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

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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ISSUES PRESENTED

This Court granted review of the following issue, as framed in appellant's petition for review: "Under California Constitution Article III § 3 (separation of powers), may the Governor, without legislative authorization or ratification, concur in the Secretary's determination, and thereby authorize off-reservation gaming?"

INTRODUCTION

The California Constitution authorizes the Governor to negotiate and conclude compacts for casino-style gaming "by federally recognized Indian tribes on Indian lands in California in accordance with federal law." Federal statutes allow the Secretary of the Interior to acquire lands and hold them in trust for the benefit of Indian tribes. Casino-style gaming on such newly acquired Indian lands is allowed by federal law in a number of circumstances, including if the Secretary determines that it would be in the best interest of the tribe and not detrimental to the surrounding community, and the governor of the affected State concurs in that determination.

In this case, Governor Brown negotiated and concluded a compact with the Enterprise Rancheria of Maidu Indians of California (the Enterprise Tribe) for casino-style gaming on a parcel of land in Yuba County. He concurred in the Secretary's interest/detriment determination regarding that land. A competing tribe then filed suit, claiming that the Governor's concurrence violated the separation of powers doctrine of the California Constitution.

The lower courts properly rejected that claim. The Constitution and the Government Code grant the Governor specific authority in the area of Indian gaming, and that authority includes the power to concur, in accordance with federal law, under the circumstances presented here. The Governor also has general authority to interact with the federal government and to communicate his or her policy views in response to inquiries from

federal officials. That is precisely what Governor Brown did here. And the Governor's exercise of this authority did not offend separation of powers principles, because it did not intrude on the Legislature's core functions in any way. The Court of Appeal's judgment should be affirmed.

LEGAL BACKGROUND

A. Federal Law Regarding Indian Gaming and Acquisition of New Indian Lands

This case involves the intersection of two federal statutes: the Indian Reorganization Act (IRA), which governs the acquisition of new Indian lands by the federal government, and the Indian Gaming Regulatory Act (IGRA), which regulates gaming activities by tribes on Indian lands.

IRA provides the United States Secretary of the Interior with discretion to take property into trust "for the purpose of providing land for Indians." (25 U.S.C. § 5108.) The Secretary may take land into trust when he or she "determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing." (25 C.F.R. § 151.3(a)(3).) The Secretary is not required to obtain the consent or approval of the State in which a parcel of land is located before taking the land into trust. (See *Carcieri v. Kempthorne* (1st Cir. 2007) 497 F.3d 15, 20, 39-40 (*Carcieri*), revd. on other grounds *sub nom. Carcieri v. Salazar* (2009) 555 U.S. 379.) After the land is taken into trust, primary jurisdiction over the land "rests with the federal government and the Indian tribe inhabiting it, not with the state." (*Id.* at p. 21.)

Congress enacted IGRA in 1988 to establish a regulatory structure for Indian gaming, including by specifying the circumstances under which casino-style gaming may occur on lands that have been taken into trust by the Secretary for the benefit of an Indian tribe. (See 18 U.S.C. §§ 1166-1168; 25 U.S.C. § 2701.) Before then, gaming on Indian lands was not subject to federal regulation, and the ability of States to regulate such

gaming was limited. (See *California v. Cabazon Band of Mission Indians* (1987) 480 U.S. 202, 210-214.) IGRA is "an example of 'cooperative federalism' in that it seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme." (*Artichoke Joe's v. Norton* (E.D. Cal. 2002) 216 F.Supp.2d 1084, 1092.)

As part of IGRA's regulatory balance, the statute divides Indian gaming into three "classes" of gaming. Federally recognized Indian tribes may conduct casino-style gaming, referred to as "class III" gaming, only in "a State that permits such gaming for any purpose by any person, organization, or entity . . . ." (25 U.S.C. § 2710(d)(1)(B); see *id.*, § 2703(6)-(8) [defining classes of gaming].)[1] If a tribe wishes to engage in class III gaming in a State that permits it, the tribe must "request the State . . . to enter into negotiations for the purpose of entering into a Tribal-State compact," and "the State shall negotiate with the Indian tribe in good faith to enter into such a compact." (*Id.*, § 2710(d)(3)(A).) If a State refuses to enter negotiations or to negotiate in good faith, the tribe may file suit in federal court. (*Id.*, § 2710(d)(7).) In appropriate circumstances, where the tribe and State do not reach agreement, the Secretary has the power to "prescribe . . . procedures" that will function in place of a duly negotiated compact. (*Ibid.*)

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[1] "Class I" gaming means traditional forms of tribal gaming and social games for minimal prizes. (25 U.S.C. § 2703(6).) "Class II" gaming includes bingo games meeting certain criteria and some card games. (*Id.*, § 2703(7).) "Class III" gaming is defined to include all forms of gaming that are not in class I or class II. (*Id.*, § 2703(8).)

IGRA generally prohibits class III (and class II) gaming on Indian lands acquired by the Secretary in trust for the benefit of an Indian tribe after 1988. (25 U.S.C. § 2719(a) [prohibition extends to any "gaming regulated by this chapter"]; *id.*, § 2710 [regulating class II and class III gaming].) That general prohibition is subject to a number of exceptions.[2] The exception at issue in this case is described in 25 U.S.C. § 2719(b)(1)(A). It allows gaming on newly acquired Indian lands if the Secretary—after consulting with local officials and nearby tribes—determines that a gaming establishment on those lands "would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community." (*Id.*; see also 25 C.F.R. §§ 292.19-292.21.)[3] This exception is only available "if the Governor of the State in which the gaming activity is to be conducted concurs in" the Secretary's interest/detriment determination. (25 U.S.C. § 2719(b)(1)(A).)

To satisfy that condition, the Secretary sends to the Governor a written notification of any such determination, along with the findings of fact supporting the determination, a copy of the entire application record, and a request for the governor's concurrence. (See 25 C.F.R. § 292.22.) The governor may then concur, not concur, or take no action at all in response to the Secretary's request. A governor's concurrence in the Secretary's determination is merely "one precondition to the Secretary of

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[2] The exceptions include, for example, gaming on: lands that were contiguous to the boundaries of the reservation of a tribe on October 17, 1988 (25 U.S.C. § 2719(a)(1)); lands of a tribe that had no reservation on that date, which are located within the tribe's last recognized reservation (*id.*, § 2719(a)(2)(B)); lands taken into trust as part of a "settlement of a land" claim (*id.*, § 2719(b)(1)(B)(i)); and "restored" lands for a tribe that has been restored to federal recognition (*id.*, § 2719(b)(1)(B)(iii)).

[3] That determination is often referred to as a "two-part" determination.

the Interior's authority . . . to permit gaming on after-acquired trust land." (*Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States* (7th Cir. 2004) 367 F.3d 650, 661 (*Lac Courte*).) Even when a governor concurs, the Secretary retains exclusive authority over whether to take the land into trust. (See 25 C.F.R. §§ 151.1-151.15.)

B. California Law and Policy on Casino-Style Gaming

Before Congress adopted IGRA, Indian tribes were already operating gambling establishments in California, leading to legal disputes between tribes and state officials regarding violations of California's gambling laws. (See *Flynt v. Cal. Gambling Control Com.* (2002) 104 Cal.App.4th 1125, 1132.) Even after IGRA's adoption, tribes and state officials continued to dispute what types of gambling were proper subjects for class III compact negotiations under California law. (See *Rumsey Indian Rancheria of Wintun Indians v. Wilson* (9th Cir. 1994) 64 F.3d 1250, 1256-1260, *amended by* 99 F.3d 321.)

In 1998, "proponents of tribal gaming sought voter approval of an initiative designed to facilitate tribal-state compacts." (*Flynt*, *supra*, 104 Cal.App.4th at p. 1136.) That statutory initiative, approved by the voters, attempted to require state officials to enter into model tribal-state class III gaming compacts that allowed slot machines and banked games. (*Ibid.*) In *Hotel Employees and Restaurant Employees International Union v. Davis* (1999) 21 Cal.4th 585, 612-613 (*Hotel Employees*), this Court held that the statutory initiative was unconstitutional because it was inconsistent with a 1984 amendment to the state constitution banning casino-type gaming in California. That constitutional provision directs that "[t]he Legislature has no power to authorize, and shall prohibit casinos of the type currently operating in Nevada and New Jersey." (Cal. Const., art. IV, § 19, subd. (e).)

After this Court's ruling in *Hotel Employees*, the voters adopted Proposition 1A in 2000. Proposition 1A changed the California Constitution to authorize "members of federally recognized Indian tribes to operate slot machines, lottery games, and banked and percentage card games only on tribal lands and only under the terms of duly negotiated and ratified compacts." (*Flynt, supra*, 104 Cal.App.4th at p. 1130.) Specifically, it authorized the Governor

> to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for 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. Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts.

(Cal. Const., art. IV, § 19, subd. (f).)

The Legislature has adopted statutes codifying this grant of authority to the Governor, which direct that:

> [t]he Governor is the designated state officer responsible for negotiating and executing, on behalf of the state, tribal-state gaming compacts with federally recognized Indian tribes in the State of California pursuant to the federal Indian Gaming Regulatory Act of 1988 ([citation]) for the purpose of authorizing class III gaming, as defined in that act, on Indian lands.

(Gov. Code, § 12012.5, subd. (d); see also *id.*, § 12012.25, subd. (d).)

STATEMENT OF THE CASE

A. Factual Background

In 2002, the Enterprise Tribe requested that the Secretary of the Interior acquire land in Yuba County (the Yuba site) in trust so that the

Tribe could build a hotel and casino featuring class III gaming. (CT 14.)[4] After complying with federal environmental review laws (see CT 15, 17), the Secretary (through the Assistant Secretary for Indian Affairs) determined in 2011 that the proposed gaming establishment would be in the best interest of the Enterprise Tribe and would not be detrimental to the surrounding community. (CT 18; see 25 U.S.C. § 2719(b)(1)(A).) The Secretary then asked the Governor to concur in that determination. (CT 18.)

Governor Brown concurred by letter dated August 30, 2012. (CT 160.) The Governor reasoned that class III gaming at the Yuba site would "directly benefit" a "large tribal population" of "more than 800 native Californians who face serious economic hardship." (*Ibid.*) It would also provide indirect benefits to other Indian tribes by increasing contributions to two funds established by state law that provide financial distributions to tribes. (*Ibid.*; see Gov. Code, § 12012.75 [creating the Indian Gaming Revenue Sharing Trust Fund]; *id.*, § 12012.95 [creating the Tribal Nation Grant Fund].) The Governor noted that the facility would "create jobs and generate revenue for Yuba County," which had "a 16% unemployment rate" at the time. (CT 160.) Further, the facility would be outside any major metropolitan area, on land with a "significant historical connection" to the Tribe. (*Ibid.*)

The Governor's concurrence was informed by his experience negotiating a provisional class III gaming compact between the State and the Enterprise Tribe for the Yuba site, and his knowledge of the terms and conditions of that compact. (See generally *Estom Yumeka Maidu Tribe of the Enterprise Rancheria of Cal. v. California* (E.D. Cal. 2016) 163

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[4] Citations to the record are to volume I of the Clerk's Transcript on Appeal (CT).

F.Supp.3d 769, 773-774 (*Enterprise Rancheria*).) The compact could take effect only if the Secretary took the lands into trust, and if the Legislature ratified the compact. (See generally Cal. Const., art. IV, § 19, subd. (f).) On the same day that he sent the concurrence letter, Governor Brown announced and signed the compact with the Enterprise Tribe. (CT 160.)[5]

On November 21, 2012, the Department of the Interior issued a record of its decision to approve a fee-to-trust application for the Yuba site. (See CT 46-47, citing 25 C.F.R. Part 151.) A grant deed was filed, and the Secretary accepted the site into trust for the Enterprise Tribe on May 15, 2013. (CT 52-54.)

B. Procedural Background

United Auburn owns and operates the Thunder Valley Resort and Casino, located approximately 20 miles from the Yuba site. (CT 7.) United Auburn filed a petition for a writ of mandate and complaint for injunctive relief, claiming that the Governor's actions violated California's separation of powers doctrine and seeking to set aside his concurrence. (CT 22-25.) The superior court sustained the Governor's demurrer and entered judgment in the Governor's favor. (CT 185-206.)

The Court of Appeal unanimously affirmed the judgment of the superior court. It rejected United Auburn's argument that the Governor's concurrence was a legislative act (Opn. pp. 7-19), observing that the

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[5] Ultimately, the Legislature did not ratify the compact and it expired by its own terms in July 2014. (See *Enterprise Rancheria*, *supra*, 163 F.Supp.3d at p. 771.) A federal court later held that the Legislature's delay supported a finding that the State had failed to negotiate in good faith, and ordered the parties to attempt to conclude a compact. (See *id.* at pp. 785-787; 25 U.S.C. § 2710(d)(7)(B)(iii)-(vii).) Under IGRA, the parties have an opportunity to reach a negotiated compact; failing that, the Secretary has the power to prescribe gaming procedures that function in place of a negotiated compact. (See 25 U.S.C. § 2710(d)(7).)

Legislature had already "made the decision to participate in IGRA" (*id.* at p. 14). Consequently, the "Governor did not create state policy by performing his role in the federal program." (*Ibid.*) The Governor's concurrence was instead "an executive function" under California law because it implemented California's existing gaming policy. (*Id.* at pp. 18-19; see also *id.* at p. 19, fn. 3 [Governor's concurrence "was executive, rather than strictly legislative"].)

The Court of Appeal also rejected United Auburn's argument that the Governor exceeded his authority under section 19, subdivision (f) of the California Constitution by entering into compact negotiations concerning lands that had not yet been taken into trust. (Opn. p. 20.) The court reasoned that the Constitution "does not specify when the negotiations may occur . . . ." (*Ibid.*) Instead, it requires only that the lands must constitute Indian lands when the class III gaming actually occurs. (*Ibid.*)[6]

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[6] In a separate case in which this Court has also granted review, the Fifth District held that the Governor's concurrence regarding a different tribe and parcel was invalid. (See *Stand Up for California! v. State of California* (2016) 6 Cal.App.5th 686 (*Stand Up*).) The three Justices in *Stand Up* filed separate opinions advancing divergent theories. In the lead opinion, Justice Smith reasoned that even if the Governor had the implied authority to concur, this power "would not extend to lands as to which there is no state-approved compact, nor any prospect of one, since the point of the implied concurrence power would be to give effect to the state's compacting power." (*Id.* at p. 698.) Justice Detjen reasoned that the Governor lacked authority to compact on the facts in *Stand Up*, because the lands at issue were not yet held in trust by the United States for the benefit of the tribe at the time of the compact negotiations. (See *id.* at p. 712 (conc. & dis. opn. of Detjen, J.).) Justice Franson reasoned that the Governor never has authority to concur because Proposition 1A did not contemplate or authorize the acquisition of new lands for gaming. (See *id.* at pp. 722-723 (conc. & dis. opn. of Franson, J.).)

SUMMARY OF ARGUMENT

Under this Court's precedents, there are two questions the Court should address in resolving United Auburn's challenge. First, did the Governor have the authority to concur in the Secretary's determination regarding the Yuba site? Second, did that concurrence defeat or materially impair a core function of the Legislative Branch?

Governor Brown had both specific and general authority to concur as a matter of state law. The Constitution and the Government Code authorize the Governor to negotiate compacts "in accordance with federal law" for gaming "pursuant to" IGRA. (Cal. Const., art. IV, § 19, subd. (f); Gov. Code, §§ 12012.5, subd. (d), 12012.25, subd. (d).) IGRA authorizes gaming to be conducted on lands like the Yuba site, which are acquired by the Secretary after 1988 and held in trust for the benefit of an Indian tribe, provided that the Governor of the affected State concurs in the Secretary's interest/detriment determination regarding those lands. (See 25 U.S.C. § 2719(b)(1)(A).) By explicitly granting authority to the Governor to negotiate and conclude compacts for any type of gaming that is in accordance with IGRA, the Constitution and the Government Code also confer authority on the Governor to issue a concurrence in such a determination. The Governor's power to compact for class III gaming in accordance with federal law presupposes that the Governor possesses the power to concur in a determination by the Secretary under section 2719(b)(1)(A) regarding lands like the Yuba site—because no class III gaming can occur on that land without a concurrence. A contrary interpretation would render the compacting power a nullity with respect to class III gaming on Indian lands of the sort at issue in this case. Neither the text nor the history of the Constitution or Government Code support limiting the Governor's authority in that way.

In addition, as the head of the executive branch, the Governor has general authority to interact with, and to respond to inquiries from, the federal government. The Legislature has acknowledged that authority, adopting a statute recognizing the Governor as the official organ of communication between the government of this State and the federal government. The Governor's inherent authority includes the power to convey his or her views on particular federal proposals, as informed by state law and policy. The concurrence at issue here is just one example of the Governor's exercise of this general authority. Indeed, this kind of interaction is an everyday occurrence in our system of federalism, and numerous federal statutes direct that the federal government may not take a proposed action until the governor of the affected State "concurs" or "consents." A rule forbidding the Governor from concurring or consenting in such a proposal unless expressly authorized to do so by a state statute or constitutional provision would be contrary to settled practice and unworkable.

Finally, the Governor's concurrence raises no separation of powers concerns, because it did not defeat or materially impair any core function of the Legislature. The concurrence was a "typical" executive act, not a legislative act. (*Lac Courte*, *supra*, 367 F.3d at p. 664.) And it was entirely consistent with existing state law and policy—including the policy of allowing federally recognized Indian tribes to negotiate compacts for casino-style gaming, in accordance with federal law, as a means of becoming economically self-sufficient.

ARGUMENT

I. LEGAL STANDARD: THE GOVERNOR MAY ACT WITHIN HIS SPHERE OF AUTHORITY SO LONG AS HE DOES NOT MATERIALLY IMPAIR THE CORE FUNCTIONS OF ANOTHER BRANCH

The California Constitution provides that the "powers of state government are legislative, executive, and judicial." (Cal. Const., art. III, § 3.) It directs that "[p]ersons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (*Ibid.*) By limiting the ability "of one of the three branches of government to arrogate to itself the core functions of another branch," this separation of powers doctrine prevents "one branch of government from exercising the *complete* power constitutionally vested in another." (*Carmel Valley Fire Protection Dist. v. State* (2001) 25 Cal.4th 287, 297, 298, italics in original.)

Although the constitutional text might be read to suggest a rigid division of authority, this Court has repeatedly recognized that the powers of the three branches overlap. Indeed, "'[f]rom the beginning, each branch has exercised all three kinds of powers.'" (*Davis v. Municipal Court* (1988) 46 Cal.3d 64, 76; see also *People v. Provines* (1868) 34 Cal. 520, 540-542 (conc. opn. of Sawyer, C.J.).) And each branch "'for its own existence must in some degree exercise some of the functions of the others.'" (*Younger v. Superior Court* (1978) 21 Cal.3d 102, 117.) The doctrine therefore "comprehends the existence of common boundaries between the legislative, judicial, and executive zones of power," and it "does not command 'a hermetic sealing off of the three branches of Government from one another.'" (*Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 338; cf. *Parker v. Riley* (1941) 18 Cal.2d 83, 90.)

Because of this inevitable overlap, courts take a "pragmatic approach" to analyzing separation of powers questions. (*Hustedt*, *supra*, 30 Cal.3d. at p. 338; see also *Marine Forests Society v. California Coastal Com.* (2005)

36 Cal.4th 1, 15 [describing "a realistic and practical" approach].) The doctrine does not "prohibit one branch from taking action properly within its sphere," even where that action "has the incidental effect of duplicating a function or procedure delegated to another branch." (*Younger*, *supra*, 21 Cal.3d at p. 117, italics omitted.) This holds true even if the effect on the core functions of another branch is "significant[]." (*Carmel Valley*, *supra*, 25 Cal.4th at p. 298.) Instead, the "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" the other branch's functions (*Marine Forests*, *supra*, at p. 46; cf. *Howard Jarvis Taxpayers Assn. v. Padilla* (2016) 62 Cal.4th 486, 499).

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

The Constitution vests "the supreme executive power of this State" in the Governor. (Cal. Const., art. V, § 1.) That power includes the general authority to "see that the law is faithfully executed." (*Ibid.*) Precedent and experience offer guidance in determining the scope of the supreme executive power conferred by the state Constitution. The Governor's authority obviously includes those specific powers expressly enumerated. (See, e.g., Cal. Const., art. V, § 7 [commander-in-chief of militia].) In addition, like the other branches, the Governor has certain inherent powers that are not expressly listed. (See, e.g., *Spear v. Reeves* (1906) 148 Cal. 501, 504; see also *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 57-58 [judicial]); *Ex parte Collie* (1952) 38 Cal.2d 396, 398 [legislative].) In this case, the Governor had specific authority to concur based on a particular power enumerated in the Constitution, and general

authority to concur flowing from his position as the supreme executive officer.

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

1. The People and the Legislature granted authority to the Governor regarding Indian gaming

After Congress adopted IGRA, California voters amended our Constitution to authorize certain types of gaming "by federally recognized Indian tribes on Indian lands in California in accordance with federal law," and to empower the Governor "to negotiate and conclude compacts" for such gaming, "subject to ratification by the Legislature." (Cal. Const., art. IV, § 19, subd. (f); see generally *Flynt*, *supra*, 104 Cal.App.4th at p. 1137.)[7] Similarly, the Legislature amended the Government Code to provide that "[t]he Governor is the designated state officer responsible for negotiating and executing, on behalf of the state, tribal-state gaming compacts with federally recognized Indian tribes in the State of California pursuant to" IGRA "for the purpose of authorizing class III gaming, as defined in that

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[7] United Auburn frames the Indian gaming provisions of the California Constitution as a narrow exception to "California's law and policy prohibiting gaming within the State." (ABOM 11.) In fact, California "has permitted the operation of gambling establishments for more than 100 years." (Bus. & Prof. Code, § 19801, subd. (b).) The State has authorized and regulated a variety of gaming activities, often in ways that confer substantial authority on the executive branch. For example, the Constitution authorizes the establishment of a California State Lottery. (Cal. Const., art. IV, § 19, subd. (d).) The Legislature created the State Lottery Commission to regulate that lottery. (See Gov. Code, §§ 8880.24 et seq.; see also Cal. Const., art. IV, § 19, subd. (b) [authorizing horse racing]; Bus. & Prof. Code, §§ 19400, 19404, 19440 [creating Horse Racing Board to regulate and enforce]; Bus. & Prof. Code, §§ 19811, 19824 [creating the Gambling Control Commission].)

act, on Indian lands." (Gov. Code, § 12012.5, subd. (d); see *id.*, § 12012.25, subd. (d) [same].)

No one disputes that these provisions confer both constitutional and statutory authority on the Governor in the arena of Indian gaming. They authorize the Governor to take the steps necessary to negotiate, conclude, and execute compacts providing for class III gaming by federally recognized Indian tribes on Indian lands in California, in accordance with the requirements and procedures in IGRA. Since 1999, three different Governors have negotiated compacts for class III gaming with scores of Indian tribes.[8]

The scope of the Governor's authority in this area is informed by federal law, because California has opted to participate in IGRA and to allow the Governor to negotiate and conclude compacts "in accordance with federal law." (Cal. Const., art. IV, § 19, subd. (f).) It is federal law, for example, that defines the entities qualifying as "federally recognized Indian tribes." (*Ibid.*; see 25 U.S.C. § 2703(5).) Federal law also informs the conduct of the negotiations, such as by requiring the State to "negotiate with the Indian tribe in good faith" (25 U.S.C. § 2710(d)(3)(A)), and by setting out provisions that may be included in a negotiated tribal-state compact (*id.*, § 2710(d)(3)(C)).

Most relevant here, federal law informs the Governor's authority by specifying the lands on which proposed class III gaming may be conducted. It limits class III gaming to "Indian lands" (25 U.S.C. § 2710(d)(1)), defined to include "all lands within the limits of any Indian reservation" and lands for which the title is "held in trust by the United States for the

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[8] See generally Ratified Tribal-State Gaming Compacts (New and Amended) <http://www.cgcc.ca.gov/?pageID=compacts> [as of June 20, 2017] ("Database of Ratified Compacts").

benefit of any Indian tribe" (*id.*, § 2703(4)(A), (B)).[9] All Indian lands that were acquired by the Secretary in trust for the benefit of an Indian tribe on or before October 17, 1988 are eligible to host class III gaming, subject to the requirements of IGRA. (See *id.*, § 2719(a).) Certain additional categories of land acquired by the Secretary after 1988 are also eligible to host class III gaming. (See *id.*, § 2719(a)-(b); *ante*, p. 15.) They include lands such as the Yuba site, which have been taken into trust for the benefit of an Indian tribe after 1988, and for which the Secretary has made the interest/detriment determination required by section 2719(b)(1)(A) and the Governor has issued a concurrence in that determination. When the People granted the Governor compacting authority regarding class III gaming on Indian lands "in accordance with federal law" (Cal. Const., art. IV, § 19, subd. (f)), that authority necessarily included gaming authorized through the process established in section 2719(b)(1)(A), which is part of the federal law regulating Indian gaming. The Governor's statutory authority to negotiate and execute gaming compacts "pursuant to" IGRA (Gov. Code, § 12012.5, subd. (d)) likewise includes gaming authorized through that process.

2. The Governor's authority regarding Indian gaming includes the power to concur

The Governor's authority in this area must also include implied power to take the steps needed to "negotiate," "conclude," and "execute" a compact consistent with federal law. This Court has long recognized that the Constitution may confer implied authority on government officials. (See, e.g., *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45,

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[9] "Indian lands" also includes "any lands title to which is . . . held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." (25 U.S.C. § 2703(4)(B).)

57; *ante*, p. 24.) It is also "well settled in this state that governmental officials may exercise such additional powers as are necessary for the due and efficient administration of powers expressly granted by statute, or as *may fairly be implied* from the statute granting the powers." (*Dickey v. Raisin Proration Zone* (1944) 24 Cal.2d 796, 810; see also *Crawford v. Imperial Irrigation Dist.* (1927) 200 Cal. 318, 333-334; 52 Cal.Jur.3d (2010) Public Officers and Employees, § 196, p. 291.)

For example, the Legislature has express authority to enact legislation, which carries with it the "implied power to appoint committees for the purpose of obtaining information concerning proposed legislation." (*Special Assembly Interim Committee on Public Morals of California Legislature v. Southard* (1939) (*Southard*) 13 Cal.2d 497, 503; cf. *Parker*, *supra*, 18 Cal.2d at p. 90.) And when a statute creates a governmental agency for the purpose of accumulating reserves and providing insurance, that agency has implied authority to employ special counsel to protect its rights when it faces pending litigation. (See *State Comp. Insurance Fund v. Riley* (1937) 9 Cal.2d 126, 128, 131.)

Here, in order to negotiate and conclude a compact with a tribe, the Governor must possess certain implied authorities. For example, the Governor and his or her staff must have authority to meet with the affected tribes and other interested parties, to research and collect information about the tribe's gaming proposal, and so forth. If the tribe's proposal is for a gaming facility on land that would be subject to the process in section 2719(b)(1)(A), then the Governor's authority must also include the power to evaluate the Secretary's determination, and—if consistent with state law and policy—to concur in it. That concurrence is a necessary precondition for any type of gaming regulated by IGRA to take place on such lands under section 2719(b)(1)(A), which is one way for Indian tribes to conduct gaming activities "pursuant to the federal Indian Gaming Regulatory Act of

1988" (e.g., Gov. Code, § 12012.5, subd. (d)) and "in accordance with federal law" (Cal. Const., art. IV, § 19, subd. (f)). As the superior court observed below, "[t]he Governor's concurrence was necessary and incidental to compact negotiations, as Class III gaming could not occur on the Yuba Site without the Governor's concurrence, and without a compact." (CT 199.)

United Auburn argues that there is no implied concurrence power because, even without that power, the Governor may still conclude those compacts that do not involve an interest/detriment determination by the Secretary. (See ABOM 20-21.) But the fact that a public official or entity may not need to use an implied power in every event is not evidence that the power does not exist. For example, the Legislature has implied power to "conduct investigations in aid of prospective legislation," which has "been held to carry with it the power in proper cases to require and compel the attendance of witnesses and the production of books and papers." (*In re Battelle* (1929) 207 Cal. 227, 241.) The Legislature may not need to compel the attendance of witnesses or the production of documents in *all* cases in which it is investigating prospective legislation, but that does not mean the power does not exist. No doubt, most Indian gaming compacts can be concluded without a determination by the Secretary under section 2719(b)(1)(A) and a gubernatorial concurrence. (See ABOM 20-21.) When an Indian tribe proposes a casino-style gaming facility on land like the Yuba site, however, the Governor's power to concur will always be necessary for the proposed gaming to commence in accordance with federal law.

United Auburn also contends that authority to concur cannot derive or be implied from the Governor's class III compacting authority because a concurrence "actually triggers class II gaming that is *not* subject to the rules governing Tribal-State compacts." (ABOM 17; see ABOM 20.) But it is

not the Governor who "triggers" such gaming. In IGRA, Congress asserted *federal* authority to regulate class II gaming on "Indian lands." (25 U.S.C. § 2710(a)-(b); see *id.*, § 2702.) The Secretary of the Interior has the ultimate authority to create new "Indian lands" by taking them into trust (see *ante*, p. 13), and Congress has the ultimate authority to determine the circumstances under which gaming may take place on those lands (see, e.g., 25 U.S.C. § 2719(a)-(b)). Under federal law, the "power to execute § 2719(b)(1)(A) is entrusted exclusively to the Secretary of the Interior, as only he or she may lift IGRA's general prohibition of gaming on after-acquired land." (*Lac Courte, supra*, 367 F.3d at p. 661.) The Governor's concurrence is a pre-condition to the Secretary lifting that prohibition, but it is the federal government that triggers the gaming. (See *post*, p. 51.)

In any event, the only question presented here involves the Governor's concurrence in a two-part determination regarding a proposed *class III* gaming facility. (See, e.g., CT 23.) This case does not directly present any question regarding whether the Governor could concur if the Secretary's determination concerned a proposed *class II* gaming facility. And that question is unlikely to arise because, in the State's experience, Indian tribes have not generally requested authorization for class II gaming facilities under section 2719(b)(1)(A).

3. Evidence of voter intent supports this understanding of the Governor's powers

Evidence of voter intent supports the conclusion that the Governor has the power to concur. The clearest indication of voter intent is typically "found in the plain meaning of the constitutional provision." (*Arden Carmichael, Inc. v. County of Sacramento* (2000) 79 Cal.App.4th 1070, 1076, citing *Mosk v. Superior Court* (1979) 25 Cal.3d 474, 495.) Here, in approving Proposition 1A, the voters gave the Governor authority to negotiate and conclude compacts for gaming "in accordance with federal

law," without any stated exceptions. (Cal. Const., art. IV, § 19, subd. (f).) As explained above, the plain meaning of that language sweeps in the various provisions in IGRA that authorize class III gaming on Indian lands acquired after 1988. (See *ante*, pp. 25-29; cf. *Prof. Engineers in Cal. Government v. Kempton* (2007) 40 Cal.4th 1016, 1037 [noting that courts must interpret initiatives in light of the overall statutory scheme].) The constitutional text thus contemplates that our Governor has authority to participate in the process set forth in section 2719(b)(1)(A), and to concur (or not) in the Secretary's determination under that section. (See *ante*, pp. 27-29.) Had the voters intended to limit the Governor's authority in this area and prevent him from participating in that process, they would have said so. But they did not—and "a court is not authorized to insert qualifying provisions not included and may not rewrite the statute to conform to an assumed intention which does not appear from its language." (*People v. One 1940 Ford V-8 Coupe* (1950) 36 Cal.2d 471, 475.)

Although United Auburn contends that extrinsic evidence of voter intent supports its restricted view of the Governor's authority (see ABOM 23), that evidence actually points in the opposite direction. In particular, the ballot arguments for and against Proposition 1A addressed the general issue of whether Indian gaming could take place on newly acquired lands. The opponents of Proposition 1A argued that "[c]asinos won't be limited to remote locations. Indian tribes are already buying up prime property for casinos in our towns and cities." (United Auburn's Request for Judicial Notice (RJN), Ex. A, Voter Information Guide, Argument Against Proposition 1A, p. 7.) That statement alerted voters that, as amended, the Constitution would allow tribes to pursue class III gaming facilities on certain newly acquired Indian lands, as envisioned in IGRA. The proponents of Proposition 1A responded by confirming that "federal law" would define which newly acquired lands could qualify as Indian lands,

eligible for class III gaming. They quoted a former investigator with the National Indian Gaming Commission, who rejected the suggestion that "casinos could be built *anywhere*," explaining to the voters that "Proposition 1A and *federal law* strictly limit Indian gaming to tribal land." (*Id.*, Rebuttal to Argument Against Proposition 1A, p. 7, italics added.) Read together, these arguments signaled that Proposition 1A would authorize the Governor to negotiate gaming compacts for any Indian land on which IGRA permitted class III gaming. That includes newly acquired Indian land for which section 2719(b)(1)(A)—a "federal law"—allows gaming to occur after an interest/detriment determination by the Secretary and a concurrence by the Governor.[10]

Nothing in the analysis prepared by the Legislative Analyst was inconsistent with that view. The Legislative Analyst told the voters that "[g]ambling on Indian lands is regulated by the 1988 federal Indian Gaming Regulatory Act (IGRA)," and that Proposition 1A would permit class III gaming to take place on "Indian land" pursuant to negotiated compacts between the Governor and Indian tribes. (RJN, Ex. A, Analysis by the Legislative Analyst, pp. 4, 5.) Like the arguments made by the proponents of Proposition 1A, this analysis did not suggest that "Indian lands" would be limited to then-existing Indian lands, or would exclude lands acquired under the process outlined in section 2719(b)(1)(A). (See *id.* at p. 5.)

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[10] United Auburn references a statement by the proponents of Proposition 1A asking voters to support the proposition "so we can keep the gaming we have on our reservations." (ABOM 23.) Proposition 1A did allow the Legislature to ratify compacts for class III gaming on then-existing Indian lands. But that does not mean that the voters intended to limit the Governor's compacting authority to those lands.

United Auburn also relies on the "background" of Proposition 1A, noting that "California executed 57 Tribal-State gaming compacts" before Proposition 1A, and contending that "[a]ll were for on-reservation land for which IGRA requires a compact but does not require a concurrence." (ABOM 23, 22.) That is not accurate. The compacts executed in 1999—including United Auburn's—did not restrict gaming to land that was held in trust and eligible for gaming at the time of execution. They provided, instead, that the "Tribe may establish and operate not more than two Gaming Facilities, and only on those Indian lands on which gaming may lawfully be conducted under the Indian Gaming Regulatory Act." (E.g., Tribal-State Compact Between the State of California and the United Auburn Indian Community (Sept. 21, 1999) § 4.2 <http://www.cgcc.ca.gov/documents/compacts/original_compacts/United_Auburn_Compact.pdf> [as of June 22, 2017].) Pursuant to those compacts, several Tribes—including United Auburn—have proposed or built gaming facilities on lands that were not Indian lands in 1999. (See *post*, pp. 35-37.)

Finally, policy considerations provide further support for reading the Constitution to recognize the Governor's authority to concur. As the ballot materials for Proposition 1A noted, casino-style gaming can be important for tribal "self-reliance" and self-determination. (RJN, Ex. A, Argument in Favor of Proposition 1A, p. 6.) And some tribes simply do not possess lands that are appropriate for such gaming. IGRA and IRA establish a careful process through which the federal government can assist those tribes, by taking land into trust for their benefit and allowing class III gaming on that land—provided that the Governor of the affected State concurs with the federal government that this would be a beneficial use of the land. The Governor's authority to issue that kind of concurrence, in appropriate circumstances and in accordance with federal law, advances the policy goals underlying Proposition 1A.

4. The Governor's power to concur is not limited to lands that are already in trust

United Auburn asserts that the Governor lacked the power to concur regarding casino-style gaming on the Yuba site, or even to negotiate a compact for that site, because the site was not yet "Indian lands" at the time of the compact negotiations and the concurrence. (ABOM 19-20, 33-35; see also *Stand Up*, *supra*, 6 Cal.App.5th at pp. 714-715 (conc. & dis. opn. of Detjen, J.).)[11] As the Court of Appeal explained below, however, United Auburn misreads the constitutional text. (See Opn. p. 20.) The Constitution directs that the proposed future gaming activities addressed in compact negotiations and concurrences must be (1) by a "federally recognized Indian tribe," (2) "on Indian lands in California," and (3) "in accordance with federal law." (Cal. Const., art. IV, § 19, subd. (f).) It requires that the lands on which class III gaming is contemplated must constitute "Indian lands," under federal law, at the time gaming occurs. That requirement was satisfied here. Any class III gaming addressed in the compact with the Enterprise Tribe, and in the Secretary's determination regarding the Yuba site, "would occur, and could only occur, if the land became Indian land." (Opn. p. 20.) "Thus, the gaming would be conducted on Indian land, just as the state Constitution provides." (*Ibid.*)[12]

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[11] Although United Auburn initially sought review of a single issue related to the Governor's authority to *concur* (see Pet. 2), it now devotes the second section of its opening brief on the merits to arguing that the "Governor has no power to negotiate a compact for gaming on non-Indian lands." (ABOM 33; see *id.* at pp. 33-35.) That is a distinct issue from the one that was raised in the petition for review, and the Court may decline to reach it on that basis. (See Cal. Rules of Court, rule 8.516(b).) In any event, as explained in the main text, United Auburn's arguments about the Governor's compacting authority are incorrect.

[12] Under 25 U.S.C. § 2710(d)(3)(A), a State "does not have an obligation to negotiate with an Indian tribe until the tribe has Indian lands." (continued...)

United Auburn responds by noting that the "prepositional phrase 'on Indian lands in California' modifies the nouns 'operation' and 'conduct,' not the noun 'compacts.'" (ABOM 34.) From this, United Auburn concludes that subdivision (f) "authorizes compacting only with respect to lands that are Indian lands *at the time of negotiation*." (ABOM 34.) But that conclusion does not follow from its premise: even if "Indian lands" is read to modify "operation" and "conduct," the plain text requires only that the lands on which the proposed gaming will take place must be "Indian lands" when the operation and conduct of gaming activities commence. As the Court of Appeal observed, the "Constitution does not specify when the negotiations may occur, only that whatever gaming is permitted must be conducted on Indian lands." (Opn. p. 20; cf. CT 199 [superior court order].) This Court should decline to impose a temporal restriction that is nowhere expressed in the constitutional text. (Cf. *Kempton*, *supra*, 40 Cal.4th at p. 1037 [a "'court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language'"].)[13]

United Auburn's position on this subject is a surprising one, because it has benefited from the practice of California governors negotiating

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(*Guidiville Band of Pomo Indians v. NGV Gaming, Ltd.* (9th Cir. 2008) 531 F.3d 767, 778 (*Guidiville*), quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Engler* (6th Cir. 2002) 304 F.3d 616, 618.) But nothing in IGRA prevents a State from voluntarily agreeing to enter compact negotiations, as the Governor did here, regarding lands that could become Indian lands in the future.

[13] The Court of Appeal's construction would not render "superfluous" the phrase "'on Indian lands in California.'" (ABOM 34.) That phrase ensures that no compact may authorize gaming on lands that are not "Indian lands" when the gaming takes place. Federal law currently includes the same requirement (see *ibid.*), but the "Indian lands" phrase enshrines this limitation on the Governor's authority as a matter of state constitutional law.

compacts allowing gaming on lands that were not yet "Indian lands" at the time of the negotiations. As noted above, the State executed compacts with United Auburn and dozens of other tribes in 1999 that did not restrict gaming facilities to lands that were held in trust for the tribes at the time of the negotiations. (See *ante*, p. 33.) Indeed, when United Auburn entered its compact with the State in 1999, it was planning to build a casino on a 49.21-acre parcel that was not yet part of the tribe's Indian lands. (See *City of Roseville v. Norton* (D.D.C. 2002) 219 F.Supp.2d 130, 135-136.) United Auburn asked the Secretary of the Interior to take the parcel into trust for the benefit of the tribe so that it could build and operate the casino (*ibid.*), as permitted under IGRA's provision allowing class III gaming on "restored" lands that are acquired by the Secretary after 1988 (see 25 U.S.C. § 2719(b)(1)(B)(iii); see also *ante*, p. 15, fn. 2). As late as July 2002, however, the Secretary still had not taken the parcel into trust. (*City of Roseville*, *supra*, at p. 137.) Having now successfully built and begun to operate a casino on land acquired after its compact negotiations, United Auburn seeks a legal rule that would prohibit other tribes from doing essentially the same thing.

Other California tribes have also proposed or built gaming facilities on lands acquired by the Secretary after 1988—and after their compact negotiations—relying on IGRA's various provisions authorizing gaming on newly acquired lands.[14] The federal government has issued advisory opinions to quite a few California tribes (including the Bear River Band of Rohnerville Rancheria, Table Mountain Rancheria, Elk Valley Rancheria, and Paskenta Band of Nomlaki Indians) concluding that lands acquired

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[14] United Auburn characterizes those exceptions as "rarely occurring" (ABOM 8, fn. 2), but does not acknowledge that it and other California tribes have relied on the exceptions.

after 1988 are (or would be) gaming eligible under IGRA. (See generally Indian Lands Opinions <http://www.nigc.gov/general-counsel/indian-lands-opinions> [as of June 21, 2017].) In the case of Table Mountain Rancheria, which negotiated its compact with the State in 1999, the federal government concluded that 60 acres of land in Fresno County that were not taken into trust until 2007 were gaming eligible because they fell within the "contiguous lands" exception. (See *ibid.*, citing Table Mountain Rancheria Opinion Letter, pp. 1 & 6; Database of Ratified Compacts, *supra.*) The Paskenta Band, which also negotiated its compact in 1999, sought to conduct gaming on lands to be taken into trust under the "restored lands" exception. (See *ibid.*, citing Paskenta Band of Nomlaki Indians Opinion Letter, pp. 1-2, & 4; Database of Ratified Compacts, *supra.*) And the North Fork Rancheria of Mono Indians negotiated its compact for a class III gaming establishment on a parcel that "was not Indian land" at the time of the compact negotiations. (See *Stand Up, supra,* 6 Cal.App.5th at pp. 721-722.)

These examples, and United Auburn's own experience, undermine United Auburn's claim that "California's expressed public policy on Indian gaming . . . prohibits gaming except on pre-1988 reservation lands." (ABOM 30.) In fact, multiple tribes operate, or intend to operate, class III gaming facilities on lands that were acquired after 1988, and the State has negotiated compacts for gaming on specific parcels of land that were not yet Indian land at the time the compacts were concluded. That practice is consistent with the Constitution and the Government Code, which empower the Governor to take the steps necessary to negotiate and conclude compacts for future gaming in accordance with federal law, so long as that gaming will take place "on Indian lands" and will comply with the other requirements of federal law at the time it commences.

B. The Governor Has General Authority to Respond to Inquiries from the Federal Government on Matters of State Policy

In addition to his specific authority to concur emanating from the Indian gaming provisions of the Constitution and the Government Code, the Governor also had general authority, as the supreme executive officer of this State, to convey his agreement with the Secretary's determination regarding the Yuba site. Like the other branches of state government (see *ante*, p. 24), the Constitution confers certain inherent authorities on the Governor.[15] In determining whether a power falls within a branch's inherent authority, this Court has considered whether the exercise of that power is supported by a settled practice or custom. (See, e.g., *Southard*, *supra*, 13 Cal.2d at p. 503; *In re Battelle*, *supra*, 207 Cal. at pp. 241-242.) It has asked whether the power is necessary for the branch "'to properly and effectively function as a separate department in the scheme of our state government.'" (*County of Mendocino*, *supra*, 13 Cal.4th at p. 58.) And it has sometimes looked to statutes that codify a particular power "'as declaratory of the [branch's] inherent power'" under the Constitution. (*In re Attorney Discipline System* (1998) 19 Cal.4th 582, 603, italics omitted.) Here, considerations of practice, history, and function, establish the Governor's inherent power to communicate his concurrence to the federal government, and the Legislature has adopted a statute recognizing that the

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[15] See, e.g., *Spear*, *supra*, 148 Cal. at p. 504 [Governor, as chief executive, has inherent duty to publish act of Legislature]; cf. 63 Ops.Cal.Atty.Gen. 583 (1980) [Governor's authority to issue directives to subordinate executive officers "emanates from his constitutional charge, as the 'supreme executive power'" as well as from "the very dimension of government which necessitates and requires the assistance and participation of others"].

"Governor is the sole official organ of communication" with the federal Government. (Gov. Code, § 12012.)

1. The Governor's inherent authority as the supreme executive extends to communicating policy views to the federal government

To effectively carry out his or her constitutional responsibility to function as California's supreme executive official, the Governor must be able to interact with the federal government on matters of policy. There is a longstanding practice of the Governor engaging in such interactions.[16] In some circumstances, those interactions are relatively informal in nature. For example, the Governor routinely asks the President to take or refrain from particular action that would affect the interests of California.[17] The

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[16] The history of these interactions between the Governor and the federal government even predates our state Constitution. The 1849 constitutional convention was convened on proclamation of the "*ex officio* civil governor" of California. (Browne, Report of the Debates in the Convention of California on the Formation of the State Constitution in September and October, 1849 (1850), p. 3 ("Browne").) That proclamation asserted that the existing "laws of California . . . are still in force" and carefully reviewed "the organization of the present government" under existing Mexican law, including the "powers and duties of the Governor." (*Ibid.*) Under that existing law, the Governor was "the ordinary channel of communication between the supreme powers of the [Mexican] nation and the departmental legislature." (Halleck, Translation and Digest of Such Portions of the Mexican Laws of March 20th and May 23d, 1837, as Are Supposed To Be Still in Force and Adapted to the Present Conditions of California (1849), pp. 9, 10.) In the course of debates at the 1849 convention, the delegates agreed that the Governor should be responsible for communications between the government of California and the United States government. (See Browne, *supra*, at p. 277.) One delegate declared that "it is a well established principle" that the President of the United States should "communicate with the highest authority"—that is, with the Governor. (*Ibid.*)

[17] See, e.g., Governor Jerry Brown, letter to President Barack Obama, Dec. 13, 2016 <https://www.gov.ca.gov/docs/POTUS_Letter_

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Governor meets with federal government officials on matters of state and federal policy.[18] The Governor provides information and offers his opinions in testimony before Congress.[19] In the course of these routine interactions with federal officials, it is common for the Governor to express views or opinions on matters of policy.[20]

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12.13.16.pdf> [as of June 21, 2017] [asking the President "to use your authority under Section 12(a) of the Outer Continental Shelf Lands Act to permanently withdraw federal waters off the coast of California from new offshore oil and gas leasing"]; Kalb, *Governor, Mayor Join Forces to Help Capital Homeless*, Sac. Bee (Mar. 26, 2009), p. B1 [Governor Schwarzenegger "told reporters that he 'personally delivered a letter to President Barack Obama last week to request that economic stimulus funds for the homeless be fast-tracked'"].

[18] See, e.g., Governor Brown to Meet with Federal Officials, Attend Gridiron Dinner in Washington, D.C., Mar. 12, 2015 <https://www.gov.ca.gov/news.php?id=18887> [as of June 21, 2017] [noting that Governor will "meet with White House, U.S. Department of State, U.S. Department of the Interior and U.S. Department of Health and Human Services officials to discuss climate change, water and health care"]; Remarks by the President on the California Drought, Feb. 14, 2014 <https://obamawhitehouse.archives.gov/the-press-office/2014/02/14/remarks-president-california-drought> [as of Apr. 20, 2017] [remarks during joint tour of Central Valley farm by President Obama and Governor Brown related to the "coordinated response" to the drought from state and federal officials]; Hotakainen, *Governor Basks in Green Light*, Sac. Bee (May 20, 2009), p. A3 [noting that Governor Schwarzenegger met with President Obama regarding fuel-efficiency standards].

[19] See, e.g., Kahn, *Governor Faults U.S. on Energy Refunds*, N.Y. Times (June 21, 2001), p. A14 [describing testimony before the United States Senate Committee on Governmental Affairs regarding California's energy crisis].

[20] For instance, the examples in the preceding footnotes involve the Governor conveying policy views on issues related to offshore drilling, economic policy, climate change, energy and water policy, and health care.

In other circumstances, a Governor's interactions with federal officials are more formal. That is particularly common in the context of land- and resource-related decisions involving the federal government, and policies or programs in which the federal government collaborates with States to address common issues or problems. A number of federal laws condition the federal government's ability to take a certain action on the consent or concurrence of the Governor (or another state executive official). For example:

- The Secretary of Energy may acquire land for the purpose of disposing radioactive materials, but generally may not do so before "consult[ing] with" and obtaining "the consent of the Governor of such State." (42 U.S.C. § 7916.)[21]
- The Secretary of the Interior may acquire land to establish an airport in or near a national park, but may not do so "without first obtaining the consent of the Governor of the State . . . in which the land is located." (54 U.S.C. § 101501(c)(2).)
- The EPA Administrator may convene a conference to develop a comprehensive management plan for an estuary of national significance, and "shall approve such plan" following review and comment if it meets the requirements of federal law *and* "the affected Governor or Governors concur." (33 U.S.C. § 1330(f)(1).)
- The EPA Administrator may defer requirements related to the transfer of certain contaminated real property at a federal facility, but only "with the concurrence of the Governor of the State in which the facility is located." (42 U.S.C. § 9620(h)(3)(C)(i).)

On occasion, a state statute expressly authorizes a state officer or entity to assent to the proposed action. (Compare 16 U.S.C. § 715k-5 with Fish &

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[21] This consent requirement applies in all States "in which there is no (1) processing site designated under this subchapter or (2) active uranium mill operation." (42 U.S.C. § 7916.) Even if those circumstances are not present, however, the Secretary "shall consult with the Governor" of the State in question. (*Ibid.*)

G. Code, § 10680.) Frequently, however, there is no provision of state law that expressly grants such authority.

The lack of a state statute (or constitutional provision) expressly authorizing the Governor to respond when the federal government seeks a concurrence cannot mean that he or she must stand mute in the face of the federal inquiry. Like the other branches, the executive branch and the Governor must possess all "powers necessary to properly and effectively function . . . in the scheme of our state government." (*County of Mendocino, supra*, 13 Cal.4th at p. 58.) It is the Governor's obligation to faithfully execute the law (Cal. Const., art. V, § 1), and "the Governor retains the 'supreme executive power' to determine the public interest" (*People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150, 158). Thus, when the federal government asks the Governor to concur in a particular proposal, the Governor is constitutionally empowered to consider and evaluate that proposal, and to determine whether it advances the interests of the State and is consistent with existing state law and policy. Indeed, as the chief executive officer of the State, the Governor is uniquely suited to serve that function.[22]

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[22] United Auburn contends that two attorney general opinions establish that the Governor lacks the power to concur. (See ABOM 31, citing 65 Ops.Cal.Atty.Gen. 467 (1982) and 62 Ops.Cal.Atty.Gen. 781 (1979).) That misreads the opinions, which said nothing about the Governor's ability to respond to an inquiry from the federal government about a particular proposed action. The first opinion concerned the Governor's authority to unilaterally incur debt on behalf of the State, in direct contravention of a constitutional provision. (65 Ops.Cal.Atty.Gen. 467 (1982).) The second opinion concerned the Governor's ability to request that a nonprofit corporation devote income to the acquisition of student loan notes under the federal Higher Education Act. (62 Ops.Cal.Atty.Gen. 781 (1979).) United Auburn cites these opinions for the proposition that "the decision of the State of California to participate in a federal program is essentially legislative and the Legislature has the

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If there remained any question, Government Code section 12012 provides confirmation of the Governor's inherent power to act in this way. It recognizes that the "Governor is the sole official organ of communication between the government of this State and the government of any other State *or of the United States.*" (Gov. Code, § 12012, italics added.) It has been in place for nearly 150 years. (See Political Code, § 380, subd. (4) (1872).) In light of the history and practice reviewed above, this statute should be viewed as declaratory of a power "'that would have been implied, if not expressed.'" (*In re Attorney Discipline System*, *supra*, 19 Cal.4th at p. 604, quoting *People v. Culkin* (N.Y. 1928) 162 N.E. 487, 492.)[23]

2. A Governor's exercise of this inherent executive authority must be informed by, and consistent with, state law and policy

The Governor's inherent executive authority to interact with the federal government and communicate his or her views to federal officials is not, of course, unbounded. The Governor may not act in a way that violates a provision of the California Constitution, including the separation of powers doctrine, or that is arbitrary or capricious or uninformed by state

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exclusive power to determine whether, the manner in which, and the conditions under which the state shall participate." (65 Ops.Cal.Atty.Gen. 467 (1982).) Here, however, the analogous "federal program" is IGRA, in which the People and the Legislature have *already* decided to participate.

[23] In *Stand Up*, one Justice of the Court of Appeal dismissed the significance of Government Code section 12012, observing that the "concurrence power involves more than communication or furnishing information." (*Stand Up*, *supra*, 6 Cal.App.5th at p. 704 (opn. of Smith, J.).) But surely the "communication[s]" encompassed by section 12012 were intended to include communications regarding matters of policy, in which the Governor might convey views or judgments informed by considerations of state law and policy. (See *ante*, pp. 39-42.)

law and policy.[24] And to the extent the Legislature (or the People) prescribe appropriate statutory "directives and limits pertaining to" this authority, the Governor "may not disregard" them. (*County of Mendocino*, *supra*, 13 Cal.4th at p. 53.)

The subject of this case illustrates some of these limitations on the Governor's authority. As a general matter, the Governor may evaluate and concur in a proposed action by a federal official, such as the Secretary's determination at issue here. That would be true even if the authority to concur were not implied by a specific constitutional or statutory provision, as it is here (see *ante*, pp. 25-33). But the Governor nevertheless would have exceeded his authority if, before Proposition 1A, he had concurred in a determination that a proposed casino-style gaming facility on lands within California would be in the best interest of an Indian tribe and not detrimental to the surrounding community. Such a concurrence, at that time, would have contravened the then-existing "fundamental public policy against the legalization in California of casino gambling of the sort . . . associated with Las Vegas and Atlantic City." (*Hotel Employees*, *supra*, 21 Cal.4th at p. 589, discussing Cal. Const., art. IV, § 19, subd. (e).)

Going forward, it is possible that the People by initiative or the Legislature by statute could attempt to limit the Governor's ability to concur in a determination under section 2719(b)(1)(A), either as a general matter or with respect to a particular parcel of land. (Cf. Ariz. Rev. Stat. § 5-601(c).) But no such limitations were in place when the Secretary asked for Governor Brown's concurrence.

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[24] Here, the Governor's concurrence was entirely consistent with state law and policy allowing for casino-style gaming (see *ante*, pp. 18-19; *post*, pp. 55-56), and the Governor concurred after compact negotiations with the Enterprise Tribe, which informed him about the nature of the proposed gaming.

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

The Governor's concurrence in the Secretary's determination did not violate the separation of powers doctrine because it did not "defeat or materially impair" the core functions of another branch. (*Rosenkrantz*, *supra*, 29 Cal.4th at p. 662; see, e.g., *Marine Forests*, *supra*, 36 Cal.4th at p. 46.) United Auburn disagrees, asserting that the concurrence violated the separation of powers doctrine because it was a "legislative" act. (ABOM 4.) As the Court of Appeal correctly held, however, the act of concurring "is in the nature of an executive act." (Opn. p. 17.) And even if the concurrence were considered to be quasi-legislative or legislative in nature, it did not defeat or impair any core function of the Legislative branch, and it was consistent with existing law and policy.

A. The Governor's Concurrence Is an Executive Act, Not a Legislative One

This Court has acknowledged that it is not always possible to draw a bright line between "executive" and "legislative" acts. (See, e.g., *Hustedt*, *supra*, 30 Cal.3d at p. 338 [discussing the "common boundaries" between legislative and executive "zones of power"]; *Provines*, *supra*, 34 Cal.3d at pp. 541-542 (conc. opn. of Sawyer, C.J.).) But cases addressing other constitutional provisions provide some guidance. In the context of construing the powers of referendum and initiative, the Court of Appeal has held that an act is "legislative in its nature if it prescribes a new policy or plan." (*Worthington v. City Council of City of Rohnert Park* (2005) 130 Cal.App.4th 1132, 1140-1141, quoting *City of San Diego v. Dunkl* (2001) 86 Cal.App.4th 384, 399.)[25] Put differently, acts "constituting a declaration

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[25] This Court has recognized that the powers of referendum and initiative "apply only to legislative acts by a local governing body" (*Yost v.* (continued...)

of public purpose, and making provisions for ways and means of its accomplishment, may be generally classified as calling for the exercise of legislative power." (*Dunkl*, *supra*, at pp. 399-400, italics omitted.)

The Governor's concurrence does not fit within this conception of a "legislative" act. In exercising his power to concur in the Secretary's determination regarding the Yuba site, Governor Brown did not prescribe any new, general plan regarding Indian gaming in California. He instead expressed a fact-specific conclusion regarding a particular proposal for a gaming facility on a particular parcel of land, informed by considerations of existing state and federal policy. (See CT 18, 160; see *post*, pp. 55-56.) The fact that the concurrence involved considerations of policy (see, e.g., ABOM 5, 30), does not mean that it was legislative in nature. As the United States Supreme Court has observed, "[e]xecutive action that has utterly no policymaking component is rare, particularly at [a high] executive level." (*Printz v. United States* (1997) 521 U.S. 898, 927; cf. Opn. p. 17 ["Making a policy determination is a core legislative function only insofar as it is part of the process of enacting a law"].)

Indeed, by its very "definition, a legislative act necessarily involves more than a mere statement of policy." (*Worthington*, *supra*, 130 Cal.App.4th at p. 1142.) It must instead "carr[y] the implication of an ability to compel compliance." (*Ibid.*) The Governor's concurrence does not do that. Although a gubernatorial concurrence is a prerequisite to gaming under section 2719(b)(1)(A), the Governor has no ability to compel the Secretary to take land into trust for a tribe or to allow gaming on such

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(...continued)
Thomas (1984) 36 Cal.3d 561, 569), and "may not be invoked with regard to those matters which are strictly executive or administrative" (*Wheelright v. County of Marin* (1970) 2 Cal.3d 448, 457).

land. Only the Secretary may "decide whether to exercise his discretion to acquire the land in trust pursuant to the Indian Reorganization Act." (*Sokaogon Chippewa Community v. Babbitt* (W.D. Wis. 1996) 929 F.Supp.1165, 1170.) The Governor's concurrence merely satisfies "one precondition to the [Secretary's] authority under § 2719(b)(1)(A) to permit gaming on after acquired-trust land." (*Lac Courte*, *supra*, 367 F.3d at p. 661; see *ibid.* [governors have no power to take land into federal trust for gaming]; (*Confederated Tribes of Siletz Indians of Oregon v. United States*, (9th Cir. 1997) 110 F.3d 688) ["The Governor cannot have land taken in trust without the Secretary's approval"].)

The Governor's concurrence fits more comfortably within the category of acts that courts have viewed as executive or administrative in nature. Acts that are "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." (*Dunkl*, *supra*, 86 Cal.App.4th at p. 400, quoting *Martin v. Smith* (1960) 184 Cal.App.2d 571, 575; see also *Simpson v. Hite* (1950) 36 Cal.2d 125, 131.) Viewed through that lens, the Governor's concurrence regarding the Yuba site was a quintessential executive act. The Governor simply evaluated a particular proposal, in light of surrounding policy, and communicated his views on that proposal to the federal government. (See *ante*, p. 18; Gov. Code, § 12012.)[26]

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[26] Executive acts by state and local officials typically carry out legislative policies already declared by the Legislature or a local government entity. The act of carrying out a "federal policy, 'pursuant to a comprehensive plan of federal regulations governing matters of national concern,'" can also be considered administrative or executive in nature. (*Worthington*, *supra*, 130 Cal.App.4th at p. 1141.)

This conclusion is consistent with *Lac Courte*, the leading federal appellate decision on the subject. That case involved a letter in which the Governor of Wisconsin decided not to concur in a determination by the Secretary of the Interior. (*Lac Courte*, *supra*, 367 F.3d at p. 653.) The plaintiffs challenged the gubernatorial concurrence requirement of section 2719(b)(1)(A) on the ground that it violated the separation of powers provision of the Wisconsin Constitution by "requir[ing] the Governor to legislate Wisconsin's gaming policy." (*Lac Courte*, *supra*, at p. 664.) The Seventh Circuit noted that the "Wisconsin Constitution and various Wisconsin statutes have already implemented a fairly complex gaming policy," which authorized certain types of gambling and prohibited others. (*Ibid.*) It reasoned that when "the Governor of Wisconsin considers the Secretary of the Interior's request for concurrence regarding an off-reservation gaming proposal, he or she will be informed by the public policy represented by the Wisconsin Constitution and relevant statutes." (*Ibid.*) The Governor's decision to concur (or not) in "any particular proposal is not analogous to creating Wisconsin's gaming policy wholesale—a legislative function—but rather is typical of the executive's responsibility to render decisions based on existing policy." (*Ibid.*)[27]

The same is true in California. Like Wisconsin, California has a complex gaming policy, contained in the state Constitution and in state statutes, which authorizes gambling in some respects and prohibits it in others. (See Cal. Const., art. IV, § 19; Bus. & Prof. Code, §§ 19400-19668, 19800-19987.) And here, as in Wisconsin, the Governor's consideration of

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[27] The Seventh Circuit also noted that the Governor's power to respond to a request for concurrence "is not without a check," because the Legislature could "curtail the Governor's power to concur" or the "citizens of Wisconsin could . . . repeal[] the Constitutional amendments that sanction gaming in Wisconsin." (*Lac Courte*, *supra*, 367 F.3d at p. 665.)

any federal request that he or she concur in a determination by the Secretary under section 2719(b)(1)(A) will be informed by that policy. When the Governor conveys his or her concurrence in the Secretary's assessment of the effects of a proposed gaming facility, it is a "typical" form of executive action. (*Lac Courte*, *supra*, 367 F.3d at p. 664.)

United Auburn construes *Lac Courte* as "hold[ing] that concurring is an executive act only when done in accordance with legislatively established state policy," and as supporting its argument that Governor Brown's concurrence here was legislative because it "made . . . new policy." (ABOM 29.) But that misreads the case. The Seventh Circuit did not suggest that the act of concurring is either legislative or executive depending on the content of state policy. Instead, it concluded that a Governor's decision to concur in the determination by the Secretary of the Interior is a typical executive act, that, like other executive acts, must "be informed by the public policy represented by" constitutional and statutory provisions. (*Lac Courte*, *supra*, 367 F.3d at p. 664; see *id.* at p. 665 [the Governor "enjoys discretion within the limitations of Wisconsin's existing gaming policy to render an opinion regarding any particular application under § 2719(b)(1)(A)"].) The fact that this act—like other executive acts—might have some "policymaking component" did not cause the Seventh Circuit to view it as legislative in nature. (See *id.* at p. 665.)

United Auburn's remaining arguments for why the Governor's concurrence is "legislative" are similarly unpersuasive. First, United Auburn contends that the Governor's concurrence was a legislative act because "whether and to what extent to approve gaming are questions with significant, policy-laden ramifications the legislature is best suited to study and balance." (ABOM 4-5.) As the Seventh Circuit recognized, however, it is quite common for executive acts to involve some determinations of policy or to have a policymaking component. (See also *Printz*, *supra*, 521

U.S. at p. 927; opn. p. 17; *ante*, pp. 46-47.) That does not make them legislative acts. If United Auburn were correct that any act having "policy[] ramifications" qualifies as legislative, then virtually everything that the Governor does would be a legislative act.

Second, United Auburn points to out-of-state cases that it describes as "conclud[ing] that power over gaming is presumptively legislative." (ABOM 28 & fn. 5.) Applying the law of other States, the cited cases generally conclude that creating new law on the subject of gaming is the province of the state legislature (see, e.g., *Fla. House of Representatives v. Crist* (Fla. 2008) 999 So.2d 601, 615-616), and that state governors may not violate duly enacted statutes that regulate gaming (see, e.g., *ibid.*).[28] But that does not establish that *any* action related to gaming by California's Governor is "legislative." It is similarly well established, for example, that "making appropriations" is one of the "core functions of the legislative branch." (*Carmel Valley*, *supra*, 25 Cal.4th at p. 299.) That does not imply that executive branch officials engage in legislative acts when they make decisions about how to spend appropriated funds.

Third, United Auburn argues that the concurrence power is legislative because the constitutional provision regarding Indian gaming is located in article IV, the "Legislative" article of the Constitution. (See ABOM 27.) But United Auburn identifies no authority supporting the view that the

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[28] Most of these decisions addressed whether entering into a tribal-state compact under IGRA was a legislative or executive act in the context of deciding whether the Governor has authority under state law to unilaterally execute a gaming compact. (See, e.g., *Panzer v. Doyle* (2006) 271 Wis.2d 295, 337-338; *Saratoga County Chamber of Commerce v. Pataki* (2003) 100 N.Y.2d 801, 823.) In California, the Constitution settles that question by granting the Governor authority to negotiate compacts subject to ratification by the Legislature. (See Cal. Const., art. IV, § 19, subd. (f).)

article of the California Constitution in which a particular subject is addressed determines whether actions by the Governor on that subject are "executive" or "legislative" in nature. This Court's cases suggest otherwise. For example, the subject of parole is addressed in the article of the Constitution on executive powers (see Cal. Const., art. V, § 8), but the Court concluded that it was an appropriate judicial function to engage in limited judicial review of the Governor's parole decisions (see *Rosenkrantz, supra*, 29 Cal.4th at p. 626; see also *In re Masoner* (2009) 179 Cal.App.4th 1531, 1539). Similarly, the subject of the State Bar is addressed in the article of the Constitution on judicial powers (see Cal. Const., art. VI, § 9), but the Court held that it was within the power of the California Legislature to adopt a statute regulating the selection and appointment of State Bar Court hearing judges (see *Obrien v. Jones* (2000) 23 Cal.4th 40, 44). It is not surprising that Proposition 1A, in amending the Constitution to address issues of Indian gaming, added those amendments to a pre-existing constitutional provision on the general subject of gaming. (See Cal. Const., art. IV, § 19.) That is no indication that every action by the Governor on this subject is legislative in nature.

Finally, United Auburn contends that the concurrence power is legislative because "[g]aming within a state implicates many policy issues" and the concurrence had "massive land-use and tax-base consequences, insofar as the Yuba Site, once in trust for the Enterprise Tribe, ceases to be subject to California's civil, criminal, and tax jurisdiction." (ABOM 27, 30.) This argument ignores the fact that the Governor was not the one who took the land into trust for the Tribe—and that he lacked any authority to do so. (See *ante*, pp. 15-16, 29-30.) Only the Secretary has authority to take land into federal trust for a tribe and to authorize gaming on such land. (*Lac Courte, supra*, 367 F.3d at p. 658.) The Governor's concurrence in the Secretary's interest/detriment determination is not akin to adopting a

zoning ordinance. (See *Mira Dev. Corp. v. City of San Diego* (1988) 205 Cal.App.3d 1201; *Arnel Dev. Co. v. Costa Mesa* (1980) 28 Cal.3d 511.)[29] Nor is it similar to a broad determination regarding what types of products are subject to taxation (*Jackson & Perkins Co. v. Stanislaus County Bd. of Supervisors* (1959) 168 Cal.App.2d 559, 564), or a regulation directing what type of income is taxable (see *Cullinan v. McColgan* (1947) 80 Cal.App.2d 976, 977-978, 981). Rather, the concurrence is a "typical" executive act, involving a determination made by applying existing policy to the facts of a particular situation. (*Lac Courte*, *supra*, 367 F.3d at p. 664.)

B. Even If Viewed as Legislative or Quasi-Legislative, the Governor's Concurrence Does Not Defeat or Impair Any Core Function of the Legislative Branch

Even if this Court were to agree with United Auburn's characterization of the concurrence as legislative or quasi-legislative in nature, that would not provide a basis for reversal. The Governor may "exercise legislative powers" if it is "permitted by the Constitution" (*Harbor v. Deukmejian* (1987) 43 Cal.3d 1078, 1084) or if the Legislature delegates "a portion of its legislative authority to" the Governor "through statutory enactments" (*Prof. Engineers in Cal. Government v. Schwarzenegger* (2010) 50 Cal.4th 989, 1015). As explained above, the Governor's concurrence in this case was authorized by article IV of the Constitution, and the Legislature authorized the Governor's concurrence when it adopted Government Code sections 12012.5, subdivision (d), and 12012.25, subdivision (d). (See *ante*, pp. 25-33.)

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[29] As the Court of Appeal correctly noted, *Mira Development Corp.* and *Arnel Development Co.* "do not hold that *any* decision by a governmental entity that involves land use or considers policy is legislative." (Opn. p. 15.)

Moreover, this Court has recognized that the executive (and judicial) branches "routinely exercise quasi-legislative authority," such as in "establishing general policies and promulgating general rules for the governing of affairs within their respective spheres." (*Davis v. Municipal Court*, *supra*, 46 Cal.3d at p. 76.) "The exercise of such quasi-legislative authority, even when the policy decision that is made by the executive or judicial entity or official is one that could have been made by the Legislature, has never been thought to violate the separation-of-powers doctrine." (*Ibid.*) Rather, an executive action only violates that doctrine if it "defeat[s] or materially impair[s]" (*Rosenkrantz*, *supra*, 29 Cal.4th at p. 662) the "'core zone'" of the Legislature's functions (*Marine Forests*, *supra*, 36 Cal.4th at p. 46).

As this Court has recognized, the "core functions of the legislative branch include passing laws, levying taxes, and making appropriations." (*Carmel Valley*, *supra*, 25 Cal.4th at p. 299, citing Cal. Const., art. IV, §§ 1, 8, subd. (b), 10, 12.)[30] The Governor's concurrence did not defeat or materially impair any of those core legislative functions. The Legislature retains the authority to pass laws on the subject of tribal gaming. (See, e.g., Gov. Code, § 12012.5, added by Stats. 1998, ch. 409, § 1.) In particular, the Legislature may adopt laws related to the Governor's concurrence authority, within constitutional limits. And the Legislature also retains the authority to ratify (or not) gaming compacts negotiated and concluded by

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[30] See also, e.g., *Southard*, *supra*, 13 Cal.2d at p. 503 ["[T]he major function of the legislature is that of enacting legislation. This power is expressly conferred by the Constitution"]; cf. *Kugler v. Yocum* (1968) 69 Cal.2d 371, 376 ["'The essentials of the legislative function are the determination and formulation of the legislative policy'"].

the Governor following a concurrence. (Cal. Const., art. IV, § 19, subd. (f).)[31]

This case is thus unlike those in which a branch violated the separation of powers doctrine by interfering with another branch's core functions. In *Hustedt*, for example, this Court considered a statute granting the Workers' Compensation Appeals Board the power to discipline an attorney by prohibiting him from practicing before the Board. (*Hustedt*, *supra*, 30 Cal.3d at p. 333.) The Court recognized that the Legislature "'may put reasonable restrictions upon constitutional functions of the courts provided they do not defeat or materially impair the exercise of those functions.'" (*Id.* at p. 338.) But the challenged statute violated the separation of powers doctrine because it "purport[ed] to restrict significantly this court's inherent power over the disciplining of attorneys" (*id.* at p. 340), and to "bestow the power to discipline attorneys upon the Board" (*id.* at p. 341). In contrast, the Governor's concurrence does not materially restrict any power of the Legislature.

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[31] In this case, the Legislature opted to take no action regarding the compact negotiated by the Governor. (See *Enterprise Rancheria*, *supra*, 163 F.Supp.3d at p. 771.) A federal court later held that, in light of this "inactivity," the State failed to meet its burden of showing that it had negotiated in good faith with the Enterprise Tribe. (*Id.* at pp. 783-786.) As a result of that holding, the Enterprise Tribe may now pursue class III gaming on the Yuba site under IGRA's remedial provisions. (See *ante*, p. 19, fn. 5; 25 U.S.C. § 2710(d)(7)(B)(vii).) That outcome is a result of a federal court order regarding the Tribe's statutory rights under federal law. It does not raise any separation of powers issue under the California Constitution. Nor does it provide any basis for retroactively invalidating the Governor's concurrence, which took place before the Legislature declined to act on the compact.

C. The Concurrence Was Consistent with Existing State Law and Policy

Finally, the Governor's concurrence in this case was entirely consistent with state law and policy. Both the Constitution and the Government Code contemplate that the Governor has the powers necessary to negotiate and conclude compacts allowing federally recognized Indian tribes to conduct class III gaming activities on Indian lands in California, consistent with the requirements of IGRA. (Cal. Const., art. IV, § 19, subd. (f); Gov. Code, §§ 12012.5, subd. (d), 12012.25, subd. (d).) That is what the Governor did here.

The Governor's concurrence was also consistent with the policies underlying those laws. The central policy concern underlying Proposition 1A was allowing class III gaming as a way of lifting California tribes out of poverty. (See RJN, Ex. A, Argument in Favor of Proposition 1A, p. 6.) The proponents underscored the potential for gaming to drive economic "self-reliance" by noting that "unemployment has dropped nearly 50%" on reservations with casinos and that "welfare has been cut by 68%." (*Ibid.*) When Governor Brown concurred in the Secretary's determination regarding the Yuba site, he emphasized how the proposed facility would serve this policy, noting that "the Enterprise Tribe is made up of more than 800 native Californians who face serious economic hardship," and that this "large tribal population will directly benefit from the gaming facility." (CT 160.)

Another important policy underlying Proposition 1A was sharing "Indian gaming revenues with non-gaming Tribes for use in education, housing, health care and other vitally needed services." (RJN, Ex. A, Argument in Favor of Proposition 1A, p. 6.) That policy is reflected in the Government Code, which establishes the "Revenue Sharing Trust Fund" and the "Tribal Nation Grant Fund" to facilitate such revenue-sharing. (See

Gov. Code, §§ 12012.75, 12012.95.) In concurring in the determination regarding the Yuba site, Governor Brown observed that the "Enterprise Tribe's compact provides assistance to other tribes by requiring substantial contributions to the Revenue Sharing Trust Fund and the Tribal Nation Grant fund." (CT 160.)

In addition, the proponents of Proposition 1A noted that casinos on Indian lands yield economic benefits for surrounding communities. (See RJN, Ex. A, Argument in Favor of Proposition 1A, p. 6 ["Indian gaming on tribal lands benefits all Californians by providing nearly 50,000 jobs for Indians and non-Indians and producing $120 million annually in state and local taxes"].) In the concurrence letter at issue here, Governor Brown explained that the proposed gaming facility would advance this policy goal because it would "create jobs and generate revenue for Yuba County, which currently has a 16% unemployment rate." (CT 160.)

Nor was the concurrence in conflict with any state policy or statute existing as of the date of the concurrence.[32] For example, there was no statute restricting the Governor's ability to concur. (Cf. Ariz. Rev. Stat. § 5-601(c).) And the concurrence was informed by the terms and conditions of the provisional gaming compact, which the Governor negotiated. In short, the Governor properly exercised his constitutional and statutory authority when he concurred in the Secretary's determination regarding a class III gaming facility on the Yuba site; that executive act did not defeat or materially impair the core functions of the legislative branch; and it was informed by—and consistent with—state law and policy.

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[32] The record includes a letter from a member of the Senate critical of another compact involving lands acquired for gaming under the process outlined in section 2719(b)(1)(A). (CT 166-167). That letter does not constitute state policy, and it was sent almost a year *after* the concurrence at issue here.

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Dated: June 26, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Answer Brief on the Merits uses a 13 point Times New Roman font and contains 13,952 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: June 26, 2017

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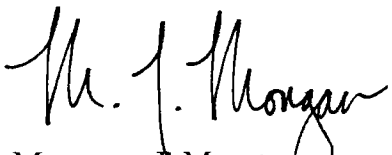

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **United Auburn Indian Community v. Brown, et al.**
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 June 26, 2017, I served the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** 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 June 26, 2017, at San Francisco, California.

M. Campos
Declarant

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Signature

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