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In the Supreme Court of the State of California

UNITED AUBURN INDIAN COMMUNITY OF THE AUBURN RANCHERIA,

Plaintiff and Appellant,

v.

EDMUND G. BROWN JR., as Governor,

Defendant and Respondent.

Case No. S238544

Third Appellate District, Case No. C075126
Sacramento County Superior Court, Case No. 34-2013-80001412CUWMGDS
Honorable Eugene Balonon, Judge

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INTRODUCTION

The federal government controls whether lands become Indian lands and which Indian lands may host certain gaming activities. This case concerns an aspect of the Indian Gaming Regulatory Act (IGRA), the federal statute regulating such gaming. As part of IGRA's framework of cooperative federalism, Congress directed that before authorizing regulated gaming activities on the category of Indian lands addressed by 25 U.S.C. § 2719(b)(1)(A), the federal Secretary of the Interior must request and receive a concurrence from the Governor of the affected State in the Secretary's determination that gaming "would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community." In this respect, IGRA resembles many other federal statutes that condition the authority of federal officials to act on obtaining the consent or concurrence of a state governor. This Court granted review to determine whether the California Constitution prohibits the Governor from issuing the concurrence required by section 2719(b)(1)(A), either because the Governor lacks the authority to concur in the Secretary's interest/detriment determination, or because the act of concurring impermissibly intrudes on the functions of the Legislature.

As explained in the answer brief on the merits, the Governor has both specific and general authority to concur as a matter of state law. The power to concur is a component of the Governor's specific authority to "negotiate and conclude" compacts for gaming "in accordance with" federal law. (Cal. Const., art. IV, § 19, subd. (f).) Without the concurrence power, the Governor could not feasibly negotiate compacts regarding lands covered by 25 U.S.C. § 2719(b)(1)(A), because the power to concur is always necessary for the proposed gaming to commence in accordance with federal law. The Governor also has general authority—inherent in his powers as the supreme executive of the State and recognized in the Government

Code—to respond to federal requests for his consent or concurrence in a manner consistent with state law and policy. Governor Brown's concurrence in the Secretary's determination in this case was a proper exercise of his specific and general authority. Moreover, his concurrence did not violate the separation of powers doctrine, because it did not materially impair any core function of the Legislature.

In this brief, the Governor responds to the amicus curiae briefs filed by Stand Up for California! (Stand Up), the Mooretown Rancheria of Maidu Indians of California and Cachil Dehe Band of Wintum Indians of the Colusa Indian Community (collectively, Mooretown), and the Picayune Rancheria of Chukchansi Indians (Picayune) in support of appellant.[1] Amici make a variety of arguments, many raising policy concerns and warning that gaming facilities authorized by 25 U.S.C. § 2719(b)(1)(A) could reduce the profits of some of amici's own casinos. While there may be room for debate over the pure policy issues raised by amici, none of amici's arguments establish that Governor Brown's concurrence violated the California Constitution. Amici do not cite even a single case regarding the separation of powers doctrine, and they fail to offer any persuasive argument that the Governor lacked the power to concur, or that the concurrence impermissibly intruded on the functions of the Legislature.

ARGUMENT

I. AMICI'S ARGUMENTS MISUNDERSTAND IGRA

Much of amici's briefing addresses the provisions of IGRA, and offers various theories why IGRA supposedly establishes that the Governor lacked the power to concur. (See, e.g., Stand Up Br. 15-16; Mooretown Br.

[1] This brief will address the arguments that are new or different from those presented by Appellant United Auburn, and will refer to the Governor's answer brief on the merits ("RBOM") as appropriate.

22-31, 36; Picayune Br. 16-33.) Those arguments largely misunderstand IGRA.

IGRA "is an example of 'cooperative federalism,'" designed to give tribes and States a role in the federal regulatory scheme governing Indian gaming. (*In re Indian Gaming Related Cases* (9th Cir. 2003) 331 F.3d 1094, 1096.) As a matter of federal constitutional law, Congress has sole authority to acquire land in trust for tribes, which it has largely delegated to the Secretary. (See U.S. Const., art. IV, § 3, cl. 2; 25 U.S.C. § 5108; *Confederated Tribes of Siletz Indians of Oregon v. United States* (9th Cir. 1997) 110 F.3d 688, 694.)[2] Congress also has the power to determine whether, and to what extent, gaming may take place on such lands. (See *California v. Cabazon Band of Mission Indians* (1987) 480 U.S. 202, 207.) In IGRA, Congress defined the "Indian lands" that may host gaming; specified the types of gaming that may occur on them; and adopted procedures through which tribes can seek to operate casino-style, "class III" gaming facilities on their lands under the terms of a tribal-state compact or through procedures imposed by the Secretary. (See 25 U.S.C. §§ 2703, 2710, 2719; RBOM 13-16.)

Of particular relevance to this case, Congress authorized regulated gaming activities on all lands acquired by the Secretary in trust for an Indian tribe before IGRA's 1988 effective date. For lands acquired in trust after that date, however, Congress authorized such gaming activities on

[2] See also U.S. Const., art. I, § 8, cl. 3 [Indian Commerce Clause]; *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) ["the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs"]; *Oneida County v. Oneida Indian Nation of New York State* (1985) 470 U.S. 226, 234 ["With the adoption of the Constitution, Indian relations became the exclusive province of federal law"].

only seven carefully defined categories of land. (See 25 U.S.C. § 2719(a)-(b).) The category at issue in this case is lands for which the Secretary concludes, after extensive consultation with local stakeholders, that gaming "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(b)(1)(A).) That congressional grant of authority to the Secretary to allow gaming on newly acquired lands becomes effective only if the Secretary requests and receives the concurrence of "the Governor of the State in which the gaming activity is to be conducted." (*Ibid.*) Congress thus conditioned the ability of a federal official to take an action authorized by federal law on the consent of the Governor of the relevant State, as it has done in many other contexts. (See RBOM 41.)

Amici have a very different—but ultimately unsupported—understanding of IGRA. To begin with, they read IGRA as granting the States expansive discretion over decisions regarding Indian gaming. Stand Up contends that "IGRA gives states unfettered discretion to allow or disallow the creation of new Indian land for the purposes of class II or class III gaming," and posits that the Governor exceeded his authority by "unilaterally" exercising that discretion. (Stand Up. Br. 15-16, 23; see also Mooretown Br. 17 [the Governor "single-handedly permitted Enterprise to operate gaming"].) In fact, the State's discretion in this area is quite constrained, as a result of federal constitutional and statutory law. It is the federal government that decides whether to create new "Indian lands" by acquiring land in trust for a tribe. (25 U.S.C. § 5108.) And it is the federal government that decides which categories of tribal lands may host regulated gaming activities by Indian tribes. (See *Cabazon Band*, *supra*, 480 U.S. at p. 207; see, e.g., 25 U.S.C. § 2719(a)-(b).) For the most part, those categories apply *regardless* of the policy determinations of States and state officials. (See 25 U.S.C. § 2719(a)(1)-(2), (b)(1)(B), (b)(2).) Section

2719(b)(1)(A) is the only category for which Congress made the concurrence of a state official "one precondition to the Secretary of the Interior's authority . . . to permit gaming on" the land. (*Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. United States* (7th Cir. 2004) 367 F.3d 650, 661 (*Lac Courte*).) Even in that context, the Governor's role is a limited one. (See RBOM 15-16, 29-30.)

Picayune disagrees, characterizing the Governor's concurrence as the singular event determining whether gaming may occur on a parcel of land—an action with "immediate effect" that is "final and irrevocable" and allows "lands to forever be considered gaming eligible." (Picayune Br. 22, 25.) But the federal government retains ultimate authority to determine whether a parcel should become Indian lands, and whether regulated gaming activities may occur on any particular categories of land. The Governor is not asked to concur unless the Secretary has already completed a lengthy process of consultation and review and made a favorable interest/detriment determination under section 2719(b)(1)(A). (See 25 C.F.R. §§ 292.13-21 [process requirements]; North Fork Rancheria of Mono Indians (North Fork) Br. 42-45 [describing process and noting that North Fork's application involved five years of federal review].) Even if the Governor concurs, the Secretary still "must decide whether to exercise his discretion to acquire the land in trust"—a separate and distinct agency action—before the land is eligible for gaming under IGRA. (*Sokaogon Chippewa Community v. Babbitt* (W.D. Wisc. 1996) 929 F.Supp. 1165, 1170.)[3]

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[3] Picayune argues that the concurrence "creates affirmative obligations on the state to negotiate a compact." (Picayune Br. 39.) That is incorrect. Although the State may negotiate a compact regarding lands that could become Indian lands in the future, it "does not have an obligation to negotiate with an Indian tribe until the tribe has Indian lands." (*Guidiville*
(continued...)

Picayune suggests that the trust-acquisition decision will have either already occurred, or will be a foregone conclusion, by the time of a gubernatorial concurrence. (See Picayune Br. 22-30.) But in this case (and in *Stand Up v. Brown* (2016) 6 Cal.App.5th 686), the trust acquisition decision was not made until months after the Governor's concurrence. (See *id.* at p. 29; RBOM 18-19; CT 46-47, 52-54.) In the State's experience, that is the typical sequence. And while the criteria and procedures that guide the Secretary's trust acquisition decision overlap with those guiding the Secretary's interest/detriment determination in some respects, they are not "nearly identical." (Picayune Br. 22-30; compare 25 C.F.R. §§ 151.1-151.15 [trust acquisition] with 25 C.F.R. §§ 292.13-21 [interest/detriment determination].) Indeed, it is not unprecedented for the Secretary to decide against acquiring land in trust, even after a tribe secured a favorable interest/detriment determination and a gubernatorial concurrence with respect to the same land. (See North Fork Br. 46-47 & fn. 45.)

Mooretown believes that IGRA defers to the States on the subject of which state official should be the one to concur in an interest/detriment determination by the Secretary under section 2719(b)(1)(A). (Mooretown Br. 26 ["Congress never intended to meddle in matters of internal state governance by determining which official would exercise the state's discretion" to concur].) It thus contends that the Governor's concurrence in this case "undermines the role Congress set for the states." (*Id.* at p. 22.) The statutory text says otherwise. Despite repeatedly referring to the

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(...continued)
Band of Pomo Indians v. NGV Gaming, Ltd. (9th Cir. 2008) 531 F.3d 767, 778; see RBOM 34-35, fn. 12; see also Picayune Br. 42.) It is the federal government's acquisition of the lands in trust, coupled with IGRA's provisions, that oblige the State to "negotiate with the Indian tribe in good faith" regarding a gaming compact. (25 U.S.C. § 2710(d)(3)(A).)

"State" in other IGRA provisions (e.g., 25 U.S.C. § 2710(d)), Congress conditioned gaming under section 2719(b)(1)(A) on the concurrence of "the *Governor* of the State in which the gaming activity is to be conducted." (25 U.S.C. § 2719(b)(1)(A), italics added.) Congress adopted that language after it considered—but failed to enact—legislation that would have required "the concurrence of the Governor of the State, the State legislature, and the governing bodies of the county and municipality in which such lands are located." (H.R. No. 1920, 99th Cong., 2d Sess., § 3, p. 2 (1986) [as reported in House on Mar. 10, 1986].)[4] There is no basis here for deviating from the normal rule that courts must "presume Congress says what it means and means what it says." (*Simmons v. Himmelreich* (2016) 136 S.Ct. 1843, 1848; see *People v. Snook* (1997) 16 Cal.4th 1210, 1215 [similar]; cf. 73 Fed. Reg. 29,354 (May 20, 2008) [by requiring only the Governor's concurrence, "Congress has implicitly rejected the need for concurrence by other officials"].)

Picayune also cites IGRA in support of its argument that the category of land at issue in this case is "fundamentally different" from other categories of tribal land acquired after 1988 on which IGRA permits gaming (Picayune Br. 17), but it fails to support that argument. Each of the categories is consistent with the same purpose of providing "a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." (25 U.S.C. § 2702(1).) That general purpose applies to tribes like Picayune, that operate casinos on Indian lands acquired before

[4] See also Estom Yumeka Maidu Tribe of the Enterprise Rancheria Br.12, fn. 3; cf. *Dames & Moore v. Regan* (1981) 453 U.S. 654, 685 ["It is telling that the Congress which enacted the FSIA considered but rejected several proposals designed to limit the power of the President to enter into executive agreements, including claims settlement agreements"].)

1988 (see 25 U.S.C. § 2719(a)); to Mooretown and other California tribes operating casinos on lands acquired after 1988 that do not require a gubernatorial concurrence (see 25 U.S.C. § 2719(a)(1)-(2), (b)(1)(B), (b)(2); see *post*, pp. 27-28); and to tribes that, after the review process established by section 2719(b)(1)(A), receive a favorable interest/detriment determination by the Secretary followed by a gubernatorial concurrence.[5]

Mooretown and Picayune argue that allowing the Governor to concur "threatens the ability of California Indian tribes to benefit from tribal government gaming as Congress intended under the Indian Gaming Regulatory Act." (Mooretown Br. 14.) They warn that their own casinos will become unprofitable if other tribes are able to open new casinos in the region. (See *id.* at pp. 1-8, 10, 14, 40-47; Picayune Br. 9-10; *post*, p. 36.) Of course, the entrance of a new competitor can affect the operations of a going concern in any marketplace.[6] As Picayune acknowledges, however, IGRA requires the Secretary to consider whether the proposed casino will "be detrimental to the surrounding community and other nearby Indian tribes." (Picayune Br. 18, citing 25 U.S.C. § 2719(b)(1)(A).) Moreover, the federal regulations implementing IGRA require the Department of the Interior to solicit comments from "[o]fficials of nearby Indian tribes" (25 C.F.R. § 292.19(a)(2)), and require the Secretary to consider those

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[5] Picayune identifies nothing in the legislative history suggesting that section 2719(b)(1)(A) serves a "fundamentally different" purpose from the other provisions authorizing gaming on lands acquired after 1988. The Senate Committee report described these provisions collectively as "policies with respect to lands acquired in trust after enactment of this act." (Sen. Rep. No. 100-446, 2d Sess., p. 20 (1988).)

[6] Cf. *Sokaogon Chippewa Community v. Babbitt* (7th Cir. 2000) 214 F.3d 941, 947 [noting that "it is hard to find anything [in IGRA] that suggests an affirmative right for nearby tribes to be free from economic competition"].

comments as part of the interest/detriment determination (25 C.F.R. § 292.21(a)). In this case, the Governor's concurrence decision addressed those issues as well. (See, e.g., CT 160 ["The ability of other tribes to benefit from tribal gaming will not be unduly harmed"].)

Finally, Mooretown warns that the concurrence "enable[s] the Governor to manipulate the movement of tribal casinos like pieces on a checkerboard, skipping tribes over each other in an ongoing scramble to get ever closer to urban centers." (Mooretown Br. 38; see also Picayune Br. 17 ["lands subject to [section 2719(b)(1)(A)] can be located anywhere in any state where an Indian tribe is geographically located"].) That characterization is inconsistent with the governing legal framework, which gives the federal government—not the Governor—ultimate authority to determine what lands may host Indian gaming. (See *ante*, pp. 11-13.) Moreover, IGRA's implementing regulations require the Secretary to consider the "[d]istance of the land" on which the proposed casino would be located "from the locations where the tribe maintains core governmental functions" (25 C.F.R. § 292.17(g)), as well as "[e]vidence of significant historical connections, if any, to the land" (*id.* § 292.17(i); see also *id.* § 292.21.) Similarly, before acquiring land in trust for a tribe, the Secretary must consider "the distance between the tribe's reservation and the land to be acquired"; as that distance "increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition." (25 C.F.R. § 151.11(b).) On at least one occasion, the Secretary has refused to acquire land for gaming because of its great distance from the tribe's reservation, even after the tribe secured a

favorable interest/detriment determination and a gubernatorial concurrence regarding the same land.[7]

II. THE GOVERNOR HAD AUTHORITY TO CONCUR IN THE SECRETARY'S DETERMINATION ABOUT GAMING AT THE YUBA SITE

The central question in this case is whether California's Governor has the power to participate in the limited concurrence role that Congress established in section 2719(b)(1)(A). As explained in the answer brief, the Governor has specific authority to concur in an interest/detriment determination, arising from the powers that the California Constitution and the Government Code grant him regarding Indian gaming. (RBOM 25-37.) The Governor also has general authority to give this type of concurrence in response to a federal inquiry. That authority is recognized in the Government Code and arises from his inherent power as the supreme executive official in California. (RBOM 38-44.) Amici's contrary arguments are unpersuasive.

A. The Governor Has Specific Authority to Concur Arising from the Constitution and the Government Code

The California Constitution grants the Governor specific authority with respect to Indian gaming. Article IV, section 19, subdivision (f) authorizes certain types of gaming "by federally recognized Indian tribes on Indian lands in California in accordance with federal law"—i.e., IGRA—and empowers the Governor "to negotiate and conclude compacts" for such gaming, subject to legislative ratification. (Cal. Const., art. IV, § 19, subd.

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[7] See Statement of Alex Skibine, Professor, University of Utah S.J. Quinney College of Law, Before U.S. House of Representatives Subcom. on Indian and Alaska Native Affairs, p. 4 (Sept. 19, 2013) [describing St. Regis Mohawk tribe in New York] <http://docs.house.gov/meetings/ii/ii24/20130919/101312/hhrg-113-ii24-wstate-skibinea-20130919.pdf> [as of Dec. 5, 2017].

(f).) Government Code sections 12012.5 and 12012.25 grant the same authority to the Governor. (Gov. Code, §§ 12012.5, subd. (d), 12012.25, subd. (d).) The Governor's authority to negotiate and conclude compacts for Indian gaming "in accordance with" IGRA carries with it the authority to respond to the Secretary's request for a concurrence in an interest/detriment determination, because the existence of that authority is always necessary for gaming activities to commence in accordance with federal law on lands covered by section 2719(b)(1)(A). (See RBOM 27-30.)[8]

Stand Up disagrees, reasoning that the Governor's authority regarding Indian gaming compacts cannot include the power to concur because a "concurrence has much broader effects than does simply negotiating a compact." (Stand Up Br. 7; see *id.* at pp. 11-13, 15; see also Picayune Br. 31-33, 41-42.)[9] But any "broader effects" result from federal law and actions taken by federal officials. If the Secretary takes land into trust for

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[8] Picayune notes that the State has no *obligation* under federal law "to negotiate a compact concerning lands that are not Indian land qualified for gaming." (Picayune Br. 42.) That is correct (see RBOM 34-35, fn. 12), but it does not undermine the Governor's position. The Governor has constitutional and statutory *authority* under state law to negotiate a compact regarding lands that could become Indian lands in the future; that authority includes the power to respond to a concurrence request.

[9] Stand Up, the plaintiff-appellant in *Stand Up for California! v. State of California*, No. S239630, also argues that even if the Court "holds that the Governor has implied authority to concur stemming from his authority to negotiate compacts, that decision would not validate the Governor's concurrence" regarding "the North Fork Tribe's acquisition of new land for gaming," which is at issue in No. S239630. (Stand Up Br. 15, fn. 5.) The Governor disagrees, and notes that this Court granted review in No. S239630 and held briefing in abeyance pending the resolution of this case. Arguments addressing the particular circumstances of No. S239630 should be reserved for decision in that case. (See also *id.* at pp. 7-10, 15-17 Picayune Br. 8-11, 57-59.)

gaming following a gubernatorial concurrence, it is federal law that directs that the land is eligible for class II gaming and that allows the tribe to seek to conduct class III gaming under a compact or procedures prescribed by the Secretary. (See 25 U.S.C. §§ 2710(a)-(b), (d), 2719(a)-(b).) Those federal consequences do not change the fact that, for the category of lands at issue in this case, the authority to concur is "necessary for the due and efficient administration" of the Governor's compacting powers, and "may fairly be implied from" the constitutional and statutory provisions conferring those powers. (*Dickey v. Raisin Proration Zone* (1944) 24 Cal.2d 796, 810 [analyzing implied powers of committee representing raisin producers]; see also *People v. Maikhio* (2011) 51 Cal.4th 1074, 1088 [applying *Dickey*]; Estom Yumeka Maidu Tribe of the Enterprise Rancheria Br. 16-21 [discussing standard governing implied powers].)[10]

The history of Proposition 1A, the 2000 constitutional initiative granting the Governor authority regarding Indian gaming, supports this understanding of the Governor's power. (See RBOM 30-33.) Amici counter that the "people unequivocally rejected the Governor's interpretation of his authority" in 2014, when they rejected Proposition 48. (Stand Up Br. 17; see *id.* at p. 15; Mooretown Br. 19-22; Picayune Br. 56-59.) That is incorrect. Proposition 48 was a statutory referendum targeting a specific compact, and did not purport to alter the Governor's

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[10] Mooretown argues in the alternative that if the Governor's specific authority regarding Indian gaming includes the power to concur, then any concurrence by the Governor "must be subject to legislative ratification." (Mooretown 40, fn. 15; cf. Picayune Br. 49-51, 56-57.) But that scheme is not envisioned by either IGRA or the California Constitution. Congress considered and rejected a proposal to give state legislatures a say in the concurrence process. (See *ante*, p. 15.) And Mooretown does not explain how a power to ratify *concurrences* may fairly be implied from the Legislature's constitutional power to ratify *compacts*.

constitutional and statutory authority with respect to Indian gaming generally. It only asked the voters to approve the statute in which the Legislature ratified the gaming compact between the State and the North Fork Rancheria of Mono Indians that is at issue in the *Stand Up* case. (See Prop. 48, Gen. Elec. (Nov. 4, 2014).) In construing voter initiatives, courts "begin with the text as the first and best indicator of intent." (*Kwikset Corp. v. Superior Ct.* (2011) 51 Cal.4th 310, 321.) Nothing in Proposition 48 "clearly manifested [an] intent to preclude" (Mooretown Br. 21), as a categorical matter, gaming on newly acquired trust lands pursuant to section 2719(b)(1)(A).[11]

B. The Governor Has General Authority to Respond to Federal Requests for Concurrence

As explained in the answer brief on the merits, the Governor has general authority to interact with the federal government, and to communicate his or her policy views in response to inquiries from federal officials. (See RBOM 38-43.) That authority is inherent in the Governor's position as the supreme executive of the State, and the Legislature acknowledged that inherent authority when it described the Governor as the "official organ of communication" with the federal government. (Gov.

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[11] Amici argue that ballot arguments and newspaper articles show that the voters opposed all "off-reservation gaming" and intended to ban gaming altogether at the Madera Site. (Mooretown Br. 21; see Picayune Br. 58-59.) Whatever the motivations and policy preferences of those who made public pronouncements in opposition to Proposition 48, the Proposition's text makes no mention of Indian gaming policy. Moreover, the Legislative Analyst informed the voters that Proposition 48 would not necessarily prohibit gaming even on the Madera Site. (Ballot pamp., Gen. Elec. (Nov. 4, 2014) analysis of Proposition 48 by Legislative Analyst, p. 42 [noting that North Fork could still go ahead with its plans if "a new compact [is] approved by the state and federal governments"]; see also 25 U.S.C. § 2710(d)(7) [IGRA remedial procedures].)

Code, § 12012; see RBOM 42.) The Governor's general authority includes responding to informal inquiries from federal officials, as well as responding to more formal inquiries required by a range of federal statutes (like section 2719(b)(1)(A)) that condition the ability of federal officials to take particular actions on obtaining consent or concurrence from state governors. (See RBOM 41 [collecting statutes].) Of course, the Governor must exercise this authority in a way that is informed by, and consistent with, state law and policy. (See RBOM 43-44.)

Picayune insists that the Governor lacks general authority to concur in an interest/detriment determination under section 2719(b)(1)(A). (See Picayune Br. 34-41). Yet Picayune also acknowledges that the Governor *does* have authority to interact with the federal government on matters of policy, including matters related to Indian gaming. (Picayune Br. 46-49.) Indeed, it concedes that, "under the proper theory of implied power," the Governor may "act as the voice of California with regard to receiving information from the Secretary of Interior regarding a proposed" interest/detriment determination, and may also "provid[e] his views and opinions regarding the social, economic and environmental impacts that will result from the proposed off-reservation casino." (*Id.* at pp. 46, 49.) But Picayune contends that this "implied power" to respond to federal inquiries disappears once the Secretary actually makes an interest/detriment determination and requests a concurrence from the Governor—at which point the Governor becomes powerless to respond. (See *id.* at p. 50.) It fails to offer any coherent explanation for that position.

Picayune's core theory appears to be that the Governor cannot have authority to concur because the effect of the concurrence is too consequential. (Picayune Br. 38-40.) As explained in Part I, however, a concurrence is not the singular event determining whether Indian gaming may occur on a parcel of land. The federal government controls that

process; no gaming may occur unless the Secretary conducts lengthy administrative proceedings and takes two distinct administrative actions. (See *ante*, pp. 13-14; RBOM 15-16, 29-30.) Although current law makes the Governor's concurrence a condition precedent to gaming under section 2719(b)(1)(A), that is only because Congress has assigned legal significance to the concurrence for purposes of federal law. Amici offer no compelling explanation why the Governor's authority under state law to respond to an inquiry from a federal official should turn on the significance assigned to that response by federal law. They do not explain, for example, why the Governor is empowered to respond when federal law requires the Department of Interior to seek and consider the views of state officials about the "[a]nticipated impacts" of a proposed gaming facility on "the surrounding community" (e.g., 25 C.F.R. § 292.20(b)(2), (3)), but lacks power to respond when federal law requires the Secretary to "request . . . the Governor's concurrence in" an interest/detriment determination (see *id.* § 292.22(c); see also 25 U.S.C. § 2719(b)(1)(A)).[12]

Picayune's remaining arguments on this subject are similarly meritless. It argues that the Governor cannot "have inherent authority . . . to unilateral[ly] issue a concurrence" because the California Constitution addresses gaming issues in the article concerning legislative powers and

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[12] Picayune seeks to distinguish the concurrence required by section 2719(b)(1)(A) from concurrences and consents required by other federal statutes, which, it suggests, the Governor may have authority to give. (Picayune Br. 51-53.) But it fails to explain this distinction. It argues only that the other statutes do not "involve a subject matter . . . that the Constitution generally prohibits." (*Id.* at p. 52.) Neither does section 2719(b)(1)(A). (See generally *Artichoke Joe's Cal. Grand Casino v. Norton* (9th Cir. 2003) 353 F.3d 712, 721 ["Proposition 1A . . . explicitly states that 'slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands' subject to the regulations embodied in the Tribal-State compact"].)

because the Legislature has exercised its authority to adopt the California Gambling Control Act. (Picayune Br. 34-37.) No doubt, the Legislature has substantial authority to legislate on the subject of gaming. (See *post*, p. 32.) That does not provide any basis for concluding that the Governor lacks general authority as the State's supreme executive official to respond to a concurrence request from the federal government. (Nor is it any basis for concluding that the powers specific to Indian gaming that article IV vests in the Governor (see *id.*, art. IV, § 19, subd. (f)), do not include the power to concur.)

Picayune also contends that Government Code section 12012, which recognizes the Governor as "the sole official organ of communication between the Government of this State" and the federal government, undermines the Governor's legal position in this case. (Picayune Br. 40, fn. 10; see RBOM 43.) It reasons that if the Governor were correct that he had general authority to respond to inquiries (and requests for concurrence) from the federal government, then "section 12012 would be rendered superfluous." (Picayune Br. 40, fn. 10.)[13] As this Court has recognized, however, some statutes are "'declaratory of [an] inherent power'" that "'would have been implied, if not expressed.'" (*In re Attorney Discipline System* (1998) 19 Cal.4th 582, 603, 604, quoting *In re Integration of Neb.*

[13] Government Code section 12012.25, subdivision (f) directs that the Secretary of State is responsible for "forward[ing] a copy of the executed compact and the ratifying statute" to the Secretary. (See Picayune Br. 45, fn. 12.) That the Legislature opted to assign that ministerial function to another executive office does not undermine the Governor's inherent constitutional authority to communicate with the federal government.

State Bar Assn. (Neb. 1937) 275 N.W. 265, 267, *People v. Culkin* (N.Y. 1928) 162 N.E. 487, 492, italics omitted.) Section 12012 is such a statute.[14]

III. THE GOVERNOR'S CONCURRENCE DID NOT DEFEAT OR MATERIALLY IMPAIR THE CORE FUNCTIONS OF ANOTHER BRANCH

The California Constitution's separation of powers doctrine "is violated only when the actions of a branch of government defeat or materially impair the inherent functions of another branch" (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 662) or "impermissibly intrude or infringe upon" the "'core zone' of" another branch's functions (*Marine Forests Society v. California Coastal Com.* (2005) 36 Cal.4th 1, 46; see RBOM 23-24). Although amici do not cite or discuss any of this Court's cases on separation of powers, they nevertheless assert that the Governor's concurrence unconstitutionally interfered with the Legislature's prerogatives. (See, e.g., Stand Up Br. 5; Picayune Br. 15.) As explained in the answer brief, however, the Governor's concurrence was a quintessential executive act that did not intrude upon any core function of the legislative branch. (See RBOM 45-56.)

Amici's belief that the Governor violated the separation of powers doctrine appears to rest on three related arguments. First, they contend that California has a "longstanding State policy" that limits "tribal casinos to existing . . . federal Indian lands," i.e., "lands that were in federal trust as of 1988." (Mooretown Br. 17-18, 28.) Second, they argue that the Governor's concurrence power "drastically, singlehandedly and irrevocably

[14] This case illustrates that powers conferred on an official by the Constitution are sometimes also conferred by or reiterated in statutory provisions. (Compare Cal. Const., art. IV, § 19, subd. (f) [Governor's specific authority regarding Indian gaming] with Gov. Code, §§ 12012.5, subd. (d), 12012.25, subd. (d) [same].)

alter[ed]" that policy (*id.* at p. 18), thereby "set[ting] California public policy regarding off-reservation gaming that previously did not exist in California" (Stand Up Br. 18-19, italics omitted). Third, they reason that the concurrence "usurp[ed] the Legislature's authority" (Mooretown Br. 39) and "interfere[d] with the Legislature's ability to set the state's gaming policy as it concerns off-reservation gaming" (Stand Up. Br. 7). Amici are wrong on all three points.

A. California's Policy Allows Gaming on Indian Lands Acquired After 1988, Consistent with IGRA

Amici's claim that "longstanding" California policy prohibits gaming on Indian lands acquired after 1988 (Mooretown Br. 18; cf. Stand Up Br. 18-19) is demonstrably false. To begin with, California does not have any general policy that categorically prohibits gaming. California allows card rooms, bingo, horse-race betting, and a state-run lottery, all subject to appropriate oversight and regulation. (See generally *Hotel Employees & Restaurant Employees Internat. Union v. Davis* (1999) 21 Cal.4th 585, 594-595; *California v. Cabazon Band of Mission Indians*, *supra*, 480 U.S. at p. 211; RBOM 25, fn. 7.) Indeed, the Business and Professions Code acknowledges that the State "has permitted the operation of gambling establishments for more than 100 years." (Bus. & Prof. Code, § 19801, subd. (b).)

That general policy of authorizing certain types of gaming informs the State's policy on Indian gaming. IGRA authorizes tribes to "engage in . . . class II gaming on Indian lands within" their jurisdiction if the "gaming is located within a State that permits such gaming for any purpose by any person, organization or entity" and satisfies other requirements of federal law. (25 U.S.C. § 2710(b)(1).) Consistent with that federal directive, California may not (and does not) prohibit tribes from operating class II gaming activities on Indian lands, so long as those activities are of a type

that California allows non-tribal entities to conduct in other parts of the State. (See North Fork Br. 34-35 [discussing the Lytton Casino in Contra Costa County].)

Likewise, California has a history of allowing class III gaming facilities on Indian lands that were taken into trust after 1988. The Constitution authorizes "the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law," and it grants the Governor authority to take the steps needed "to negotiate and conclude compacts" for such gaming, subject to ratification by the Legislature. (Cal. Const., art. IV, § 19, subd. (f); see generally *Artichoke Joe's*, *supra*, 353 F.3d at p. 721.) The "federal law" referenced by the Constitution is IGRA, which authorizes class III gaming on multiple categories of Indian lands acquired after 1988. (See 25 U.S.C. § 2719(a)(1)-(2)(B), (b)(1); RBOM 15, fn. 2.) Consistent with IGRA and the California Constitution, at least six tribes are currently operating class III gaming facilities on Indian lands acquired after 1988—including United Auburn and one of its amici. (See North Fork Br. 20, fn. 3, 29-34; RBOM 35-37; cf. *Citizens Exposing Truth About Casinos v. Kempthorne* (D.C. Cir. 2007) 492 F.3d 460, 468 [permitting gaming on after-acquired lands furthers IGRA's goal of promoting economic self-sufficiency]; *City of Roseville v. Norton* (D.C. Cir. 2003) 348 F.3d 1020, 1030 [similar].)[15] Other tribes have entered state-ratified compacts that authorize class III gaming on such lands, but

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[15] These tribes are Mooretown, United Auburn, the Bear River Band of Rohnerville Rancheria, the Paskenta Band of Nomlaki Indians, the Habematolel Pomo of Upper Lake Indians, and the Federated Indians of Graton Rancheria. (See North Fork Br. 20, fn. 3)

have not yet commenced gaming. (North Fork Br. 20, fn. 4, 30-31, 33-34.)[16]

This history refutes amici's argument that California has a policy prohibiting gaming on Indian lands taken into trust after 1988. The State's policy instead allows gaming on such lands, provided that the gaming satisfies the requirements of IGRA. The Governor's decision to concur in the Secretary's interest/detriment determination under 25 U.S.C. § 2719(b)(1)(A) regarding gaming on the Yuba site is consistent with that policy.

B. The Governor's Concurrence Did Not Alter or Contravene State Policy

Amici's second argument fails for similar reasons. The Governor's concurrence did not "set California public policy regarding off-reservation gaming that previously did not exist in California." (Stand Up Br. 18-19, italics omitted; see Mooretown Br. 18; Picayune Br. 54-56.) Even before the Governor exercised his concurrence authority, California's law and policy allowed tribes to conduct class III (and class II) gaming on land acquired after 1988, provided that the land fell within one of the categories for which IGRA authorizes gaming, and that the gaming otherwise satisfied applicable requirements of federal and state law. (See RBOM 16-17; see also *ante*, pp. 26-28.) The Governor's concurrence did not create new policy; it merely implemented existing policy, including the provisions of the California Constitution and Government Code that authorize gaming on Indian lands in accordance with the requirements of IGRA. (See Cal.

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[16] These tribes are the Soboba Band of Luiseno Indians, the Elk Valley Rancheria, the Table Mountain Rancheria, and the Karuk Tribe. (See North Fork Br. 20, fn. 4.)

Const., art. IV, § 19, subd. (f); Gov. Code, §§ 12012.25, subd. (d); 12012.5, subd. (d); RBOM 17, 25-27, 55-56.)

Indeed, in conveying his concurrence, the Governor specifically addressed the policy considerations underlying the voters' decision to authorize class III gaming on Indian lands in accordance with IGRA. Those policy considerations included lifting California tribes out of poverty, sharing gaming revenues with non-gaming tribes, and providing economic benefits to surrounding communities. (See RBOM 55-56; CT 160.) The Governor explained why his concurrence was informed by and consistent with those considerations. (See CT 160.) Stand Up is thus incorrect when it contends that there is no "existing policy that could serve to guide or limit the Governor in his exercise of the concurrence power." (Stand Up Br. 19.)

Amici's argument that the Governor "set" new policy by issuing a concurrence reflects a misunderstanding of the nature and effects of the concurrence. Amici contend that the Governor has "singlehandedly" seized the power "to unilaterally permit gaming on newly-acquired trust lands." (Mooretown Br. 11-12, 18; see Picayune Br. 54-56; Stand Up Br. 13 ["The decision to create new Indian land eligible for gaming has been made by the Governor"].) But the Governor does not have—and does not claim—that power. Only the federal government has the authority to take land into federal trust for a tribe and to authorize gaming on such land. (See *ante*, p. 11; *Lac Courte*, *supra*, 367 F.3d at pp. 658, 661; RBOM 15-16, 29-30, 41.) Under current federal law, the Secretary may exercise that authority only after a lengthy process, the details of which are governed by the Indian Reorganization Act, IGRA, and federal regulations. (See RBOM 15-16, 29-30; North Fork Br. 40-42.) A gubernatorial concurrence in the Secretary's interest/detriment determination is just one of the requirements that must be satisfied before the federal government authorizes gaming on newly acquired Indian lands under 25 U.S.C. § 2719(b)(1)(A). Any

suggestion that the concurrence gives the Governor unilateral authority to authorize gaming on off-reservation parcels is unfounded.

C. The Governor's Concurrence Did Not Interfere with Any Core Functions of the Legislature

Finally, there is no basis for amici's argument that the Governor "usurp[ed] the Legislature's authority." (Mooretown Br. 39; see Stand Up Br. 7.) Governor Brown engaged in a classic executive act when he concurred in the Secretary's interest/detriment determination regarding the Yuba site. His concurrence was based on a fact-intensive analysis regarding a particular proposal for a gaming facility in a particular location, informed by considerations of existing state and federal policy. (See RBOM 46-47.) That concurrence "is not analogous to creating . . . gaming policy wholesale—a legislative function—but rather is typical of the executive's responsibility to render decisions based on existing policy." (*Lac Courte*, *supra*, 367 F.3d at p. 664.)

Amici disagree, noting this Court's observation that the Legislature "'is charged with the formulation of policy.'" (Stand Up Br. 19, quoting *Carmel Valley Fire Prot. Dist. v. State of California* (2001) 25 Cal.4th 287, 299.) They are of course right that the Legislature is the branch of state government charged with "establish[ing] general policies and objectives, and the ways and means of accomplishing them." (*Worthington v. City Council of City of Rohnert Park* (2005) 130 Cal.App.4th 1132, 1140 [discussing the difference between legislative and executive acts in the context of local government]; see RBOM 45-46 & fn. 25.) The creation of such a general policy is a legislative act because it "carries the implication of an ability to compel compliance." (*Worthington*, *supra*, at p. 1142.) But the concurrence at issue here did not compel anyone to do anything. Instead, the Governor assessed a particular proposal for a gaming facility in light of state and federal law and policy, and then communicated his

assessment to the federal government. (See RBOM 18-19, 55-56.) His concurrence fell "among those governmental powers properly assigned to the executive department," because it implemented "legislative policies and purposes already declared by" legislative bodies. (*City of San Diego v. Dunkl* (2001) 86 Cal.App.4th 384, 400, quoting *Martin v. Smith* (1960) 184 Cal.App.2d 571, 575.)[17]

That conclusion is not undermined by amici's observation that the concurrence had "policymaking implications" and involved policy considerations such as "balancing the interests of nearby tribes and local communities." (Stand Up Br. 18, 19.) Executive decisions frequently have policy implications, "particularly at [a high] executive level." (*Printz v. United States* (1997) 521 U.S. 898, 927.) In deciding whether to concur, the Governor appropriately weighed policy considerations, including "the best interest of the Indian tribe and its members" and the interests of "the surrounding community." (25 U.S.C. § 2719(b)(1)(A); see CT 160; *Lac Courte, supra,* 367 F.3d at p. 653.) That appropriate consideration of policy factors does not establish that the decision was a legislative one.

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[17] Stand Up cites federal authority holding that, under the Property Clause of the federal Constitution, "power delegated to the Secretary to acquire Indian trust lands for gaming purposes is a legislative power." (*Confederated Tribes, supra,* 110 F.3d at p. 696; see *id.* at pp. 693-696.) But it does not follow that the Governor's power to concur "must be" a "legislative function" for purposes of the separation of powers doctrine of the *California* Constitution. (Stand Up. Br. 20-21, fn. 8.) Assessing a particular proposal in service of "a plan already adopted by [a] legislative body itself, or some power superior to it" is a classic executive function. (*Dunkl, supra,* 86 Cal.App.4th at p. 399, italics and quotation marks omitted.) It is thus an executive act for the Governor to decide whether to concur in an interest/detriment determination, after considering a particular proposal in light of the gaming policies adopted by the voters in the California Constitution, by the Legislature in the Government Code, and by Congress in IGRA. (See *Lac Courte, supra,* 367 F.3d at p. 653.)

Amici are not correct that the Governor's concurrence "interferes with the legislature's prerogatives over gaming policy." (Stand Up Br. 5; see *id.* at pp. 7, 13-14, 17.) For one thing, the Legislature retains its constitutional authority to decide whether or not to ratify any compact for proposed class III gaming. (Cal. Const., art. IV, § 19, subd. (f).) It can take account of any number of considerations in declining to ratify a compact, including the location of the proposed gaming facility.[18] And the Legislature may also adopt new laws related to gaming on Indian lands acquired after 1988, so long as those laws are consistent with constitutional limitations. (See RBOM 44.) For example, the Legislature could enact a statement of policy regarding gaming on lands subject to 25 U.S.C. § 2719(b)(1)(A). Or it could enact legislation requiring some reasonable period of time between when the Secretary of the Interior initially requests a concurrence and when the Governor responds, to ensure an opportunity for input by legislators. So far, the Legislature has not taken such actions; but that inaction does not mean that the Governor's concurrence in this case impermissibly intruded on the Legislature's prerogatives.

Amici's central concern appears to be that the Legislature has "been locked out of the decision regarding whether or not to designate this new land as 'Indian land' for purposes of gaming." (Stand Up Br. 11; see *id.* at pp. 14, 21, 23, 24; Mooretown Br. 8, 17, 22, 39.) As discussed above, however, any purported "lock out" is a consequence of federal law, not one

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[18] If the Legislature does not ratify a compact, and a federal court subsequently finds that the State failed to negotiate in good faith, the Secretary may adopt procedures allowing for class III gaming through IGRA's remedial provisions. (See 25 U.S.C. § 2710(d)(7)(B)(i)-(vii); Stand Up Br. 16-17.) That possibility is a consequence of Congress's plenary authority in this area and the legal framework it adopted in IGRA. (See *ante*, pp. 11-13.)

that results from any action by the Governor. (See *ante*, pp. 11-13.) The controlling federal legal framework simply does not give States the final say in what lands will host Indian gaming. (See also U.S. Const., art. IV, § 3, cl. 2; 25 U.S.C. § 5108; *Confederated Tribes*, *supra*, 110 F.3d at p. 694.) In the words of a former state senator quoted in Stand Up's brief, the Legislature does not "determine whether or not there will or won't be gambling on" a particular site. (Stand Up Br. 12, quoting former Senator Roderick Wright.) "That decision was made by the Department of the Interior" when it took land into trust for a tribe, and by Congress when it directed what tribal lands are eligible for gaming and under what circumstances, "and there is nothing that we are able to do about that." (*Ibid.*, italics omitted.) Current federal law requires a gubernatorial concurrence as one condition before gaming may proceed under 25 U.S.C. § 2719(b)(1)(A); but it is the federal government that ultimately controls the matter. Although the current federal framework may well be frustrating to amici, and to certain members of the Legislature, such frustration does not provide a basis for concluding that the Governor has materially intruded or infringed upon any core functions of the Legislature.[19]

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[19] Stand Up discusses statements from legislators that it characterizes as "express[ing] their displeasure" with the Governor for concurring in the interest/detriment determination regarding the proposed North Fork gaming facility. (Stand Up. Br. 21; see *id.* at pp. 21-23.) Although Stand Up views these statements as evidence that the Governor "usurp[ed]" the Legislature (*id.* at p. 23), it fails to identify any actual law or policy that was contravened by the Governor's concurrence. Indeed, the quoted statements acknowledge that the Legislature has yet to adopt any "process [or] policy parameters" regarding gaming on recently acquired Indian lands. (*Id.* at p. 22.) As noted above, the Legislature remains free to do so, within constitutional limitations. (See *ante*, p. 32.) Statements of displeasure by individual legislators do not establish that the Governor's exercise of his concurrence power in this case impaired the Legislature's ability to pursue its core functions.

IV. AMICI'S REMAINING ARGUMENTS PROVIDE NO BASIS FOR REVERSAL

Amici also advances arguments under the Tenth Amendment and the Guarantee Clause of the federal Constitution. (Mooretown Br. 47-52; Picayune Br. 53, fn. 13.) Those issues were not raised by the parties and exceed the scope of review. (See Cal. Rules of Court, rule 8.516(b); *Prof. Engineers in Cal. Government v. Kempton* (2007) 40 Cal.4th 1016, 1047, fn. 12 ["'[I]t is the general rule that an amicus curiae accepts the case as he finds it and may not "launch out upon a juridical expedition of its own unrelated to the actual appellate record . . . ."'"].)[20] They also fail on the merits.

Relying on *New York v. United States* (1992) 505 U.S. 144, Mooretown contends that IGRA unconstitutionally "commandeers state government" in violation of the Tenth Amendment by designating the Governor as the state official who must exercise the concurrence power. (Mooretown Br. 49.) The anti-commandeering principle prohibits the federal government from compelling "the States to enact or administer a federal regulatory program." (*New York, supra*, at p. 188.) In *Lac Courte*, the Seventh Circuit explained why IGRA's gubernatorial concurrence provision does not violate the Tenth Amendment. Unlike the federal statute at issue in *New York*, section 2719(b)(1)(A) does not force States to implement "costly and time-consuming [federal] programs" against their will. (*Lac Courte, supra*, 367 F.3d at p. 662.) Rather, it "preserves state sovereignty by merely encouraging the states to decide whether to endorse federal policy and by reserving the ultimate execution of that policy to the

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[20] Cf. *Seminole Tribe of Florida v. Florida* (1996) 517 U.S. 44, 61, fn. 10 [declining to consider Tenth Amendment claim raised for the first time on appeal].

federal government." (*Id.* at p. 663.)[21] In support of its Tenth Amendment argument, Mooretown raises the concern that if "a state has delegated [concurrence] authority to its legislature, for all practical purposes the state would . . . be compelled to reallocate that governmental decision making authority to its governor to comply with federal law." (Mooretown Br. 49.) But the constitutional implications of that hypothetical scenario are not presented here, because California has *not* delegated concurrence authority to the Legislature as a matter of either statutory or constitutional law.

Picayune advances a similar argument under the Guarantee Clause, which guarantees to every State a republican form of government. It asserts that States must "have the final say in who can make decisions for a state on any given matter." (Picayune Br. 53.) In its view, any encroachment on that "basic principle" is an "arguable" violation of the Guarantee Clause. (*Id.* at p. 53 & fn. 13.) But Picayune does not cite any authority supporting this theory, and it is well-settled that Congress may condition the exercise of its power upon the consent or approval of a specific state officer or entity. (See, e.g., *North Dakota v. United States* (1983) 460 U.S. 300, 310-

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[21] See also *Lac Courte*, *supra*, 367 F.3d at p. 663 ["Nor does the gubernatorial concurrence provision obstruct the political accountability of the dual sovereigns. Because the provision does not require a governor to respond, each governor is solely responsible for the decision to grant, decline, or deny consideration of the request for concurrence. The inability to shift blame to Congress for the decision ensures that a governor will remain attuned to political pressure from his or her constituents"]; cf. *Confederated Tribes*, *supra*, 110 F.3d at pp. 698-699 [section 2719(b)(1)(A) does not violate the Appointments Clause of the federal Constitution]; *Carcieri v. Kempthorne* (1st Cir. 2007) 497 F.3d 15, 39, rev'd on other grounds *sub nom.* 555 U.S. 379 (2009) [Secretary's authority to take land into trust does not violate Tenth Amendment]; *Cheyenne River Sioux Tribe v. South Dakota* (8th Cir. 1993) 3 F.3d 273, 281 [IGRA's compacting requirement does not violate Tenth Amendment].

315 [discussing federal statute requiring governors to consent to the federal acquisition of land for waterfowl production areas].)

Last, amici identify a wide range of considerations in service of their argument that the Governor's decision to concur in the Secretary's interest/detriment determination regarding the Yuba site was a "bad policy choice." (Mooretown Br. 40; see *id.* at pp. 1-8, 10, 14, 18-19, 25, 27-29, 32-36, 38-37; cf. Picayune Br. 9-10, 54-59.) Many of the policy concerns that amici raise were thoroughly considered by the Governor and the Secretary. For example, amici argue that allowing a new casino on the Yuba site will depress the revenues of nearby tribal casinos (Mooretown Br. 3-8, 10, 14, 40-47; cf. Picayune Br. 9-10) and strain the coffers of state and local governments (Mooretown Br. 14, 25, 32-36). The Governor considered the economic impact on various stakeholders before deciding to concur. (CT 160.) And IGRA's implementing regulations require the Secretary to consider these factors, among others, before making the interest/detriment determination and taking the lands into trust for gaming. (See 25 U.S.C. § 2719(b)(1)(A); 25 C.F.R. §§ 151.3(a)(3), 151.11, 292.20-21; see also North Fork Br. 40-43.) If amici believe that the Secretary failed to adequately consider these factors, the Administrative Procedure Act (5 U.S.C. § 551, et seq.) provides the proper avenue for seeking relief. (Cf. *Stand Up for Cal.! v. U.S. Dept. of the Interior* (D.D.C. 2016) 204 F.Supp.3d 212 [rejecting Picayune and Stand Up's APA claims].) In any event, amici's belief that there should not be gaming on the Yuba site as a matter of policy is not germane to the state constitutional questions presented here. The Governor's concurrence was constitutionally permissible because he has specific and general authority to concur and because his concurrence did not materially intrude on any core function of the Legislature. The Court of Appeal's judgment should be affirmed on that basis.

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

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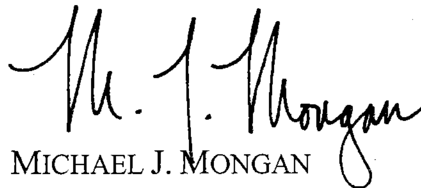

MICHAEL J. MONGAN
Deputy Solicitor General

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

I certify that the attached Answer to Amicus Curiae Briefs uses a 13 point Times New Roman font and contains 8,725 words, as counted by the Microsoft Word word-processing program, excluding the parts of the brief excluded by California Rules of Court, rule 8.520(c)(3).

Dated: December 8, 2017

XAVIER BECERRA
Attorney General of California

MICHAEL J. MONGAN
Deputy Solicitor General
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **United Auburn Indian Community v. Brown**
Case No.: **S238544**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On December 8, 2017, I served the attached **RESPONDENT'S ANSWER TO AMICUS CURIAE BRIEFS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 8, 2017, at San Francisco, California.

M. Campos	
Declarant	Signature

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