Case No. S238544

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

UNITED AUBURN INDIAN COMMUNITY OF THE AUBURN RANCHERIA,

Appellant,

v.

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

Respondent.

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

APPELLANT'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

The Governor's Answer Brief ("AB") on the merits fails to address the many ways in which the Governor's exercise of a concurrence power here was invalid. He can neither establish that the power is implied in the compacting power nor inherent as part of his general executive powers. In making his primary argument, that he had the implied power to concur here, the Governor does not articulate the well-established standard for implied powers, much less demonstrate that the standard was met here. Further, even if one assumes an implied power to concur arises from a power to compact, the Governor lacked the power to compact on these facts. The Governor's contention that the voters intended for him to have the significant power to concur, despite never saying so, again defies the law and the record here, all of which establish that the voters had no such intent.

The Governor's contention that he had the inherent power to concur is simply off the mark. In the words of Justice Detjen, there is "no doubt that the authority to [concur] cannot exist within the Governor's inherent executive authority." *Stand Up for California! v. State of California* (2016) 6 Cal.App.5th 686, 719 ("*Stand Up*") (Detjen, J., concurring and dissenting).

Moreover, because the Governor's concurrence was an exercise of

legislative power, contrary to the California Constitution's absolute prohibition on the Legislature to authorize casinos and restrictions for compacting for tribal casinos, the concurrence was unconstitutional. The Governor's contrary arguments ignore the law and the record here.

The Court of Appeal's decision should be reversed.

ARGUMENT

I. The Governor Violated the California Constitution by Concurring.

A. The Governor Lacked Implied Power To Concur.

As the Governor has admitted, "no statutory, constitutional, or other authority under state law explicitly authorizes the Governor to exercise the concurrence power contemplated by IGRA." *Stand Up*, 6 Cal.App.5th at 697. The Governor contends, however, that his power to *compact* implies the power to *concur*. AB at 27-30. In so contending, the Governor ignores the well-established legal standards governing implied powers, which refute his argument.

As a rule, courts "should not presume the Legislature intended to legislate by implication." *San Diego Service Authority for Freeway Emergencies v. Superior Court* (1988) 198 Cal.App.3d 1466, 1472 ("*San Diego Service Authority*"). "[F]or a consequence to be implied from a statute there must be greater justification for its inclusion than a consistency or compatibility with the act from which it is implied." *Lubner v. City of*

L.A. (1996) 45 Cal.App.4th 525, 529 ("*Lubner*") (internal citation omitted). An implied statutory power must instead arise by "necessary implication" — one that is "so strong in its probability that the contrary thereof *cannot reasonably be supposed.*" *Ibid.* (citing *Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1451 ("*Woodland*") (emphasis added).

Judicial reluctance to imply statutory powers is even stronger where, as here, the statute — Proposition 1A — was the result of extensive public debate. *See Stand Up*, 6 Cal.App.5th at 723 (Franson, J., concurring and dissenting) (authorizing off-reservation gaming "was and is a controversial issue of public policy with a wide range of consequences for Californians. It is implausible that the average voter would have understood the controversy was being resolved by an undisclosed, implied grant of the authority to concur."); *see also Woodland*, 2 Cal.App.4th at 1452 (reluctance to find implied statutory powers "is heightened because we are construing statutes that are the eventual product of strong competing political currents.")

The compacting power specified in Proposition 1A does not imply a concurrence power, for many reasons.

First, the concurring and compacting powers are operationally distinct one from the other, and thus one power is not subordinate or ancillary to the other. *See* Appellant's Opening Brief ("AOB") on the

Merits at 18-20; *see also Stand Up*, 6 Cal.App.5th at 766 (Franson, J., concurring and dissenting) ("the compacting responsibility is distinct from the concurrence authority in many ways — structurally, conceptually, and functionally"). *Keweenaw Bay Indian Community v. United States* (6th Cir. 1998) 136 F.3d 469 ("*Keweenaw*"), illustrates this. There, an Indian tribe operated an off-reservation, class III gaming casino under a valid tribal-state compact. Though the compact's validity was unquestioned, the tribe had not acquired the land through the two-part secretarial determination required by IGRA section 2719(b)(l). *Id.* at 470-71. The tribe argued that its compact obviated section 2719's two-part determination requirement. *Id.* at 474. The Sixth Circuit disagreed, stating that "[s]ection 2719 concerns a *distinct sphere of Indian gaming*; off reservation gaming on land acquired [after 1988]." *Id.* at 476 (emphasis added). The Secretary's approval of a valid tribal-state compact and his favorable two-part determination subject to the Governor's concurrence "are not an 'either-or' proposition." *Ibid.* The court further stated that interpreting IGRA's compact provision to incorporate the two-part determination provision "would produce an absurd result." *Ibid.* "To find that the existence of a valid, approved tribal-state compact somehow eliminates other IGRA provisions would obviate the plain language of the statute." *Id.* at 475.

Compacting and concurring, moreover, serve entirely different purposes. The need for a compact flows from the difference between class

II and III gaming, which recognizes that class III gaming is more susceptible to the infiltration of organized crime, and works to protect tribes from such effects through federal-state-tribal regulation of the class III gambling activity involved. *Pueblo of Santa Ana v. Kelly* (D.N.M. 1996) 932 F. Supp. 1284, 1289-90, 1292-93 (discussing compact's intended function to prevent infiltration of organized crime into high-stakes gaming), *aff'd*, (10th Cir. 1997) 104 F.3d 1546. The concurrence requirement, by contrast, "involves a 'best interests' determination which requires consultation with local and neighboring tribal officials and a determination that the proposed gaming would not be detrimental to the surrounding community." *Keweenaw*, 136 F.3d at 476.

Concurrences and compacts are functionally distinct, also. Compacts balance the interests of Indian tribal sovereignty and state jurisdiction in controlling and regulating class III gaming on Indian lands and force states and tribes to share control. Concurrences do not require shared sovereignty — the decision whether to concur is exclusively within the state's control. Concurrences diminish state jurisdiction, because they permit taking off-reservation land into trust for gaming purposes, meaning the land is removed from the state and local tax base and high-stakes gambling is permitted where the state had prohibited it. In contrast, a compact *expands* state jurisdiction by providing the state some regulatory control over the gaming operations on Indian lands.

Not only are compacting and concurring distinct, the power to concur is simply not "necessary" to exercise the compacting power in any real sense, as proved by the fact that every compact the Governor has concluded before this one needed no concurrence:

> [C]oncurrence in a two-part determination by the Secretary is not necessary for the Governor to be able to negotiate and conclude *most* tribal-state compacts . . . . [T]hose compacts have been implemented and stand as examples of the effective exercise of the Governor's compacting authority. Consequently, the Governor's authority to negotiate and conclude compacts is not rendered nugatory (i.e., of no meaningful application) by absence of the authority to concur. Therefore, the concurrence authority is not *necessary* under the legal principle set forth in [*Lubner*, 45 Cal.App.4th at 529].

Stand Up, 6 Cal.App.5th at 759 *(Franson, J., concurring and dissenting)*.

Also, as noted, the fact that a concurrence can permit gambling on land where the Constitution would otherwise prohibit it, even absent the exercise of the compacting power, further illustrates that the power to concur is not implied from the power to compact. *See* AOB at 25. When the Governor concurs, he triggers the lifting of the federal prohibition on tribal class II gaming, including bingo and certain card games, not the subject of article IV, section 19, subdivision (f). *See ibid.* The Governor's attempts to dismiss this fact fail. He asserts that, in such circumstances, the Secretary, not the Governor, acts to authorize gaming on off-reservation land. AB at 29-30. That is not entirely true. In order to be lawful, *both* the Secretary and the Governor must *act* for such gaming to be lawful in California on off-reservation lands. *See* AOB at 8-9; *cf. Stand Up*, 6

Cal.App.5th at 718-719 (Detjen, J., concurring and dissenting) ("[w]hile it is true the Governor's concurrence does not, by itself, create permission to operate [class III] casinos in California, that authority being expressly found only in the Secretary, there can be no doubt that the practical effect" of such concurrence is to permit gaming where it would otherwise be prohibited). Class II gaming conducted off-reservation requires approval of the Secretary, but, without the Governor's concurrence, it is no more lawful off-reservation than is compacted class III gaming.

The Governor also asserts that class II gaming is not relevant here (AB at 30), but it is. The Governor's concurrence here had the very real effect of lifting the federal prohibition on off-reservation class II gaming, and with the Secretary's approval, the Enterprise Tribe is entitled to open a class II casino *without any compact* with the State. This further demonstrates the concurrence power is functionally distinct from the compacting power. Since (1) the power to concur is almost never required in order for the Governor to exercise his Constitutional power to compact for class III gaming, **and** (2) concurring, without compacting, legally authorizes class II gaming, which the Constitution generally prohibits, the power to concur cannot be implied from the Constitutional power to compact.

Moreover, "[l]aws are deemed to have implied provisions and confer implied powers only when necessary for the carrying out of express

provisions and powers." *Stand Up*, 6 Cal.App.5th at 699. Thus, as discussed, the Governor lacked the express power to compact in this case (*see* AOB at 33-35; *see also infra* Section II.D), he could not have an implied power to concur here, either. *See Stand Up*, 6 Cal.App.5th at 700 ("it would be perverse to find the Governor has an implied authority" to concur absent a lawful compact).

B. The Governor's Arguments in Support of His Supposed Implied Power To Concur Are Flawed.

The Governor's arguments in support of his contention that he had the implied power to concur are flawed.

1. The Governor Does Not Meet the Legal Standard for Implied Powers.

As noted, the Governor does not set forth the legal standard regarding implied concurrences set forth in *Lubner* (*see supra* Section I.A) nor does he argue that standard is met here. He instead relies almost entirely on cases: (1) affirming the Legislature's implied power to conduct investigations, or (2) a governmental agency's implied powers to employ special counsel to defend against litigation. *See* AB at 27-28. Those cases do not support the Governor's argument, for many reasons.

First, none of the cases on which the Governor relies on this point discussed a situation, like the one here, involving an assertion of an implied power in an area where the Constitution has banned all exercises of power, with limited exceptions. That key distinction is fatal to the Governor's

position. It's one thing to infer power to hire a lawyer, conduct investigations, and hold meetings, where none of those ancillary actions expands the scope of situations to which the Governor's express powers may be put. But here, by contrast, implying a concurrence power materially expands the range of lands on which Indian gaming may occur in California.

The cases the Governor cites arose before the "modern rule of construction" developed. *See Grubb & Ellis Co. v. Bello* (1993) 19 Cal.App.4th 231, 239 (citing *San Diego Service Authority*, 198 Cal.App.3d at 1472). For example, courts recognized the Legislature's implied powers to conduct investigations in the "earliest times in the history of American legislation." *In re Application of Battelle* (1929) 207 Cal.227, 241 ("*Battelle*"). Similarly, California has recognized an agency's implied power to employ special counsel since 1859. *Smith v. Sacramento City* (1859) 13 Cal.531, 533 (upholding Sacramento City Council's power to employ special counsel). These cases are irrelevant to whether a 1990 constitutional provision includes an implied concurrence power.

Further, the first group of cases the Governor relies on concerns the Legislature's power, not the Governor's. The Legislature's power is plenary, and viewed broadly. *See* AOB at 15-16 (citing *State Personnel Bd. v. Dept. of Personnel Admin.* (2005) 37 Cal.4th 512; *accord, People ex rel. Smith v. Judge of Twelfth Dist.* (1861) 17 Cal. 547, 556. The

Governor's powers, however, are neither plenary, nor as expansive. *Marine Forests Society v. California Coastal Com.* (2005) 36 Cal.4th 1, 31 (While "it is well established that the California Legislature possesses *plenary* legislative authority except as specifically limited by the California Constitution . . . [t]here is nothing in the California Constitution that grants the Governor . . . the exclusive or paramount authority to appoint all executive officials or that prohibits the Legislature from exercising such authority."). Moreover, all the cases the Governor relies on for this point involved implied powers that were, in fact, necessary to a far greater extent than is the Governor's rare need to concur. The Legislature's power to investigate, is, for example, *necessary* for the Legislature to effectively legislate. *See Battelle*, 207 Cal. at 241 ("in many instances, in order to the preparation of wise and timely laws the necessity of investigation of some sort must exist as an indispensable incident and auxiliary to the proper exercise of legislative power"). The need to employ special counsel is, similarly, often necessary, because exigency frequently demands it. *State Comp. Ins. Fund v. Riley* (1937) 9 Cal.2d 126, 132 (upholding employment of special counsel "when the exigencies of the case are such as to demand it"). Proof of such necessity is how widespread those practices are in other jurisdictions: even federally, the President and Congress both frequently conduct investigations and hire special counsel.

That is not so with regard to the rarely-used concurrence power. *See*

AOB at 20. And other jurisdictions, like Arizona, have clearly given their governor a compacting power while simultaneously withholding a concurrence power. Arizona, while governed by a different constitution, recognized that the two powers are *not* necessarily linked; indeed, if concurrence were necessary for compacting, then the Arizona statute would be absurd.

The Governor argues that, even if concurrence arises in only a small minority of circumstances where he may exercise his compacting power, it still is "necessary," because the Governor's concurrence power will be required in those rare circumstances. AB at 29. That, however, stretches the meaning of "necessity" so broadly as to render it meaningless. As noted, an implied statutory power must be "so strong in its probability that the contrary thereof *cannot reasonably be supposed.*" *Lubner*, 45 Cal.App.4th at 529 (emphasis added). It is certainly not unreasonable to suppose that, by expressly granting the Governor the power to compact, and not expressly granting him the power to concur, the voters did not intend to grant the Governor the power to concur, and thereby authorize gaming in the rare circumstances that may require both concurrence and a compact. Indeed, it is unreasonable to suppose such an implied power *exists* on these facts. In grants of power "there is an implied negative; an implication that no other than the expressly granted power passes by the grant . . . ." *Wildlife Alive v. Chickering* (1976) 17 Cal.3d 190, 196

("*Chickering*"); *see also* AOB at 22. Thus, any implication here is *against* the Governor's power to concur.

The Governor observes that section 19, subdivision (f) includes the qualifying language "in accordance with federal law" (AB at 26) which, he suggests, means that he can take any action with regard to gaming that federal law permits. *Id.* at 26-27. That is not correct. First, section 19, subdivision (f)'s "in accordance" with federal law language cannot be read to eliminate the other language in article IV, section 19, which generally prohibits casino-style gaming, and which gives the Governor a limited, specified power, namely "to negotiate and conclude compacts," (subject to legislative ratification), with further limitations on that power, including that it concern "Indian lands in California." "In accordance with federal law" is an additional *limitation*, not an expansion, of the Governor's powers. Also, "in accordance with" does not mean "to the fullest extent permitted by," particularly in the context of section 19's other limiting language. Indeed, the ordinary meaning of "in accordance with," at the time of the statute's enactment, was in "conformity" with or in "agreement" with. The Random House Dictionary of the English Language 12 (2d ed. 1987). To illustrate, a car rental agreement that said the driver could drive "up to 55 mph, in accordance with federal law," would not permit the driver to go 65 mph in areas where federal law permitted that speed.

The Governor lacks an implied power to concur.

2. The Voters Did Not Intend To Grant the Governor the Power To Concur.

The best evidence of voter intent is the statute's language. *People v. Valencia* (2017) 3 Cal.5th 347, 400 ("The unambiguous language of an initiative is the best evidence of the voters' intent."). Proposition 1A says nothing about the concurrence power.

When a statute grants a particular power, "there is an implied negative; an implication that no other than the expressly granted power passes by the grant . . . ." *Chickering*, 18 Cal.3d at 196, cited at Section I.B.1, *supra.* Thus, because Proposition 1A expressly granted the compacting power, but did not mention a concurrence power, that indicates that the power to compact was the only power the voters intended to grant the Governor under that Proposition.

On this issue, the Governor revisits Proposition 1A's grant of power "to negotiate and conclude compacts . . . *in accordance with federal law*," arguing that this language means that voters intended for him to have the power to concur. AB at 31. He argues that the "federal law" includes all of IGRA, which would then include the provision involving the Governor's concurrence, which then means that the voters must have intended to grant him the power to concur. *Id.* However, if, as the Governor's argument necessarily assumes, voters were aware of IGRA when voting on Proposition 1A, they were also aware of IGRA's clear distinction between

compacting and concurring. *See supra* Section I.A; *see also Stand Up*, 6 Cal.App.5th at 761 (Franson, J., concurring and dissenting) ("the structure of IGRA and the implementing regulations treat the compacting responsibility as a subject separate from the two-part determination exception and its concurrence condition"). Thus, the average voter would have had no reason to believe that by authorizing the power to compact they were also authorizing the entirely separate power to concur.

Further, the reference to "in accordance with federal law," *i.e.*, IGRA, does not suggest a concurrence power would be granted by the initiative. Indeed, IGRA does not, and cannot, grant the Governor the power to concur; such a power arises, if at all, under *state* law. AOB at 17-18.

The Governor points to language in materials submitted by the opponents of Proposition 1A, where they contended that "[c]asinos won't be limited to remote locations" because "Indian tribes are already buying up prime property for casinos in our towns and cities." AB at 31. This, to him, indicates that the average voter would understand Proposition 1A to grant him the power to concur. *Ibid.* Precisely the contrary is true.

Here, the sponsors successfully rebut the opponents' arguments, which in any case are "not highly authoritative in construing the measure's meaning." *Legislature v. Eu* (1991) 54 Cal.3d 492, 505 ("*Eu*") (citing *DeBartolo Corp. v. Fla. Gulf Coast Trades Council* (1988) 485 U.S. 568,

585 ("*DeBartolo*")). Proposition 1A's proponents argued:"Proposition 1A and federal law strictly limit Indian gaming to tribal lands." Appellant's Request for Judicial Notice ("RJN"), Ex. A, Voter Information Guide, Rebuttal to Argument Against Proposition 1A, at 7. Given this rebuttal, "[i]t is the sponsors that we look to when the meaning of the statutory words is in doubt." *DeBartolo*, 485 U.S. at 585 (citations omitted). Those sponsors consistently and emphatically stated that Proposition 1A would only facilitate gaming on historical Indian lands. *See* AOB at 23.

Moreover, had Proposition 1A's drafters, or the voters, intended to grant the Governor the power to concur, it would have been very easy to do so, by explicitly stating it. That they did not indicates that was not their intent.

Proposition 1A's background reveals that the voters meant to facilitate gaming that required no concurrence. AOB at 22. Specifically, in between (1) *Hotel Employees & Restaurant Employees Int'l v. Davis* (1999) 21 Cal.4th 585 ("*Davis*") — which invalidated Proposition 1A's predecessor, and (2) Proposition 1A, California executed 57 gaming compacts, all of which required no concurrence. AOB at 22.

The Governor responds that certain of those compacts permitted gaming on lands that were not Indian lands in 1999 (AB at 33), under IGRA provisions permitting gaming on newly-acquired lands (*id.* at 36-37), which provisions require no concurrence. *Id.* at 36-37. But that distinction

means nothing here. Again, all 57 compacts were for gaming on lands that did not require a concurrence. AOB at 22; *see also Stand Up*, 6 Cal.App.5th at 743 (Franson, J., concurring and dissenting) ("none of the 57 compacts involved the two-part determination exception to IGRA's general prohibition against gaming on after-acquired trust land and, therefore, did not require a Governor's concurrence"). All were conditioned on Proposition 1A's subsequent passage, and, moreover, Proposition 1A's proponents argued that ratification of those specific compacts was a key reason justifying that initiative's passage. *See Stand Up*, 6 Cal.App.5th at 743-744; *see also* RJN, Ex. A, March 7, 2000 Primary Election Voter Information Guide, at 5 ("If this proposition is approved, those [57] compacts would go into effect."). This is evidence that the intent behind Proposition 1A was to facilitate gaming on lands for which no concurrence was required, which, in turn, indicates that the Proposition was not intended to empower the Governor to concur.

Without doubt, permitting Indian gaming on areas other than traditional Indian lands "was and is a controversial issue of public policy with a wide range of consequences for Californians. It is implausible that the average voter would have understood the controversy was being resolved by an undisclosed, implied grant of the authority to concur." *Stand Up*, 6 Cal.App.5th at 723 (Franson, J., concurring and dissenting). Nothing "in the historical record, the language or history of Proposition 1A,

or the ballot materials . . . show[s] that the electors were asked to vote on a grant of the authority to concur." *Ibid.*

3. The Governor's Public Policy Arguments Do Not Warrant Re-Writing the Statute.

Finally, as part of his "voter intent" argument, the Governor suggests that "policy considerations" support granting him the power to concur. AB at 33. These arguments miss the mark.

First, "policy" judgments do not override rules of statutory construction, which, as discussed, indicate the Governor has no power to concur. *Thomas v. City of Richmond* (1995) 9 Cal.4th 1154, 1165 ("one can make policy arguments on both sides, but this is a question of statutory interpretation. It is not for us to substitute our public policy judgment for that of the Legislature"). Courts "have no general power to rewrite statutes to conform to some underlying 'policy.'" *Woodland*, 2 Cal.App.4th at 1451.[1]

Second, the policy arguments made by Proposition 1A's proponents were all in the context of those proponents' repeated assertion that casino-

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[1] *See also San Diego Service Authority*, 198 Cal.App.3d at 1466 (rejecting argument that public policy supports a competitive bidding requirement not found in the statute's language: "Notwithstanding the powerful purposes served by competitive bidding, there is no all-pervasive public policy that requires all public entities to engage in that practice. Rather, the Legislature imposes competitive bidding requirements on public entities within its purview when the Legislature determines it is in the public interest to do so.").

style gaming would be limited to historical Indian lands. *See* AOB at 22-23. Granting the Governor the power to concur would allow him to authorize gaming beyond such lands. Thus, arguments by proponents cannot support a concurrence power.

Third, California's "fundamental public policy," embodied in its Constitution, has long been to prohibit casino-style gambling in the state. *Davis*, 21 Cal.4th at 589. Proposition 1A grants a limited exception, but, in light of California's general public policy against gambling, "policy considerations" cannot support the *extension* of casino-style gambling beyond Proposition 1A's stated limitations.

All evidence relevant to voter intent indicates that the voters did not intend to grant the Governor the power to concur.

C. The Governor Lacks Inherent Authority To Concur.

The Governor's argument that he has "inherent authority" to concur is misplaced. As noted, the California Constitution generally prohibits all casino-type gambling statewide. Cal. Const., art. IV, § 19, subd. (e). Through Proposition 1A, the voters adopted a specific exception to that general prohibition. When doing so, they granted the Governor the specific power to compact, but not to concur. "By expressly removing the authority to authorize Nevada- and New-Jersey style casinos from within the broad plenary powers of the Legislature, then placing partial authority to compact for such casinos with the Governor, subject to express ratification from the

Legislature, the California Constitution leaves no doubt that the authority to authorize such casinos cannot exist within the Governor's inherent executive authority." *Stand Up*, 6 Cal.App.5th 686, 719 (Detjen, J., concurring and dissenting); *see also id.* at 718 ("I concur with and join Justice Franson's conclusion that no such [inherent] authority exists."); *id.* at 768 (Franson, J., concurring and dissenting) (rejecting the Governor's assertion of an inherent power to concur: "A harmonious interpretation of the Constitution requires that executive action conflicting with a general constitutional prohibition must be expressly authorized to be valid.").

This Court's precedent supports the views of Justices Franson and Detjen. In *Prof. Engineers in Cal. Gov't v. Schwarzenegger*, this Court rejected the Governor's argument that article V, section 1 of the California Constitution gave him "inherent . . . constitutional authority as the state's chief executive" to unilaterally institute unpaid furloughs on state employees. (2010) 50 Cal.4th 989, 1015-16; *id.* at 1016 ("[T]he Governor's authority to issue the . . . furlough order cannot be supported simply by reference to the broad language of article V, section 1 of the Constitution."). "Under the California Constitution it is the Legislature, rather than the Governor, that generally possesses the ultimate authority to establish or revise the terms and conditions of state employment through legislative enactments," and that any authority that the Governor or executive branch entity may "exercise in this area emanates from the

Legislature's delegation of a portion of its legislative authority to such executive officials or entities through statutory enactments." *Id.* at 1015.

The Governor argues that he traditionally has, and is statutorily authorized to, communicate with the federal government, and other states, on California's behalf. *See* AB at 39-41. However, a fundamental difference exists between mere communication on the one hand, which has no legal effect, and concurrence, which has a significant legal effect. *Stand Up*, 6 Cal.App.5th at 704 (rejecting this argument by the Governor as "not persuasive. The concurrence power involves more than communication or furnishing information."). This argument, moreover, proves too much, because it compels the erroneous conclusion that the Governor's authority is unbounded provided he exercises that authority by communicating. Contracts, for example, are created by mere "communication" — an offer communicated to the offeree and an acceptance communicated to the offeror. *Donovan v. Rrl Corp.* (2001) 26 Cal.4th 261, 271. However, absent some specific legal authority, the Governor cannot take an action that has the legal effect of binding the state to a contract — such as communicating acceptance of an offer — based solely on his statutory and traditional role as California's organ of communication.

Failing to conclude that the Governor has the power to concur does not, as the Governor argues, require him to "stand mute in the face of federal inquiry" (AB at 42), or otherwise interfere with his ability to

"interact with the federal government on matters of policy." *Ibid.* He can still so communicate without the concurrence power, and did so effectively for over a century before the power to concur was even an issue. But, absent Constitutional authority, he cannot take an *action* that has the legal effect of authorizing gaming where the Constitution otherwise prohibits it, just because that action is effected by communication.

The Governor notes that several federal statutes require the Governor's input or concurrence before certain federal actions can occur. AB at 41-42. These statutes are not relevant here. Most importantly, the Governor does not show, and it is not apparent, that any of those federal statutes contemplate the Governor taking an action analytically similar to a concurrence, *i.e.*, to act in an area ordinarily falling under the Legislature's plenary authority and in which he has specifically circumscribed Constitutional authority, and thereby authorize conduct that the Constitution otherwise expressly prohibits. For example, one of the federal statutes the Governor relies on for this point permits the Secretary of the Interior to acquire land to establish an airport in or near a national park, with the consent of the governor of the state in which the land is located. *See* AB at 41 (citing 54 U.S.C. § 101501(c)(2)). Unlike the case with gaming, there is no Constitutional prohibition on such airports, nor, as is the case with gaming, does the Constitution specifically circumscribe the Governor's authority in the realm of airports within national parks.

The Governor's observation that "settled practice or custom" can evidence the existence of an inherent power does not help his case. *See* AB at 38. No settled practice or custom supports the Governor's exercise of a concurrence power.

The Governor's cited authorities on the issue of inherent authority do not support his position. *People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150, 158, holds merely that "if a conflict between the Governor and the Attorney General develops over the faithful execution of the laws of this state, the Governor retains the 'supreme executive power' to determine the public interest; the Attorney General may act only 'subject to the powers' of the Governor." The inherent power recognized in *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45 was the judiciary's long-recognized inherent power to determine days and hours of courts' operation. *In re Attorney Discipline System* (1998) 19 Cal.4th 582, 592, recognized that "the power to admit and to discipline attorneys . . . has long been recognized to be among the inherent powers of the article VI courts." Those cases have no bearing here.

The Governor asserts that his exercise of the concurrence power would be informed and limited by state law and policy. AB at 43-44. However, the existence of limiting principles that may bind the Governor's exercise of a particular power does not indicate that the power, in fact, exists in the first instance.

Finally, the Governor notes that the Legislature or the people, via initiative, could have, but did not, prohibit his concurrence. However, it is not enough for the Governor to point to the fact that no law prohibits his concurrence. He must instead show some statutory or constitutional basis for it. He hasn't. For these reasons, the Governor lacked the inherent power to concur here.

D. The Governor Lacks Power To Negotiate Or Execute A Compact For Gaming On Non-Indian Lands.

As noted in the Opening Brief, the Governor's compacting power does not extend to lands that were not Indian lands when the compact was negotiated and executed. AOB at 33-35. Thus, even if the power to compact implied the power to concur, that would not save the Governor's concurrence at the Yuba site, since the Governor compacted for that site before the site became Indian lands. *Ibid.*

The Governor argues that UAIC sought review in this Court only regarding the Governor's claimed power to concur, and thus cannot now challenge the Governor's compacting power. AB at 34 n. 11. However, UAIC's argument regarding the Governor's compacting power is part of, and not in addition to, its argument that the Governor lacks the concurrence power. UAIC argues that, since he lacked the power to compact when he did for gaming on the Yuba site, the Governor could not have had the implied power to concur with regard to that site. *See* AOB at 33-35; *see*

also Stand Up, 6 Cal.App.5th at 710 (Detjen, J., concurring and dissenting) ("even if the power to concur was necessary to or implied within the authority to compact, the Governor was not properly executing the authority to compact"). Thus, by challenging the Governor's compacting power in this case, UAIC raises the central issue in its petition for review — the Governor's power to concur.

The Governor's responsive arguments on the merits are flawed.

1. The Governor Cannot Negotiate and Execute a Compact Before Lands Are Taken Into Trust.

As for the merits of the argument, as the Opening Brief notes, article IV, section 19's text — specifically the prepositional phrase "on Indian lands in California" — modifies the nouns "operation" and "conduct," not "compacts." AOB at 34. That means that this section creates a conditional power, which exists only upon satisfying the condition needed to bring the right to act into existence — that the land at issue be "Indian lands." *See id.*; *see also Stand Up*, 6 Cal.App.5th at 710. Section 19's overall structure, Proposition 1A's broader social context, and the practical problems that would arise from a different interpretation, also indicate that the Governor's compacting power extends only to lands that are Indian lands when the compact is executed. *See* AOB at 34-35.

The Governor responds only to the textual point, arguing that the text itself creates no "temporal restriction" on the Governor's compacting

power. AB at 34-35. Not only does this ignore the other arguments that refute the Governor's interpretation, the Governor's textual argument misses the mark. "On Indian lands" is not a temporal restriction, but instead a conditional one. *See Stand Up*, 6 Cal.App.5th at 713 (Detjen, J., concurring and dissenting) ("The disputed limitation on the Governor's authority to act is not temporal but conditional.") Section 19 creates one power — the power to compact — which may be exercised only when the articulated conditions for exercising it exist, namely, that the land that is the subject of the negotiation be "Indian lands." The lands at issue in this case were not Indian lands when the Governor negotiated and executed the compact, and thus the Governor acted without constitutional authority.

Moreover, as the Opening Brief notes, the Governor's interpretation would render the phrase "on Indian lands in California" superfluous, thus violating a key rule of statutory construction. *See* AOB at 34; *see also Shoemaker v. Myers* (1990) 52 Cal.3d 1, 22 (courts should not interpret "statutory provisions so as to render them superfluous"). The Governor responds that this language was meant only to "enshrine[]" in California's Constitution a limitation already present in federal law (AB at 35 n. 13), but that is no answer. Under the Governor's reading, the phrase "on Indian lands in California" could be stricken, and not change section 19's meaning. Thus, that reading would render statutory language superfluous, and should therefore be rejected.

2. UAIC's 1999 Compact Is Irrelevant Here.

The Governor also observes that the Governor negotiated and executed a compact with UAIC in 1999 for gaming on land that was not yet Indian land. AB at 35-36. However, his observation fails to undercut UAIC's argument that California's public policy is directed at compacting for pre-1988 land and not to subsequently-acquired land. In fact, UAIC was brought into the gaming negotiations as a tribe "restored to federal recognition" under the 1994 Auburn Indian Restoration Act, Pub. L. 103–434, title II, §202, Oct. 31, 1994, 108 Stat. 4533. The entire point of the special congressional act was to restore all rights and privileges of the tribe and put it in its rightful position from before it was terminated. "Congress has expressly repudiated the policy of terminating recognized Indian tribes, and has actively sought to restore recognition to tribes that previously have been terminated." *Stand Up for California! v. U.S. Dept. of the Interior* (D.D.C. 2016) 204 F. Supp. 3d 212, 294 (citing Federally Recognized Indian Tribe List Act of 1994, Pub. L. 103-454, § 103(5), 108 Stat. 4791 (Nov. 2, 1994). In other words, the UAIC was returned to its previous status and given the same rights as before, equally with other California tribes, including those never terminated. It is for this reason that restoration of land to tribes restored to federal recognition is not subject to the concurrence requirement. "Indeed, the exceptions in IGRA § 20(b)(1)(B) serve purposes of their own, ensuring that tribes lacking reservations when

IGRA was enacted are not disadvantaged relative to more established ones." *City of Roseville v. Norton* (D.C. Cir. 2003) 348 F.3d 1020, 1030. To meet the "equalization" purpose of the exception, any land restored to the tribe puts the tribe in its original rightful position with the tribes that were not the subject of the termination acts. *Ibid.*

Under the restoration act, the use of UAIC's restored land for gaming is on an equal footing as land of established tribes. It thus does not implicate the concurrence requirement and does not implicate the public policy of the state to negotiate for pre-1988 lands. This contrasts wholly with the Enterprise Rancheria's acquisition of off-reservation land — removed and distant from the Enterprise's existing reservation land — for gaming. Such land can only be used for class II or class III gaming with a gubernatorial concurrence, one that is not provided for in the California Constitution. At issue here is the lifting of the gaming prohibition on Enterprise's off-reservation land; the Governor's focus on the Auburn Rancheria is misplaced.

E. Federal Law Does Not Grant The Governor the Power To Concur.

The Governor's argument that federal law grants him the power to concur (AB at 26-27) is flawed. Nothing in IGRA purports to grant any governor power under state law. IGRA instead leaves it to states to decide whether, when, and how a governor may concur. "If the Governor concurs,

or refuses to concur, it is as a State executive, under the authority of state law." *Confederated Tribes of Siletz Indians of Oregon v. United States* (9th Cir. 1997) 110 F.3d 688, 697; *see also ibid.* ("The concurrence (or lack thereof) is given effect under federal law, but the authority to act is provided by state law."); *id.* at 698 ("when the Governor responds to the Secretary's request for a concurrence, the Governor acts under state law, as a state executive, pursuant to state interests"). Not only does IGRA not purport to create any powers under state law, any federal attempt to create a state law concurrence power would almost certainly run afoul of the 10th Amendment of the U.S. Constitution.

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

The Governor argues that his concurrence did not violate the separation of powers, because (1) concurring is an executive, not legislative, act, and (2) his concurrence did not defeat or impair any core functions of the Legislature. AB at 45-54. However, that would not change the outcome here, since he lacked authority to concur altogether. *Stand Up*, 6 Cal.App.5th at 701 ("The Governor's action is invalid because there is a lack of authority for it in the first place, not because the action infringes on the Legislature's domain, so there is no need to address this contention.").

In any event, the Governor is wrong on both counts.

A. The Power to Concur Is Legislative.

Before addressing the specifics of the Governor's argument on this issue, UAIC notes a key flaw in the framework of that argument. As UAIC's opening brief points out, many factors, taken together, show that concurring is a legislative act. *See generally* AOB at 27-29. Contrary to logic, the Governor's opposition treats each of these factors as if each must alone establish the legislative nature of concurring, and if the Governor can explain away any one of them, he has shown that concurring is an executive function. *See, e.g.*, AB at 48-49. That is not so. *See Stand Up*, 6 Cal.App.5th at 719 (Detjen, J., concurring and dissenting) (examining several factors collectively to conclude that the power to concur is legislative).

The key reasons why concurring is legislative are (1) gaming is placed in article IV, the article of the Constitution covering legislative powers, (2) section 19 of article IV is focused on the Legislature's oversight of gaming policy, (3) section 19 provides the general prohibition on the Legislature's power to permit gambling, (3) specific grants of power are given to the Legislature to permit certain types of gambling in that section, (4) and that section includes a limited grant of compacting authority to the Governor, subject again to legislative ratification. *See* AOB at 27; *see also Stand Up*, 6 Cal.App.5th at 719 (Detjen, J., concurring and dissenting) (these factors are "confirmation that the underlying

authority to concur in the Secretary's determination to authorize Nevada- or New Jersey-style casinos on newly acquired lands is *inherently and wholly legislative*.") (emphasis added); *see also id.* at 721 ("California has determined . . . the ability to authorize Nevada- and New Jersey-style casinos is a legislative function").

Of these, the Governor responds only to the first, and asserts that UAIC "identifies no authority supporting the view that the article of the California Constitution in which a particular subject sits" determines whether the power described therein are legislative. AB at 50-51. Not only does the Governor ignore the other points, but this Court has found that "it is well established that chapter and section headings [of an act] may properly be considered in determining legislative intent, and are entitled to considerable weight." *People v. Hull* (1991) 1 Cal.4th 266, 272 (internal citations and quotations omitted). Thus, the fact that article IV is entitled "Legislative" strongly indicates that the powers listed therein are legislative powers.

The Governor's attempts to address some of UAIC's other arguments are flawed. The Governor argues that the fact that out-of-state cases uniformly treat the power over gaming as legislative does not necessarily mean that any action relating to gaming is legislative. AB at 50. But UAIC does not contend that it does, but instead asserts that these cases are further evidence (in addition to the factors the Governor ignores)

that control over gaming is legislative.[2]

The Governor takes issue with UAIC's observation that gaming implicates policy issues, which are traditionally the Legislature's province (AOB at 27), by arguing first, that the Secretary, not the Governor, decides whether gaming can occur. AB at 51. That is not so. Under IGRA, both the Secretary *and* the Governor must act for class II or III gaming to occur on off-reservation lands in California. *See* AOB at 8-9; *cf. Stand Up*, 6 Cal.App.5th at 718-719.

On this issue, the Governor also argues that many legitimate executive acts have some policy implications. AB at 49-50. However, here, the concurrence decision has a raft of policy implications, into areas that courts and other authorities have determined are traditionally in the legislative domain, such as (1) whether to participate in a federal program, (2) land use, and (3) tax policy, not to mention gambling. *See* AOB at 31-32. The Governor argues that these policy decisions do not have "broad" effects, but would instead be limited to the facts here. But the breadth of the impact of a decision is not what determines whether it is legislative, the nature of the decision does. *See Mira Dev. Corp. v. City of San Diego*

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[2] UAIC's Opening Brief cited to, among other cases, *Taxpayers of Mich. Against Casinos v. State,* 478 Mich. 99 (2007). However, UAIC failed to state that the language the brief quoted from that decision came from Justice Markman's dissent, not the majority opinion. UAIC greatly apologizes for the oversight.

(1988) 205 Cal.App.3d 1201, 1218 ("A zoning decision . . . is legislative in nature even if made in the context of specific, relatively small parcels of private property"); *see also Arnel Dev. Co. v. Costa Mesa* (1980) 28 Cal.3d 511, 516 (authorities holding that zoning is legislative draw "no distinctions based on the size of the area or the number of owners"); *see also* AOB at 31-32.

As for the Attorney General opinions uniformly holding that the Legislature has "exclusive power," not only "to determine whether . . . the state shall participate" in a federal program like IGRA, but also "the manner in which the state shall participate" (*see* AOB at 31), the Governor argues, first, that those cases do not involve inquiries from the federal government. AB at 42-43 n. 22. But nothing in those opinions, or common sense, suggest that fact was or could be relevant to the Attorney General's decisions. On this point, the Governor also argues that the state has already "decided to participate" in IGRA. *Ibid.* However, this ignores that it is up to the Legislature to determine "the manner in which the state shall participate" in a federal program. 65 Ops.Cal.Atty.Gen. 467, 469 (1982) ("the decision of the State of California to participate in a federal program is essentially legislative and the Legislature has *the exclusive power to determine whether, the manner in which*, and the conditions under which the state shall participate") (emphasis added). The Legislature did not decide to participate in IGRA by concurring. The Governor decided that

unilaterally.

The Governor cites *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States* (7th Cir. 2004) 367 F.3d 650, for the proposition that concurring is more akin to an executive function. But he misreads that case, and its implications. To begin with, *Lac Courte Oreilles* can have no bearing on whether, under California's very specific Constitutional structure on gaming, the decision to concur is legislative. Also, the question in *Lac Courte* was whether IGRA's concurrence provision violated federalism principles because it involved the federal government compelling a governor to create state public policy, an act reserved by the state constitution to the state legislature. The answer given by the Seventh Circuit was that there was no such violation of federalism principles because, under the reasoning of *California v. Cabazon Band of Mission Indians* (1987) 480 U.S. 202, the state already had a policy regarding Indian casinos, so the governor did not create a new policy by concurring or declining to concur. This is wrong for many reasons. First, *Lac Courte Oreilles*' apprehension of California's policy was repudiated in *Rumsey Indian Rancheria Of Wintun Indians v. Wilson* (9th Cir. 1995) 64 F.3d 1250. Second, it resolved the federal question under federal law; it does not mean that, here, the Governor has authority to concur under California law.

The Governor's other cited cases for the proposition that his

concurrence was not an exercise of legislative power miss the mark. *Worthington v. City Council of Rohnert Park* (2005) 130 Cal.App.4th 1132, 1140-1141, held that "The power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely pursues a plan already adopted by the legislative body itself, or some power superior to it." Here, the concurrence was not pursuant to a "plan already adopted by the legislative body itself, or some power superior to it." Neither the Legislature nor the people have spoken to, much less decided to adopt, a plan to permit the Governor to concur.

City of San Diego v. Dunkl (2001) 86 Cal.App.4th 384, 400, held that "Acts which are to be deemed as acts of administration, and classed among those governmental powers properly assigned to the executive department, are those which are necessary to be done to carry out legislative policies and purposes already declared by the legislative body, or such as are devolved upon it by the organic law of its existence." Again, the Legislature has developed no policy favoring concurrences.

Concurrence is an exercise of legislative power. For that reason alone, the Governor's concurrence was invalid here. *Stand Up*, 6 Cal.App.5th at 720 (Detjen, J., concurring and dissenting) ("the Governor may not exercise a legislative power without express authority from the Legislature") (quoting *United Auburn Indian Community of Auburn Rancheria v. Brown* (2016) 4 Cal.App.5th 36, 47).

B. By Exercising Legislative Power Beyond His Authority, The Governor Violated the Separation of Powers.

When the Governor exercises legislative power beyond his authority, he violates the separation of powers. *See Lukens v. Nye* (1909) 156 Cal. 498, 501 ("As an executive officer, [the Governor] is forbidden to exercise any legislative power or function except as in the constitution expressly provided."); *Harbor v. Deukmejian* (1987) 43 Cal.3d 1078, 1084 (the Governor "may exercise legislative power only in the manner expressly authorized by the Constitution."). Since, here, the Constitution expressly specified the manner in which the Governor could act in the area of gaming, his acting beyond that specific authority violated the separation of powers.

The Governor's authorities on this point all miss the mark. None involved a situation, like that here, where one branch exercised the powers of the other branch, and, in so doing, went beyond a specific Constitutional grant of authority.[3]

* * *

The Governor's concurrence was an exercise of legislative power,

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[3] In *Davis v. Municipal Court* (1988) 46 Cal.3d 64, this Court rejected the contention that a certain aspect of a local diversion program violated the separation of powers doctrine. In *In re Rosenkrantz* (2002) 29 Cal.4th 616, 667, this Court held that judicial review of the Governor's parole decisions under the 'some evidence' standard does not violate the separation of powers doctrine.

contrary to the gaming and compacting restrictions set out in the California Constitution. The concurrence is unconstitutional and must be vacated.

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Dated: August 16, 2017

MORGAN, LEWIS & BOCKIUS LLP

By: _____

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UNITED AUBURN INDIAN
COMMUNITY OF
THE AUBURN RANCHERIA

CERTIFICATION OF COMPLIANCE

Pursuant to Rule 8.204(c)(1), California Rules of Court, the undersigned herby certifies that the Reply Brief of Appellant United Auburn Indian Community of the Auburn Rancheria contains 8,329 words, excluding tables and this certificate, according to Microsoft Word 2010, the computer program used to produce this brief.

Dated: August 16, 2017

MORGAN, LEWIS & BOCKIUS LLP

By: _____

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Attorneys for Appellant
UNITED AUBURN INDIAN
COMMUNITY OF
THE AUBURN RANCHERIA

CERTIFICATE OF SERVICE

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

On August 16, 2017, I caused the following document to be served:

APPELLANT'S REPLY BRIEF

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

Timothy M. Muscat
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California Court of Appeal
Third Appellate District
914 Capitol Mall
Sacramento, CA 95814

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

I declare under penalty of perjury, under the laws of the United States of America and the State of California, that the above is true and correct. Executed on August 16, 2017, at San Francisco, California.

Shirlyn Kim

CERTIFICATE OF SERVICE

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

On August 17, 2017, I caused the following document to be served:

APPELLANT'S REPLY BRIEF

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

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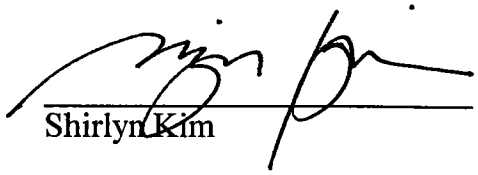
I declare under penalty of perjury, under the laws of the United States of America and the State of California, that the above is true and correct. Executed on August 17, 2017, at San Francisco, California.



Shirlyn Kim