) rescinding the earlier, unlawful resolutions].)

The law understands that mandamus lies to compel curative steps. For example, in *Board of Trustees of Calaveras Unified School District v. Leach* (1968) 258 Cal.App.2d 281 (*Calaveras*), a school district filed a mandamus action to challenge an allegedly unlawful order by the trial court directing the sheriff to seize appellants' records and deliver them to a grand jury. (*Id*. at 283-84.) The Court of Appeal agreed that the order was unlawful, finding that "the superior court judge was without jurisdiction to make the order directing the sheriff to seize [the files]" and, consequently, "the order is void." (*Id*. 289.) The court also found that mandamus was proper because appellant "ha[d] no specific remedy in the ordinary course of law[,]" as the sheriff was acting lawfully at the time of the seizure. (*Id*.)

The *Calaveras* Court then compelled curative action, emphasizing that "[m]andate is a flexible writ, whose use in modern times has been much extended." (*Id*. at 289 [quoting *Inglin,* 156 Cal. at 488].) This included not only a ruling that the lower court's action was unlawful, but also a writ that "directed the sheriff to return those records" to appellants. (*Id*. at 289.) Stated simply, *Calaveras* confirms that California courts can order appropriate steps to unwind unlawful decisions, including those necessary to give practical effect to its legal determinations.

The authorities cited by the Court below do not suggest a different result. For example, the Court was incorrect to suggest the relief Picayune seeks is significantly different in nature or kind to that issued in cases such as *Syngenta Crop Protection, Inc. v. Helliker* (2006) 138 Cal.App.4th 1135 (*Syngenta*). (4 AA 749.) In *Syngenta*, the issue was whether a plaintiff could bring a mandamus action to challenge the acceptance of a registration application as complete despite an alleged failure to comply with applicable requirements. (138 Cal.App.4th at 1148-49.) But even in that context, the remedy would not involve merely directing the agency to find the application incomplete and take no further action. Rather, the appropriate remedy would be to order the agency to find the application incomplete *and inform any parties improperly relying on that unlawful determination* (e.g., the applicant) *of that decision*. That is exactly what Picayune seeks here: An order that the Governor take appropriate steps, in his discretion, to make sure other interested parties are aware of the legal efficacy of his prior actions.

Against that backdrop, the Court below's conclusion that Picayune had not pleaded (and could not plead) a writ claim is, respectfully, mistaken. Indeed, the Court below abused its discretion when finding it lacked authority to order any further action "to correct" the Governor's unlawful 2012 concurrence. As in other cases, Picayune asked the Court to rule on the legality of the Governor's concurrence, which it did in 2024 (albeit after improperly dismissing the Governor). Picayune also asked that the Court

enter a writ directing the Governor to take reasonable steps "to correct" that unlawful decision, including "action as may be necessary to notify the Secretary that the concurrence did not take effect and is not in effect." (1 AA 18.)

While each case must admittedly be considered on its own, consistent with mandamus' equitable and flexible origins, longstanding legal precepts and practice, and the plain language of past decisions, all show that the writ claim Picayune pleaded against the Governor was plausible and the relief available. The Court's granting of a motion for judgment on the pleadings as to that claim was mistaken, but even if the Court below wanted more pleaded in the complaint itself, the analysis above further confirms why the court erred in denying leave. Picayune believes it properly pleaded a writ claim, but even if this Court agrees with the Court below's granting of a motion for judgment on the pleadings as to that claim (for want of additional information), nothing on the face of the original complaint precluded relief.

## CONCLUSION

This Court knows well the backdrop of this appeal. The People have spoken, and they have soundly rejected gaming at the Madera Site. For protective reasons, Picayune asks that this Court reverse the Court below's dismissal of Picayune's causes of action against the Governor and remand so that the Governor may be included in the judgment Picayune secured against North Fork, and so he can be ordered to take curative steps

consistent with the Court's "duty to jealously guard the right of the people to the initiative and referendum." (*Stand Up II*, 64 Cal.App.5th at 213.)

DATED: March 6, 2025 PAUL HASTINGS LLP

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## CERTIFICATE OF WORD COUNT

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Dated: March 6, 2025

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