S238544

IN THE SUPREME COURT OF CALIFORNIA

UNITED AUBURN INDIAN COMMUNITY OF THE AUBURN RANCHERIA,
Plaintiff and Appellant,

v.

EDMUND G. BROWN, JR., as Governor, etc., Defendant and Respondent.

The application of The Cachil Dehe Band of Wintun Indians of the Colusa Indian Community and The Mooretown Rancheria of Maidu Indians of California for permission to file an amicus curiae brief in support of appellant is hereby granted. (See Cal. Rules of Court, rule 8.520(f).)

SUPREME COURT
FILED
SEP 28 2017
Jorge Navarrete Clerk

Deputy

CANTIL-SAKAUYE
Chief Justice

Case No. S238544

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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UNITED AUBURN INDIAN COMMUNITY OF THE AUBURN RANCHERIA,

Appellant,

v.

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

Respondent.

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

APPLICATION OF THE MOORETOWN RANCHERIA OF MAIDU INDIANS OF CALIFORNIA and CACHIL DEHE BAND OF WINTUN INDIANS OF THE COLUSA INDIAN COMMUNITY TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT AND *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT

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25 U.S.C. § 2701(4). 15

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California Gambling Control Commission, *Revenue Sharing Trust Fund Report (RSTF) of Distribution of Funds to Eligible Recipient Indian Tribes for the Quarter Ended June 30, 2017*. 41

California Legislative Analyst, *California Tribal Casinos: Questions and Answers* (Feb. 2007). 26

California State Auditor, Indian Gaming Special Distribution Fund, Report 2016-036 (March 2017). 42

Federal Register – Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs,
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APPLICATION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

The Cachil Dehe Band of Wintun Indians of the Colusa Indian Community and Mooretown Rancheria of Maidu Indians of California hereby seek leave of this Court to file an *amicus curiae* brief in support of the Appellant, the United Auburn Indian Community of the Auburn Rancheria. The Applicants have significant interests in the outcome of this action and the proposed brief will assist the Court by addressing pertinent issues that are not addressed in the parties' briefs.

1. Interests of *Amici Curiae* Mooretown Rancheria of Maidu Indians of California and Cachil Dehe Band of Wintun Indians of the Colusa Indian Community

Amici Curiae are the Mooretown Rancheria of Maidu Indians of California ("Mooretown"), a federally recognized Indian Tribe with approximately 320 acres of federal Indian lands, and the Cachil Dehe Band of Wintun Indians of the Colusa Indian Community ("Colusa"), a federally recognized Indian Tribe with 121 acres of federal Indian lands. *See* 82 Fed. Reg. 4915, 4917 (January 17, 2017) (listing federally recognized tribes).

Both Colusa and Mooretown own and operate tribal governmental casinos whose revenues are critical to funding tribal governmental operations. Mooretown owns and operates the Feather Falls Casino & Lodge on its reservation. Mooretown depends almost entirely on revenues

from its casino to operate its tribal government and fund its governmental programs. Casino revenues are critical to funding health care, welfare, education, and housing for Tribal members, and to sustaining reservation infrastructure.

Colusa owns and operates the Colusa Casino Resort on its reservation lands. Colusa depends on casino revenue to fund approximately 85% of its governmental expenditures, which currently include such programs and services as public safety; housing; social services/Indian Child Welfare Act; health care/dialysis; elder care; child care; educational assistance; infrastructure and public works; economic development/diversification; and, pursuant to a revenue allocation plan approved by the U.S. Bureau of Indian Affairs, *per capita* distributions of gaming revenues to cover basic needs not covered by tribal programs or services or tribal members' other sources of income.

In 1999, both Colusa and Mooretown, together with 59 other tribes, negotiated and executed Compacts with California to regulate their casinos pursuant to the Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701, *et seq.* ("IGRA"), and have always fully complied with IGRA. As Congress intended in IGRA, the Feather Falls Casino has helped Mooretown, and the Colusa Casino Resort has helped Colusa, make important strides toward

IGRA's goals of "tribal economic development, self-sufficiency, and strong tribal government," by generating the revenue that funds tribal government operations. 25 U.S.C. § 2702. The Colusa Casino Resort and Feather Falls Casino have also benefitted the greater Colusa and Oroville communities through increased employment opportunities, enhanced fire and emergency medical response services, infrastructure improvements, revenue sharing for law enforcement and other local governmental services, and related benefits. Pursuant to their Compacts, both Colusa and Mooretown have been paying into the State Indian Gaming Special Distribution Fund ("SDF"), from which their respective County Local Community Benefit Committees make grants sponsored by the Tribes to various local agencies.

Geography is the key to understanding the harm the Governor's unauthorized decision at issue here will do to the *amici* and why these Tribes have a fundamental interest in this case. Mooretown and Colusa operate casinos on their original reservation lands to fund their government operations and such operations will be decimated by approval of the Estom Yumeka Maidu Tribe of the Enterprise Rancheria's ("Enterprise") proposed casino on after-acquired land far to the south of Enterprise's original reservation and south of the Mooretown and Colusa casinos. Mooretown's

casino is approximately 70 miles north of Sacramento.[1] Colusa's casino is located approximately 70 miles north of Sacramento and 27 miles from Marysville/Yuba City, the source of most of their casino patrons.[2] The land upon which Enterprise proposes its casino is between Mooretown and its primary customer bases and is closer than Colusa to Colusa's customer bases in Marysville/Yuba City and Sacramento. The Court of Appeal's decision threatens Mooretown and Colusa's fundamental interests in maintaining government operations and providing for their members, thus subverting the primary goal of IGRA.

Rather than building a casino on its existing 40-acre reservation, which is eligible for gaming under IGRA, Enterprise elected instead to attempt to literally leapfrog over Colusa and Mooretown by trying to build a casino on a non-tribal parcel of land (the "Yuba Parcel") in a different county located 55 miles southeast of Colusa, and 35 miles south of

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[1] *See* https://www.google.com/maps/place/1+Alverda+Dr,+Oroville,+CA+95966/@39.4662682,-121.5394465,14z/data=!4m5!3m4!1s0x809cb14388c32203:0xbe6a27de8b5c7fce!8m2!3d39.4662682!4d-121.521937 (Mooretown Rancheria on Google Maps).

[2] *See* https://www.google.com/maps/place/Colusa+Rancheria,+CA+95932/@39.2532201,-122.0557645,13z/data=!4m5!3m4!1s0x808368781f59d905:0x41bb646e5f900c37!8m2!3d39.2538972!4d-122.0254969 (Colusa Rancheria on Google Maps).

Mooretown, in a location that would drastically cannibalize Mooretown's and Colusa's customer bases. *See* FEIS § 1.2.2 and Figures 1-4 and 1-5; *see also* Part 151 Record of Decision ("ROD") § 2.2.4 (Alternative D – Butte Site). Enterprise's proposed casino would sit directly between Mooretown's casino in Butte County and the majority of Mooretown's customers, approximately 55-65% of whom reside in the vicinity of Yuba County. Similarly, Enterprise's proposed casino would capture Colusa's customer base because Enterprise seeks to wedge its casino into the heart of Colusa's market.

In short, the location Enterprise selected – 44 miles south of its reservation – would position Enterprise significantly closer to population centers of potential casino patrons and employees than Mooretown's and Colusa's current on-reservation locations, thereby drastically cutting into Mooretown's and Colusa's patron and employee pools. Allowing Enterprise to operate gaming on the Yuba Parcel, as the Governor did here, would, as described by an Enterprise consultant, grant Enterprise "excellent access and visibility thereby giving the casino a competitive edge over much of the competition."[3] Such an advantage for Enterprise would be devastating for

[3] Innovation Group, *Gaming and Hotel Market Assessment: Marysville, California* (August 2004), p.8 (See Appendix D to Appendix M at

Colusa and Mooretown.

The Governor's decision to allow Enterprise to situate its casino closer to population centers than Mooretown and Colusa's existing operations would have devastating effects on both Tribes if upheld. Like most California tribes, Mooretown's and Colusa's reservations are rural, far from major population centers, and lacking in infrastructure, significant natural resources and other economic development opportunities. *See, e.g.*, Indian Issues: Observations on Some Unique Factors that May Affect Economic Activity on Tribal Lands, GAO-11-543T (April 7, 2011) (available at https://www.gao.gov/assets/130/125967.html). Colusa's and Mooretown's locations are not conducive to most types of economic development. Despite these difficulties, their casinos currently generate sufficient revenue to sustain both Tribes' governmental needs.

If Enterprise is permitted to operate gaming on the Yuba Parcel, Mooretown and Colusa's tribal governments will sustain devastating losses. Based upon a study performed by one of the country's leading experts on tribal government gaming, Colusa anticipates that in the first year of operation of a casino on the Yuba Parcel, Colusa's governmental revenues

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http://www.enterpriseeis.com/documents/final_eis/files/appendices/vol1/Appendix_M.pdf).

would decline by 60%, and by the third year of a casino's operation on the Yuba Parcel, 71%. Colusa receives 85% of its discretionary budget revenue from the casino, so any reduction affects its ability to exercise flexibility in responding to the needs of its government and members. Harm would also accrue to Colusa because Colusa must use a significant portion of its casino profit to service its existing debt and maintain the casino property so that it can remain competitive in the market. After these expenditures, in the first year of casino operations on the Yuba Parcel, the Tribe would only be left with approximately 23% of its current budget for tribal government discretionary expenditures, and by the third year of operation at that site, with approximately 10% of its current budget for such expenditures.

Mooretown would similarly suffer extensive harms. Mooretown's best estimates are that its governmental revenues would plummet by approximately 60-65%, which would be disastrous. The continued viability of Mooretown's government-owned casino is essential to the Tribe's ability to provide much-needed programs and services for its members. Approximately ninety-seven percent (97%) of Mooretown's governmental budget is funded with revenues from the casino, with the remaining 3% coming primarily from federal government grants for social welfare purposes. Mooretown uses casino revenue for educational, health, housing,

welfare, vocational, and elder care programs, among others. The Tribe also uses tribal government funds to support local communities, provide emergency services, and generate jobs. If Enterprise were to operate a Yuba County casino, Mooretown would be forced to cut many of its governmental programs and eliminate others entirely. It would also be forced to rely almost exclusively on federal government handouts, a circumstance IGRA sought to reverse by empowering tribes to engage in this form of economic development. All this, without the State legislature having an opportunity to discuss the paramount policy considerations involved in letting Mooretown and other similarly-situated Northern California tribes be imperiled by the approval of the Enterprise casino.

Mooretown has long known that Enterprise might someday construct a casino on its original reservation, and has planned accordingly. Its investment and infrastructure, as well as casino operations, were carefully planned with this potential competition in mind. As to Colusa, Enterprise's pre-existing trust land is located approximately 45.5 miles from Colusa's reservation. Like Mooretown, Colusa also planned its investment, infrastructure, and operations to account for the competition posed by a casino constructed on Enterprise's existing reservation.

The Governor knew about these harms to Colusa, Mooretown, and

other nearby tribes. *See* FEIS Appendix M pp. 127-130 (acknowledging that construction of a casino on the Yuba Parcel would "cannibalize" the governmental income of other nearby tribes including Colusa and Mooretown); FEIS p. 4.7-26, (acknowledging the findings of Appendix M.) The Governor also knew that the State of California had never previously allowed such leapfrogging to the detriment of tribal governments engaged in gaming at previously-existing tribal casinos. Nonetheless, despite the drastic policy change involved in allowing such harms and permitting such leapfrogging, the Governor ignored the Tribes, State law, and previous State policy, and unilaterally concurred in the Secretary of the Interior's ("Secretary") determination that Enterprise could operate a casino on the Yuba Parcel once title passed to the United States in trust for Enterprise.

The Governor contends he is authorized to act alone in resolving the public policy considerations and conflicting interests at issue here, and that no legislative ratification is necessary. As the following proposed *amici* brief demonstrates, allowing the Governor to unilaterally concur in the Secretary's determination to allow gaming on newly acquired lands – as the Court of Appeal did in this case – amounts to enabling the Governor to critically cut Mooretown's, Colusa's and other tribes' tribal governmental revenues, undermine these tribes' viability, self-sufficiency, and

self-determination, and fundamentally alter the relationship between the State of California and the tribes with which it has entered into Class III gaming compacts. A ruling permitting the Governor to do this would have crippling effects on many California Indian tribes, like Colusa and Mooretown, whose tribal governmental revenue would plummet as a result. It would also greatly increase pressure on this Governor, and the Governors to follow, to allow many other tribes which, like Enterprise, can look past existing competitors and see California's populated urban centers as more lucrative casino markets. The decision below is a calling card to economic and political forces seeking new urbanized tribal casino locations which, if left unchecked by this Court, will dramatically alter California's public policy.

For all of these reasons, Mooretown and Colusa have fundamental interests in this case.

2. The Proposed Brief Will Assist the Court

This brief will assist the Court, first, by illuminating the adverse impacts that will befall tribal governments like the *amici* tribes if this Court were to uphold the Court of Appeal's ruling in this case. Although the current action involves only one appellant, dozens of Indian tribes statewide will be affected by the rule this Court adopts. The brief provides insight as

to the case's effects, which extend far beyond the single appellant in this case (which, unlike most other tribes, operates one of the State's largest and most successful tribal casinos statewide).

Second, this brief contextualizes the rule appellant urges this Court to adopt – that the Governor lacks authority under California law to unilaterally concur in the Secretary's two-part determination under IGRA – by describing the federal legal framework within which decisions to take land into trust are made. The brief clarifies the role states play in land-into-trust decisions and demonstrates that the Governor's action in this case usurps that role in harmful ways. The brief also explains why appellant's proposed rule is necessary to uphold the state policy-making power that federal law sought to respect and protect.

Third, the brief presents significant policy considerations that support overturning the Court of Appeal's ruling. These include harms to local jurisdictions, financial detriment to the State, and the impacts of a push by tribes and developers statewide to construct tribal casinos in major urban areas like San Diego, Los Angeles, and San Francisco where such gaming has not, until now, been possible.

Further, the brief demonstrates that California law cannot be construed as authorizing the Governor to unilaterally permit gaming on

newly-acquired trust lands because interpreting it in this way would subject the State's long-term policy to the hazards of politically-motivated action.

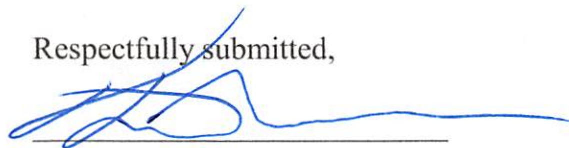
Finally, the brief shows that construing IGRA to allow the Governor to authorize gaming on new trust land raises serious Constitutional questions under the Tenth Amendment to the United States Constitution.

3. Conclusion

For these reasons, the proposed *amici* Colusa and Mooretown respectfully request that the Court grant them leave to file the attached proposed *amici* brief in support of appellant.

Dated: September 14, 2017

Respectfully submitted,



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Dated: September 14, 2017

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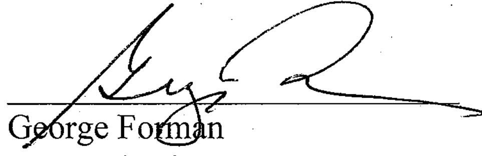

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF APPELLANT

I. INTRODUCTION

The Court of Appeal decision below threatens the ability of California Indian tribes to benefit from tribal government gaming as Congress intended under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-21 ("IGRA"). It threatens tribal rights under the 75 tribal-state gaming compacts California has negotiated and ratified with tribes throughout the State. It threatens the State's strategic policy vis-à-vis its Indian tribes and tribal government gaming facilities. It threatens to encourage developers to partner with tribes to build casinos in Los Angeles, San Diego, and San Francisco, where gaming would otherwise be prohibited. It threatens the incomes of numerous State political subdivisions and their local fire-protection, law enforcement, and other emergency service providers. It jeopardizes thousands of jobs statewide. Finally, but crucially, for some California Indian tribes, including *amici* Mooretown Rancheria of Maidu Indians of California ("Mooretown") and Cachil DeHe Band of Wintun Indians of the Colusa Indian Community of the Colusa Rancheria, California ("Colusa"), it threatens their very existence as functioning governments and their ability to provide for their members' basic needs.

IGRA permits federally recognized Indian tribes to operate gaming on lands held in trust by the federal government for tribes' benefit. Congress intended tribal casinos to generate revenue that would sustain tribal governments. *See* 25 U.S.C. §§ 2701(4), 2702(1). IGRA's primary purpose is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." *Id.* § 2702(1). Congress recognized that gaming revenue "often means the difference between an adequate governmental program and a skeletal program that is totally dependent on Federal funding." Senate Report No. 100-446, 100th Cong. 2nd Sess. 1988, 1988 U.S.C.C.A.N. 3071, 3072, 1988 WL 169811 (Aug. 3, 1988) (hereinafter "IGRA Senate Report"). Congress "views tribal gaming as governmental gaming, the purpose of which is to raise tribal revenues for member services." *Id.* at 3082.

To protect tribal government gaming revenue, and to stem the proliferation of Indian gaming beyond existing Indian lands, Congress generally prohibited tribal gaming on lands taken into federal trust status after October 17, 1988. *See* 25 U.S.C. § 2719(a). IGRA includes only a few exceptions to this limitation, one of which is at issue here. *See* 25 U.S.C. § 2719(a). That exception allows gaming to be conducted on land

taken into trust after October 17, 1988 if the Secretary of the Interior ("Secretary") determines that permitting gaming on the newly-acquired land (1) "would be in the best interest of the Indian tribe"; and (2) "would not be detrimental to the surrounding community" including Tribes such as Colusa and Mooretown; and if the Governor of the state in which the land is located concurs in the Secretary's determination. *Id.* § 2719(b)(1)(A). In other words, IGRA recognized that states and local jurisdictions could be harmed and their policies undermined if the federal government were to unilaterally authorize gaming in locations where no gaming had previously been permitted. It also recognized that while the federal government could seek to assess such harms, states had a crucial role to play in determining their extent. Accordingly, IGRA required state approval – conveyed to the Secretary by the relevant state's governor – for gaming on newly-acquired trust lands.

In 2012, after having denied several applications for trust acquisitions that would have permitted tribes from rural areas to open urban casinos in the Bay Area far from their reservations, the Secretary expressed an intent to take land into trust for gaming purposes for the Estom Yumeka Maidu Tribe of the Enterprise Rancheria ("Enterprise") in an urbanized area in a different county many miles from Enterprise's pre-existing

gaming-eligible reservation. *See* 77 Fed. Reg. 71612 (Dec. 3, 2012) (Enterprise fee-to-trust transfer); 78 Fed. Reg. 114 (Dec. 26, 2012) (correcting legal description of property).

Governor Brown then took the action at issue here. Without even consulting the Legislature, much less seeking its ratification, Governor Brown issued the State's approval for gaming on Enterprise's (and North Fork's) post-1988 land under 25 U.S.C. §2719(b)(1)(A). Thus the Governor single-handedly permitted Enterprise to operate gaming on its newly-acquired trust land, over 40 miles away from its reservation and in a different county, thereby overstepping the bounds of his authority, reversing longstanding state policy, and effectively depriving Tribal, State, and local governments of significant governmental revenues.

II. HARMFUL IMPACTS OF THE COURT OF APPEAL'S DECISION

The Court of Appeal's decision to uphold the Governor's action erroneously empowers the Governor to unilaterally issue the State authorization required under IGRA for tribes to operate gaming on land taken into federal trust after October 17, 1988.[4] It enables the Governor to

[4] While taking land in trust is governed by a separate authority and process than lifting the prohibition on gaming on post-1988 acquired land in trust, as a practical matter, whenever a new off-reservation parcel is proposed to be taken in trust for gaming purposes, the Department of

drastically, singlehandedly and irrevocably alter longstanding State policy, jeopardize the existence of nearby Indian tribes, devastate local jurisdictions and their emergency services agencies, cut funding to the State gaming agency, and permit the expansion of Indian gaming by dozens of California's 109 federally recognized Indian tribes into urban population centers where – until now – the State has precluded such gaming.

A. The Court of Appeal's Decision Will Dramatically Increase Pressure to Allow Tribal Casinos in California's Urban Centers in Direct Violation of the People's Expressed Will.

The most significant harm the Court of Appeals' decision will do is to irrevocably reverse decades of California's public policy of limiting tribal casinos to existing, predominantly remote and rural federal Indian lands. Unless reversed by this Court, the decision below and the Governor's

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Interior typically handles the two applications alongside each other. *Compare* 25 U.S.C. § 465 and 25 C.F.R. Part 151 with 25 U.S.C. § 2719; *See also* 25 C.F.R. §§ 292.15, 292.3(a)(2). The failure to obtain a Governor's concurrence relating to an off-reservation fee-to-trust acquisition will generate a revisiting of the trust acquisition process. *See* 25 C.F.R. § 292.3(a)(2). In the Department of Interior's Handbook on Acquisition of Title to Land Held in Fee or Restricted Fee Status, the Department has under development a Handbook for Gaming Acquisitions, memorializing coordinated procedures when handling simultaneous applications for off-reservation trust land acquisition and the lifting of the prohibition on gaming on such lands. *See* Fee-to-Trust Handbook (Release # 16-47, Version IV (rev. 1), Issued: 6/28/16) (https://www.bia.gov/sites/bia.gov/files/assets/bia/ots/raca/pdf/idc1-024504.pdf).

arguments here will lead inevitably to tremendous pressure to expand tribal gaming to California's urban population centers.

If the Governor's unilateral concurrence allows Enterprise to move from gaming-eligible lands in rural Butte County to rapidly growing suburban lands closer to Sacramento, then surely Mooretown should be allowed to do the same, leapfrogging farther south still, over Enterprise's intended Yuba Parcel, into Sacramento County itself. Other tribes located in even more remote areas of the Feather River and Sacramento River drainages, or in the Sierra foothills above the Sacramento and San Joaquin Valleys could make just as compelling a case for being allowed to move as did Enterprise. Under the decision below and the Governor's position here, all that stands in the way of such endless migration of tribal casinos toward larger and larger population centers is perhaps a tribe's ability to make ever larger campaign contributions to the Governor and/or his or her political allies. That same scenario could play out over and over again, from Sacramento to San Diego, Los Angeles, and San Francisco.

The People of California directly considered this "slippery slope" problem and soundly rejected off-reservation gaming in a 2014 statewide referendum. Proposition 48, the Referendum on Indian Gaming Compacts, essentially would have allowed the North Fork Tribe to build a casino on

new, previously non-Indian land in the Central Valley, more than an hour's drive from that tribe's established reservation land in the foothills near Yosemite, closer to major freeways and Central Valley communities. It was a veto referendum, such that a "yes" vote was a vote to uphold or ratify the contested legislation (AB 277) that was enacted by the California State Legislature, while a "no" vote was a vote to overturn AB 277. Proposition 48 was defeated by a No vote of 60.96% to a Yes vote of 39.04%.[5]

The "No" ballot arguments in the State's official voter information guide argued that the voters should "[k]eep Indian gaming on tribal reservation land only. Years ago, California Indian Tribes asked voters to approve limited casino gaming on Indian reservation land. They promised Indian casinos would ONLY be located on the tribes' original reservation land. PROP 48 BREAKS THIS PROMISE."[6] The No ballot argument explained that "[w]hile most tribes played by the rules, building on their original reservation land and respecting the voters' wishes, other tribes are looking to break these rules and build casino projects in urban areas across California. VOTE NO ON PROP 48 TO STOP RESERVATION

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[5] *See* https://ballotpedia.org/California_Proposition_48,_Referendum_on_Indian_Gaming_Compacts_(2014).

[6] *Id.* (emphasis in original.)

SHOPPING." *Id.* (Emphasis in original).

The ballot argument against Prop. 48 expressly noted that if passed, "PROP 48 WILL START A NEW AVALANCHE OF OFF-RESERVATION CASINO PROJECTS." *Id.* (Emphasis in original). For this reason, many prominent newspapers called for the rejection of this controversial Indian gaming compact. For example, the Los Angeles Times urged a No vote on Prop. 48, explaining that its "two casino proposals could open the door to a new era of Indian gaming in the state … which would make these the state's first Indian casinos located off existing reservations." Los Angeles Times, August 19, 2012. "While most casinos are still in remote locations, a new push by tribes to purchase additional land at lucrative freeway locations threatens to kick off a whole new casino boom." Fresno Bee, April 21, 2013. "This year, it's the North Fork tribe. Others are lined up in the wings to make their bids to build casinos in urban areas." Bakersfield Californian, September 4, 2013. The San Diego Union Tribune noted that "Voters were assured (their approval of gaming) wouldn't trigger a casino boom and that casinos would only be built on recognized Indian territory." San Diego Union-Tribune, August 11, 2013. *See* fn. 6 *supra*.

The people of California have thus clearly manifested their intent to preclude off-reservation gaming. Allowing the Court of Appeal's decision

to stand in this case would enable the Governor to circumvent the people of California and the Legislature and to open California to a deluge of tribes attempting to leap ever closer to urban cores and open casinos in city centers.

B. Harms to the State and its Political Subdivisions.

The Court of Appeals erred in upholding the Governor's action in this case because it undermines the role Congress set for states in the federal legal framework governing Indian gaming. These roles and rights followed intensive state lobbying, were deliberate and calculated, and the Governor should not be permitted to unilaterally deprive California of its rights.

Congress sought in IGRA to balance the interests of Tribes and States. IGRA was "the outgrowth of several years of discussions and negotiations between gaming tribes, States, the gaming industry, the administration, and the Congress …." IGRA Senate Report at 3071. In shaping the legislation, Congress was plainly concerned with the sovereign interests of States and Tribes (as well as the federal government's sovereign interests and the commercial gaming industry's economic concerns). IGRA "provide[s] a means by which tribal and State governments can realize their unique and individual governmental objectives while at the same time, work

together to develop a regulatory and jurisdictional pattern that will foster a consistency and uniformity in the manner in which laws regulating the conduct of gaming activities are applied." *Id.* at 3076. It allows "differing public policies of these respective [state, tribal and federal] governmental entities [to] be accommodated and reconciled." *Id.* at 3076.

IGRA emerged in the wake of litigation in which states sought to impose their laws on tribes that operated gaming: "While some States have attempted to assert jurisdiction over tribal [gaming], tribes have very strenuously resisted these attempts." *Id.* at 3071. *See, e.g., California v. Cabazon Band*, 480 U.S. 202 (1987); *Seminole Tribe v. Butterworth*, 658 F.2d 3110 (5th Cir. 1982). States lobbied Congress intensively to "transfer[] jurisdiction over Indian gaming activities to the States." IGRA Senate Report at p. 3074. Tribes pushed back, seeking to self-regulate all gaming on their Indian lands. *See id.* at 3074, 3083. After prolonged debate, Congress found middle ground that it hoped would "achieve a fair balancing of competitive economic interests." *Id.* at p. 3071. Congress created in IGRA "a system for compacts between tribes and States for regulation of class III [casino] gaming." *Id.* Congress sought to ensure "that ***the interests of both sovereign entities are met.***" *Id.* at 3083 (emphasis added). As far as States were concerned, Congress intended

IGRA to protect "[a] State's governmental interests … include[ing] … the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system, including its economic interest in raising revenue for its citizens." *Id.* In short, Congress explicitly intended to consider and protect states' interests in connection with the federal authorization of tribal gaming.

Congress clearly had the interests of the states in mind in striking the balance that is IGRA. Congress focused on ensuring that states had input into whether and how Class III gaming could occur on Indian lands. This focus informed Congress's enactment of § 2719 requiring state input into, and approval of, any form of tribal gaming on lands placed into trust after October 17, 1988. Section 2719(b)(1)(a) was specifically intended to ensure that states had an opportunity to protect their own interests and policies before gaming could take place on new lands.

Congress foresaw problems arising if some tribes – relying on IGRA – invested tremendous resources to construct casinos on their existing trust land but were subsequently undercut by new casinos on newly-created trust lands cannibalizing the existing tribal casinos' markets. Congress understood that this scenario would harm tribes with pre-existing casinos and undermine IGRA's goals of self-government and self-sufficiency. *See*

25 U.S.C. § 2701(4); *id.* § 2702(1). Congress also understood that this scenario could undermine state and local governmental policies relating to matters such as gaming regulation, law enforcement, environmental regulation, land use planning, traffic control and improvements, water, sewer and other infrastructure, and property taxes.

That the expansion of Indian gaming poses major policy concerns for states is evidenced by the opinion of California's Legislative Analyst, which has expressly identified the expansion of the tribal casino industry, the payments tribes make to the State and its political subdivisions, and the statutory method of allocating Indian Gaming Special Distribution Fund ("SDF") funds, all as "key fiscal and policy issues" for the Legislature to consider as it evaluates new proposed compact amendments. "As the Legislature considers several proposed compact amendments in 2007 (as well as any future proposed compacts), however, it faces several key fiscal and policy issues, including: How much more should the tribal casino industry expand in California? How many more slot machines and casinos should be authorized? What payments should tribes make to the state and local governments? …Do compacts provide for effective state regulation to ensure that tribes meet their financial obligations to state and local governments? Should the statutory method of allocating funds from the

SDF [Special Distribution Fund] be changed in the future?" California Legislative Analyst, *California Tribal Casinos: Questions and Answers* (Feb. 2007), http://www.lao.ca.gov/2007/tribal_casinos/tribal_casinos_020207.aspx.

Congress's overarching concern with safeguarding state interests demonstrates clearly that IGRA focused on ensuring that states would have input into whether and how tribal gaming would occur. IGRA was not concerned with, and took no position on the question of, which entity within each state would formulate that state's position. The internal mechanisms of state policy-making were left to the states. IGRA was concerned only with ensuring that those policies, once formulated under state law, were given expression.

Thus, when Congress used the word "Governor" in IGRA, it intended only to designate the official that would, for purposes of federal law, communicate the state's position as to permitting any form of gaming on new trust land. Congress never intended to meddle in matters of internal state governance by determining which official would exercise the state's discretion or to grant the governor of any state authority that he did not otherwise have under state law, nor could Congress have done so constitutionally. As the Ninth Circuit Court of Appeals recognized twenty

years ago,

> "[w]hen the Governor exercises authority under IGRA, the Governor is exercising state authority. If the Governor of California concurs, or refuses to concur, he does so as a State executive, under the authority of State law. The concurrence (or lack thereof) is given effect under federal law, but the authority to act is provided by state law… In the present case, the consequences of the Governor's exercise of discretion under state law will affect how the Secretary of the Interior will proceed to execute IGRA. No doubt, federal law provides the Governor with an opportunity to participate in the determination of whether gaming will be allowed on newly acquired trust land. But when the Governor responds to the Secretary's request for a concurrence, the Governor acts under state law, as a state executive, pursuant to state interests. The Governor does not act with "significant authority" under federal law."

Confederated Tribes of Siletz Indians of Oregon v. United States, 110 F.3d 688, 697-98 (9th Cir. 1997), *as amended on denial of reh'g and reh'g en banc* (June 13, 1997). Indeed, IGRA's entire framework was intended to safeguard a broad array of state interests through deference to states and their law- and policy-making bodies. Construing IGRA as the Governor of California now proposes conflicts with the very policy vis-à-vis states IGRA sought to implement.[7]

Acting out of these concerns, Congress froze the status quo, generally prohibiting tribal gaming "on lands acquired by the Secretary in

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[7] *See* discussion of the potential Tenth Amendment implications of the Court of Appeal's opinion below at Section III of this brief.

trust for the benefit of an Indian tribe after October 17, 1988." 25 U.S.C. § 2719(a). IGRA's general rule – that tribes can only operate gaming on lands that were in federal trust as of 1988 – served the interests of states by generally containing tribal gaming to existing federal Indian trust lands.[8] It also served tribal interests because tribes knew where to expect new casinos to pop up and where there was little likelihood of this occurring. And it served local governments because they could gauge the extent of infrastructure required and negotiate agreements to obtain assistance in providing services like water, sewer, fire protection, and police protection. Because it was clear which trust lands existed in 1988 and were therefore eligible for gaming, states, local governments and tribes were able to plan accordingly. States and local jurisdictions could anticipate the likely impacts of gaming on pre-1988 trust lands within their geographic regions and plan their infrastructure accordingly. They also had assurances that tribal participation in mitigating the off-reservation impacts of tribal gaming, and tribal payments to state and local jurisdictions to this end, would remain relatively predictable and consistent. And Tribes were able to plan and construct casinos, and make financial and other commitments to

[8] It also served the economic interests of the commercial gaming industry, which as noted above clearly was involved in the negotiations leading to IGRA's passage.

their states and local jurisdictions, with a clear understanding of where additional casinos may be built in their vicinity.

Thus, counties like Colusa and Butte, as well as tribes like Colusa and Mooretown, were well aware of the distance between existing tribal lands eligible for gaming. These settled geographical relations have for nearly two decades informed financial commitments and cooperative agreements between local governments and tribes to mitigate off-reservation gaming impacts with respect to a wide range of issues including fire protection, police protection, emergency response, water supply, sewage services and road improvements. The State of California, for itself and on behalf of the local jurisdictions, understood the lay of the land and negotiated compacts under which Mooretown and Colusa pay substantial mitigation fees that go to the counties for the provision of services, infrastructure improvements, and similar matters. IGRA explicitly protected these states, local jurisdictions, and tribes by letting them know in advance the precise circumstances under which new casinos on new trust lands might appear and cut into casino revenues, thereby affecting the mitigation payments available to local jurisdictions, negotiated payments available to states, and governmental revenue available to tribes.

One of the very limited exceptions to IGRA's general prohibition

against gaming on new trust lands allows gaming on such land when:

> "the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination …."

Id. § 2719(b)(1)(A) (emphasis added).

Congress understood that circumstances might arise in which tribes wished to operate gaming on new trust land. Congress also understood that allowing tribes to put new casinos on new land could potentially harm states and local jurisdictions that had already – in reliance on the pre-1988 map of existing federal Indian trust lands – entered into compacts and mitigation agreements calibrated to existing markets and competition. Congress protected tribes and the states and local jurisdictions that rely on casino revenues for emergency and other services from potential harms inflicted by unanticipated newcomers by requiring that states confirm – through their governors – that such gaming would not be detrimental to them or to other nearby tribes. *See* 25 U.S.C. § 2719(b)(1)(A).

Given IGRA's mandate that tribes may operate gaming on pre-1988 trust land, Auburn, Colusa, Mooretown and other local tribes knew – and were required to take into account the possibility that – Enterprise might

construct a casino on its pre-1988 lands. Similarly, the local jurisdictions that rely on income and other assistance from Auburn, Colusa, and Mooretown for the provision of police, fire, emergency medical, and other services, were required to take the possibility into account and to accurately assess the potential for a reduction in such assistance, and to plan accordingly. And the State of California was similarly able to calculate the potential effects of all known Indian casinos on the region.

IGRA's safeguards against unanticipated changes in status quo as to where gaming may occur affected the decisions that tribes and local jurisdictions made and the agreements they reached. Relying on IGRA and their longstanding compacts, Colusa and Mooretown (and other similarly situated tribes) spent enormous amounts of time and resources planning, designing, financing, constructing, remodeling, expanding and operating governmental gaming facilities that took into account the known potential for an Enterprise casino on Enterprise's pre-1988 land. They developed and built small motels on their reservations,[9] as well as other necessary infrastructure projects such as road, sewer, water and electrical

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[9] *See* Colusa's River Valley Lodge, http://www.colusacasino.com/hotel/river-valley-lodge/; and Mooretown's Feather Falls Lodge, http://featherfallscasino.com/the-lodge-2/the-lodge/.

improvements.[10] Based on these carefully-planned improvements, these tribes also entered into agreements with local jurisdictions for the provision of emergency and other services, with local jurisdictions relying on the income from these agreements. The tribes and local jurisdictions based their agreements on the revenues they could anticipate from each tribe's gaming facility. The drastic decline in Mooretown's, Colusa's and Auburn's revenue that would occur as a result of the Governor's action here would thus deprive numerous local jurisdictions within California of desperately-needed funds for emergency and other services.

In addition, the State of California similarly relies on its revenue-sharing from Mooretown, Colusa, Auburn and other similarly-situated tribes under Tribal-State Compacts. If these tribes' revenue decreases as a result of the Governor's actions, the revenues available to local jurisdictions and to the State gaming regulatory agency will similarly decrease. When California negotiated 61 separate compacts

[10] For example, Colusa constructed a casino that is entirely self-contained, including for electricity, and effluent disposal. It also established a tribal health clinic that serves the surrounding community and also operates the only dialysis facility in the County, sparing the County's residents the burden of having to travel to Marysville/Yuba City for dialysis. The County was thus able to count on Colusa's continuing ability to provide these services, releasing local jurisdictions from the obligation to do so.

in 1999,[11] one of the State's highest priorities was to obtain revenue sharing to help the State and its political subdivisions mitigate the projected costs of State regulation of tribal gaming and the off-reservation impacts of tribal casino projects. To this end, the 1999 compacts created the Indian Gaming Special Distribution Fund ("SDF"), whose primary purposes included "(a) Grants … for programs designed to address gambling addiction. (b) Grants … for the support of state and local government agencies impacted by tribal government gaming. (c) Compensation for regulatory costs incurred by the State Gaming Agency and the Department of Justice in connection with the implementation and administration of tribal-state gaming compacts." *Id.*[12] The Legislature codified the SDF in California Government Code § 12012.85, which created the SDF "for the receipt and deposit of moneys received by the state from Indian tribes pursuant to the terms of tribal-state gaming compacts." *Id.* The SDF funds "shall be available for appropriation by the Legislature" for several purposes enumerated in the statute. *Id.*

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[11] *See* http://www.cgcc.ca.gov/?pageID=compacts (listing California's Indian gaming compacts, including dates of subsequent amendments, if any, listed by tribe).

[12] Other purposes include payment of "shortfalls that may occur in the Indian Gaming Revenue Sharing Trust Fund", payments to implement tribal labor relations ordinances, and "[a]ny other purpose specified by law." *Id.* at § 12012.85 (d)-(f).

Mooretown, Colusa and Auburn are three of the 31 tribes currently paying into the SDF. *See* http://www.cgcc.ca.gov/documents/Tribal/2017/List_of_tribes_currently_making_payments_4-24-17.pdf.

Mooretown's 2016 contribution to the SDF totaled $980,486. Over the past three years, 2014-2016, Mooretown's SDF contributions totaled $2.6 million. Mooretown projects that its SDF contributions going forward will be in the range of $925,000 – $1 Million annually – provided Enterprise does not open a casino in Yuba County. Importantly Mooretown's payments to the SDF are calculated as a percentage of slot machine gross revenues. *See* Compact section 5.1. Thus, if Mooretown's casino revenues decrease drastically, so will its payments to the SDF.

Since the inception of its Compact, Colusa has contributed approximately $16,186,875 into the SDF, and $1,620,000 into the RSTF. In 2016, Colusa paid $960,188 into the SDF, and $360,000 into the RSTF. Since the inception of its Compact, an average of approximately $700,000 of Colusa's SDF payments have been returned to Colusa County, from which the Local Community Benefit Committee has made grants sponsored by Colusa to the County and other local governmental agencies.

The revenues that would be lost to local jurisdictions and the State

gaming regulatory agency due to a decline in Mooretown's and Colusa's revenue would not necessarily be recoverable from Enterprise. This is because Enterprise's proposed casino would not operate under a compact with the State of California, but rather under procedures imposed on California by the Secretary. The California Legislature explicitly declined to ratify a compact with Enterprise and the Secretary therefore prescribed its own Class III procedures for Enterprise. Those procedures dramatically alter the method by which Enterprise's contributions to the SDF would be calculated and paid.[13] Moreover, the Enterprise procedures alter the permitted uses of SDF funds. Specifically, the Enterprise Procedures omits backfilling the Indian Gaming Revenue Sharing Trust Fund, another key element of the 1999 compacts that provided revenue sharing from gaming tribes to Non-Compact Tribes.[14] These same changes to the State SDF were

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[13] *Compare* Secretarial Procedures for the Estom Yumeka Maidu Tribe of the Enterprise Rancheria (hereinafter "Enterprise Procedures"), § 4.3(a) (available at http://www.cgcc.ca.gov/documents/compacts/ORIGINAL_COMPACTS/Enterprise%20Secretarial%20Procedures%202016.pdf) with section 5.1 of the 1999 Compact (*see, e.g.*, Mooretown's compact at http://www.cgcc.ca.gov/documents/compacts/original_compacts/Mooretown_Compact.pdf).

[14] *Compare* Enterprise Procedures § 4.3.1 with Cal. Gov't Code § 12012.85 (d) ("Payment of shortfalls that may occur in the Indian Gaming Revenue Sharing Trust Fund. This shall be the priority use of moneys in the Indian Gaming Special Distribution Fund"). Note that the Legislature

in the proposed Enterprise Compact, which the California Legislature rejected. *See* https://www.gov.ca.gov/docs/Final_Compact_-_Enterprise.pdf at § 4.3 and § 4.3.1. Thus, permitting the Governor to unilaterally approve gaming on Enterprise's new trust land would significantly harm the State and local jurisdictions.

Congress clearly intended to afford states, tribes and local jurisdictions IGRA's full benefits and protections. These protections included IGRA's grant to states of the right to block gaming on new trust land when, as here, a tribe like Enterprise sought to belatedly alter the status quo and take action that would negatively impact the state and its local jurisdictions and tribes. IGRA clearly intended to enable states to veto any gaming on post-1988 trust land that would interfere with their interests.

That the State of California is vigilant when it comes to the impacts of tribal gaming on State interests has been demonstrated repeatedly over the last twenty years. California robustly exercised its rights under IGRA in that time period. The California Legislature carefully considered each of the 103 compacts and compact amendments it has approved since IGRA's

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expressly specified that "This [backfilling of the Revenue Sharing Trust Fund] shall **be the priority use of moneys in the Indian Gaming Special Distribution Fund.**" *Id.* (emphasis added).

passage, and entered into the compacts in reliance on their anticipated beneficial impacts on tribes, local jurisdictions and the State. Allowing the Governor to unilaterally concur in a two-part determination, without requiring legislative ratification or approval, would permit the Governor to usurp the State's approval power and singlehandedly undermine almost twenty years of carefully-considered legislative policy. It would further allow the Governor to undo the beneficial effects of agreements approved by the Legislature years earlier, divest tribes and local jurisdictions of badly needed funds used to pay for basic governmental services, abolish existing jobs, and cause the State to lose revenues.

In short, according the Governor unilateral authority to concur in Secretarial two-part determinations would enable the Governor to manipulate the movement of tribal casinos like pieces on a checkerboard, skipping tribes over each other in an ongoing scramble to get ever closer to urban centers, with no regard for the policies, interests, objectives, investments, and strategies of the state or local communities or tribal governments.

C. Permitting the Governor to Unilaterally Concur in Two-Part Determinations Endangers the State by Subjecting Its Long-Term Policy to the Hazards of Politically-Motivated Gubernatorial Action.

The Court of Appeal's decision, allowing a single individual to

unilaterally make irrevocable State policy based on input only from the proponent of the requested action, risks holding the State's future hostage to that individual's political interests and politically-motivated actions. The ruling must be overturned because the decision to permit gaming on newly-acquired trust land has long term implications and is too important to place in the hands of a single elected official. Placing such decision-making authority in the Governor eliminates the role of the Legislature which is composed of numerous individuals whose various interests – whether political, regional or otherwise – balance one another in the course of committee hearings and floor votes.

The Governor, as an elected official, may at times be motivated to act in ways that are more beneficial to a particular interest group than to the State as a whole. This is a normal aspect of democratic political systems that, in response, generally incorporate mitigating checks and balances. *See* Cal. Const. art. III, § 3 ("The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution"). For our system to work, each of its branches – legislative, executive, and judicial – must honor its respective role. An individual governor, entrusted with executing the policy enacted by a multi-person

legislature, cannot suddenly be allowed to unilaterally enact policy, particularly an irrevocable policy such as the permanent transfer of State and local jurisdiction over lands that flow from a federal fee-to-trust transfer.

Allowing the Governor such unilateral authority is dangerous for at least two reasons. First, it places far too much unchecked power in the hands of a single individual. When a legislature composed of numerous individuals makes State policy, no single person has a monopoly over State-wide policy-making. Second, permitting a governor to singlehandedly bind the State to a policy he or she favors allows the political pressures and interests that drive that individual to dictate to the State as a whole, overriding other expressions of policy on this topic. Allowing the political interests of a single individual to set State policy is not only undemocratic; it is dangerous.

The Governor's decision in the present case to usurp the Legislature's authority is even more problematic because it is irreversible. When the Legislature acts, the people of California can reverse that action through referendum. As explained above, the people of California rejected "reservation shopping" and shut down tribes' ability to operate gaming in urban centers far from those tribes' reservations when they voted "no" on

Prop. 48 in 2014. In contrast, the Governor's unilateral authorization of gaming on the Yuba Parcel cannot be overturned by referendum. In unilaterally authorizing gaming on the Yuba Parcel, the Governor has thus not only usurped the legislature's policy-making authority; he has also shut down the people's ability to exercise their referendum power to override his misguided decision. Allowing the Governor to sidestep democracy and hold the entire State hostage to his actions, is a bad policy choice.[15]

D. Harms to the *Amici* Tribes.

1. Harms to Mooretown.

As noted above in the accompanying Application to File an *Amicus Curiae* Brief In Support of Appellant ("Application"), the harms that will befall Mooretown as a result of the Governor's action in this case are illustrative of the types of harms that will occur statewide. Mooretown's government depends almost entirely on revenues generated by the Tribe's Feather Falls Casino located on the Mooretown Reservation. The Tribe uses these revenues to fund Tribal governmental operations and

[15] While the *amici* Tribes agree with Appellant's argument that the Governor's power to negotiate and execute compacts does not impliedly include the power to concur in fee-to-trust determinations, in the alternative, even if it did include that power, it nevertheless must be subject to legislative ratification. The compacting power is subject to legislative ratification. To the extent the Court thinks it silently implies the power to concur, that power too must be subject to legislative ratification.

infrastructures. Casino revenues also provide funding for the Tribe's education, housing, health, welfare, vocational, and elder care programs, among others. These funds also support the Tribe's participation in local community emergency services, and help to generate jobs for the community at large. Approximately 97% of the Tribe's governmental budget is funded with revenues from Feather Falls Casino.

In addition to generating revenues to sustain the Tribal government, Mooretown's casino also generates revenue that assists other tribes. Under their 1999 gaming compacts with the State, Mooretown and Colusa have paid millions of dollars into the Indian Gaming Revenue Sharing Trust Fund ("RSTF"), a fund created to support Non-Compact Tribes.[16] As of July, 2017, tribes paying into the RSTF, such as Colusa and Mooretown, have collectively generated over $1.2 Billion for the Non-Compact Tribes.[17] These funds are critical to the existence and governmental operations of the numerous non-gaming Indian tribes in California.

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[16] *See* section 4.3.2 of Mooretown's and Colusa's compacts, which are available on the California Gambling Control Commission's web site at http://www.cgcc.ca.gov/?pageID=compacts.

[17] *See* California Gambling Control Commission, *Revenue Sharing Trust Fund Report (RSTF) of Distribution of Funds to Eligible Recipient Indian Tribes for the Quarter Ended June 30, 2017* Ex. 1, p.8, available at http://www.cgcc.ca.gov/documents/rstfi/2017/14_RSTF_Distrib_63rd_CommStaffReport.pdf.

In addition, Mooretown's casino generates revenue that assists the State and local jurisdictions. Both Mooretown and Colusa pay into the Special Distribution Fund ("SDF"), a fund that has generated hundreds of millions of dollars for local government agencies to fund law enforcement, fire-fighting services, emergency response services, road improvements, other local services, and for the State to fund gaming regulation. Butte and Colusa counties have each received between $750,000 and $2,000,000 each annually from the SDF.[18]

The Mooretown government's ability to provide governmental services to its members, maintain Tribal infrastructure, operate critical emergency services, help sustain other tribes, and continue to fund State and local programs as described above, is contingent on the Feather Falls Casino's success. The casino's success, in turn, depends on its patronage. Mooretown's casino – like those of virtually all other California Tribes located in rural areas – depends entirely on patronage from mid-distanced suburban and urban populations.

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[18] *See* California State Auditor, Indian Gaming Special Distribution Fund, Report 2016-036, at p. 8 (March 2017) (auditing fiscal year 2013-14) (available at https://www.auditor.ca.gov/pdfs/reports/2016-036.pdf). Colusa County received, on average, about $700,000 per year from Colusa's SDF payments in years when the Governor approved legislation appropriating money to the SDF.

As explained in the accompanying Application, geography and population are key to understanding the devastating impacts the Governor's action would have on Mooretown and other similarly situated tribes. Mooretown's casino is located approximately 70 miles north of Sacramento. Colusa's casino, is located 27 miles from its customer base in Marysville/Yuba City and 70 miles from its customer base in Sacramento. Enterprise has 40 acres of pre-existing trust lands, which, although not as ideally-situated for a casino as the Yuba Parcel, nonetheless are eligible for gaming under IGRA's general rule.[19] *See* FEIS § 1.2.2; Part 151 ROD § 2.2.4 (Alternative D – Butte Site). Those lands, which are eligible for gaming because they were in federal trust for Enterprise before IGRA's 1988 cutoff, are located approximately nine miles from Mooretown's casino. *Id.* Mooretown's customer base is located to the south of Mooretown, in and near Yuba County.

Rather than building a casino on its existing gaming-eligible 40-acre reservation, however, Enterprise instead attempted to leapfrog over Mooretown by proposing to build a casino on a non-tribal parcel of land located 35 miles to the south of Mooretown, along the highway that leads to

[19] *See* footnotes 1-3 *supra* (Google Map links to the Enterprise, Colusa, and Mooretown reservations).

Mooretown. In other words, Enterprise deliberately sought to position itself significantly closer to Mooretown's patron base – 55-65% of which is located in Yuba and other nearby counties – than Mooretown's current location, along the very same highway that currently feeds Mooretown's casino. An Enterprise casino on the Yuba Parcel would, as Enterprise well knew, cannibalize Mooretown's customers. *See* FEIS § 1.2.2 and Figures 1-4 and 1-5; see also Part 151 Record of Decision ("ROD") § 2.2.4 (Alternative D - Butte Site). An Enterprise casino on the Yuba Parcel would be devastating for Mooretown.

The Governor's action – authorizing Enterprise to operate gaming on the Yuba Parcel, tens of miles away from the Enterprise reservation – will, unless stopped by this Court, result in catastrophic reductions in Mooretown's governmental revenues. Mooretown's best estimates are that Enterprise opening a casino in Yuba County will cause a reduction of 60-65% in revenues from Mooretown's Feather Falls Casino. Because approximately 97% of the Tribe's governmental budget is funded with revenues from Feather Falls Casino, a 60-65% reduction in casino revenues would be devastating to Tribal government operations.

In practical terms, this loss of revenue will eliminate Mooretown's Health, Welfare & Burial program. Members would no longer receive help

from the Tribe with the cost of doctors' appointments, prescriptions, glasses, dental care, or the cost of burying their loved ones. The anticipated loss of revenue will end current and planned construction and maintenance projects for Tribal buildings and infrastructure. It will terminate the Tribe's Higher Education Program which funds full-time college and vocational students each year. In addition, tribal member K-12 students would lose funding that helps with tutoring, school fees, gym clothes and other school-related needs. Further, the Tribe's donations to off-reservation community groups, would be terminated, as would the Tribe's budget for economic development projects seeking to diversify its sources of governmental revenue beyond gaming.

In addition, the Tribe would have to terminate approximately 25 employees. The Tribe and surrounding community would lose another estimated 200 jobs at Feather Falls Casino. This loss of jobs will have a predictable ripple effect on households, local businesses supported by wages, and businesses that serve as vendors for the Tribal government and the casino. These displaced workers would, in many cases, go from being taxpayers to consumers of social services. Revenue to local governments and agencies would decrease because the funds paid into the SDF are directly based on gaming revenue. Butte County and City of Oroville Fire

departments, Sheriff and Police departments, and Public Works, among others, would all feel the significant impact of this loss.

In sum, the Governor's action will directly cripple the Tribe's ability to meet the needs of its own community, and indirectly harm surrounding non-tribal communities. The same fate would await other rural tribal and county governments throughout the State.

2. Harms to Colusa.

As set out in the accompanying Application, a study performed by one of the country's leading experts on tribal government gaming found that in the first year of operation of an Enterprise casino on the Yuba Parcel, Colusa's governmental revenues for discretionary uses would decline by 60%, and by the third year of a casino's operation on the Yuba Parcel, 71%. Colusa must use a significant portion of casino profit to service its existing debt and maintain the casino so that it can remain competitive in the market. After these expenditures, the Tribe would only be left with approximately 23% of its current budget for tribal government discretionary expenditures, and by the third year of operation of a casino on the Yuba Parcel, Colusa's discretionary government revenues would decline to approximately 10% for such expenditures compared to current budget. Colusa would likely have to lay off about 100 casino employees, or almost 25% of its casino's

workforce, as well as a substantial number of its governmental employees.

The Governor's action will directly cripple Colusa's ability to engage in meaningful self-governance and indirectly harm surrounding non-tribal communities. Other rural tribes, and their local governments, would suffer similar impacts were the Court of Appeal's decision to be upheld.

III. THE COURT OF APPEAL'S DECISION RAISES A SERIOUS TENTH AMENDMENT ISSUE

The Court of Appeal's construction of IGRA raises serious federal Constitutional questions under the Tenth Amendment. This construction disregarded the doctrine of constitutional avoidance, under which "a statute should not be construed to violate the Constitution if any other possible construction remains available." *People v. Garcia*, 2 Cal.5th 792, 804 (2017). Because an otherwise acceptable construction of IGRA exists – namely, Appellant's interpretation – this Court should reverse.

The Tenth Amendment is a part of the federal Constitution's system of "dual sovereignty" in that it reserves to the states those powers not delegated to the federal government. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). The Constitution's "separation of the two spheres" – that is, the federal government and the states – "is one of the Constitution's structural protections of liberty." *Printz v. U.S.*, 521 U.S. 898, 921 (1997). "The constitutionally mandated

balance of power between the States and the Federal Government was adopted by the Framers to ensure the protection of our fundamental liberties. Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory*, 501 U.S. at 458 (internal quotations and citations omitted). Harvard Constitutional Law Professor Laurence Tribe has noted that the federal Constitution, "presupposed that neither the states nor the federal government could undermine ultimate popular control over … the state lawmaking process." Tribe, *American Constitutional Law*, §§ 5-12, p. 909 (3d ed.2000) (*discussing Gregory*, 501 U.S. at 463).

In *New York v. United States*, 505 U.S. 144 (1992), the Supreme Court addressed whether incentives created by the Low-Level Radioactive Waste Policy Amendments of 1985 were within Congress's authority under the Commerce Clause or whether they violated the Tenth Amendment. One incentive required states to take title to low level radioactive waste if they could not arrange for appropriate disposal sites or to fully comply with the federal regulatory scheme. The Supreme Court held that this incentive violated the Tenth Amendment because it usurped the state's authority to

regulate this subject matter by requiring the states to regulate in a particular way. (*Id.* at 161-62.) The Court explained: "While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *Id.* at 162.

In this case, the Court of Appeal ratified just the sort of intrusion that New York held is forbidden by the Tenth Amendment. IGRA expressly designates the state official to decide the state's position as to a gaming fee-to-trust transfer: it must be the governor who decides whether to concur, and the governor who communicates that decision to the Secretary. If a state has delegated such authority to its legislature, for all practical purposes the state would – under the Court of Appeal's reasoning – be compelled to reallocate that governmental decision making authority to its governor to comply with federal law. Read this way, IGRA commandeers state government, usurps the States' authority to decide for itself who within its government shall make the significant policy determination whether a new fee-to-trust transfer for gaming purposes is or is not detrimental to the surrounding community. Compare *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981) (upholding against Tenth

Amendment challenge federal statute because "there can be no suggestion that the Act commandeers the legislative processes of the States.") The Tenth Amendment, however, leaves it to the State to decide which state body or official should make such decisions.[20]

It is of no constitutional moment that Governor Brown may disclaim federal authority as a source of his power to concur here. IGRA on its face puts the concurrence squarely in the governor's hands, regardless of how state law allocates authority to decide for the state whether or not urbanized gaming would be detrimental to the surrounding community specifically and state policy generally. The potential constitutional violation is that Congress has, without authority, substituted its decision for the State's IGRA. Affirming the Court of Appeal here would countenance a federal mandate designating which branch of state government can decide these important questions of state policy. Thus to avoid unnecessarily deciding the lurking Tenth Amendment problem, this Court should adopt Appellant's

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[20] Federal law certainly can make the State's concurrence a condition precedent to the Secretary's ability to lift the gaming prohibition in section 2719. See *Confederated Tribes of Siletz Indians of Oregon v. United States*, 110 F.3d 688, 695 (9th Cir. 1997) ("By requiring local approval, Congress is exercising its legislative authority by providing what conditions must be met before a statutory provision goes into effect"). But it cannot dictate to the State which state body or official can or should participate in a federal program – that is a matter to be determined solely under state law.

interpretation of IGRA and reverse the Court of Appeal.

States must implement their Indian gaming policy according to their own state laws. For example, the State of Washington has delegated to its Gambling Commission the authority to negotiate tribal-state compacts under IGRA. *See* Wash. Rev. Code Ann. § 9.46.360 ("The gambling commission … shall negotiate compacts for class III gaming on behalf of the state with federally recognized Indian tribes in the state of Washington"). Congress could have left unstated which body or official would have the authority to express the State's concurrence or non-concurrence in Secretarial two-part determinations. Instead, IGRA designates the Governor as unilaterally deciding state policy and as the conduit for expressing State concurrence, apparently, at least under the Court of Appeal's view, leaving the states with no choice: it must be the Governor – and only the Governor – who can decide whether to concur and communicate that decision to the Secretary. Alternatively, under the Court of Appeal's decision, the Governor unilaterally may decide to take no action, effectively declining a concurrence, even if the state's legislative branch could or should have the concurrence power under state law. Federal law certainly can make the State's concurrence a condition precedent to the Secretary's ability to lift the gaming prohibition in section

2719. See *Confederated Tribes of Siletz Indians of Oregon v. United States*, 110 F.3d 688, 695 (9th Cir. 1997) ("By requiring local approval, Congress is exercising its legislative authority by providing what conditions must be met before a statutory provision goes into effect"). But it cannot dictate to the State which state body or official can or should participate in a federal program – that is a matter to be determined solely under state law.[21]

IV. CONCLUSION

For these reasons, Mooretown and Colusa urge the Court to reverse the judgment of the Court of Appeal for the Third Appellate District.

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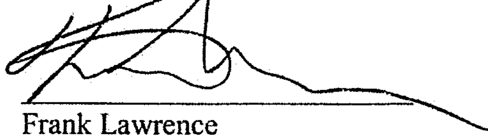
[21] In *Lac Courte Oreilles v. U.S.*, 367 F.3d 650 (7th Cir. 2004) – which held in part that the gubernatorial concurrence requirement did not violate the 10th Amendment, the decision focused on the state's gaming policy and did not address the question of the federal law mandating that this concurrence be done by a state's governor. In fact, the Seventh Circuit read IGRA overly narrowly as merely "seeking the voluntary input of the States in the federal government's execution of federal law" when in fact the State's concurrence is an essential element of the two part determination. *Id.* at 663. Moreover, the state in that case did not have the expressions of public policy opposing off-reservation gaming that California has, as discussed above.

Dated: September 14, 2017

Respectfully submitted,



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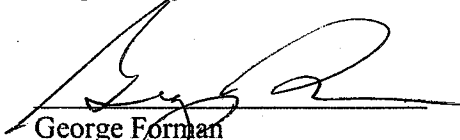

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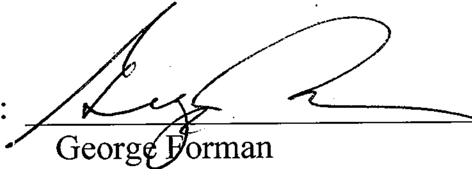
CERTIFICATION OF COMPLIANCE

Pursuant to Rule 8.204(c)(1), California Rules of Court, the undersigned hereby certifies that the *Amici Curiae* Brief of Mooretown Rancheria of Maidu Indians of California and Cachil Dehe Band of Wintun Indians of the Colusa Indian Community contains 10,874 words, in 13 point Times New Roman font, excluding Tables and this Certificate, according to Corel WordPerfect x8, the computer program used to produce this brief.

Dated: September 14, 2017

FORMAN & ASSOCIATES

By: 

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