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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MADERA

STAND UP FOR CALIFORNIA!, BARBARA LEACH,

Plaintiffs,

v.

STATE OF CALIFORNIA et al.,

Defendants.

NORTH FORK RANCHERIA OF MONO INDIANS,

Intervenor-Defendant and Cross-Complainant,

v.

STATE OF CALIFORNIA et al.; DOES 51-100,

Cross-Defendants.

CHERYL SCHMIT, an individual,

Real Party in Interest.

Case No. MCV062850

Dept: 4
Judge: Michael J. Jurkovich

Real Party in Interest Cheryl Schmit's Memorandum of Points and Authorities in Support of Demurrer to Cross-Complaint

Date: July 1, 2014
Time: 8:30 am
Place: Dept. 4

Complaint filed: March 27, 2013

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INTRODUCTION

Exercising her constitutional right to challenge the Legislature's enacting of a statute ratifying the class III gaming compact between the State of California and the North Fork Rancheria of Mono Indians (the "Tribe"), Real Party in Interest Cheryl Schmit ("Schmit") successfully qualified a referendum for the November 2014 general election to reject the Legislature's action. The Tribe now seeks to infringe on Schmit's constitutional right by bringing an action for declaratory relief that cannot be maintained as matter of law and by attempting to transform a matter of statewide concern into a narrow controversy between the parties to the compact.

Schmit files this demurrer to the Tribe's Verified Cross-Complaint ("Cross-Complaint") on the grounds that the Cross-Complaint fails to allege facts sufficient to support a cause of action, a claim for declaratory relief regarding the validity of the referendum is not subject to pre-election review, and the Court has discretion dismiss a cause of action for declaratory relief where an adequate remedy is provided by statute.

The demurrer must be sustained for the following reasons:

1. Because Assembly Bill No. 277 ("AB 277") was presented as a bill to both houses, passed by a majority vote of both houses, and signed into law by the Governor, it enacted a statute that is subject to the referendum power of Article II, section 9, of the California Constitution. The Legislature chose to ratify tribal-state compacts by statute and could have cut off the electorate's right of referendum by passing AB 277 as an urgency statute, but it did not.

2. The referendum of AB 277 cannot conflict with the federal Indian Gaming Regulatory Act ("IGRA") because IGRA does not prescribe the method for approving tribal-state compacts, but rather leaves the decision regarding how a compact is approved and by whom it is approved entirely up the states. Consequently, the referendum cannot violate the Supremacy Clause of the U.S. Constitution.

3. The referendum of AB 277 cannot conflict with the timing requirements under California law or IGRA for the approval of a tribal-state compact because the federal approval of the compact in the Federal Register cannot give effect to a compact under state law, and the

Secretary of the Interior has the authority to reexamine federal approval where a compact has been approved in violation of state law.

4. The short title of the referendum petition, as matter of law, could not have misled any potential voters in the manner the Tribe alleges, and any allegations that the short title was misleading are theoretical and speculative.

5. The Tribe's cause of action does not warrant pre-election review because the Tribe does not seek a writ of mandate to prevent the referendum from being placed before the voters. To hold otherwise would infringe on what California courts have deemed "one of the most precious rights of our democratic process."

6. This Court has discretion under Code of Civil Procedure Section 1061 to dismiss the Tribe's cross-complaint because members of the Tribe have been provided a speedy and adequate remedy under Section 13314 of the Elections Code.

For these reasons, Real Party in Interest respectfully asks the Court to sustain this demurrer without leave to amend.

STATEMENT OF FACTS

AB 277 was introduced by Assembly Member Hall, February 11, 2013. [Declaration of Brian Daluiso in Support of Request for Judicial Notice in Support of Real Party's Demurrer (Daluiso, Decl.) ¶ 2, Ex. 1.] On May 2, 2013, the Assembly passed AB 277, a bill to ratify the compact between the State of California and the Tribe and add section 12012.59 to the Government Code. [*Ibid.*] On June 27, 2013, the Senate passed AB 277. [*Ibid.*] On July 3, 2013, the Governor signed AB 277. [Cross-Complaint, ¶ 31, p. 12.] On or about July 8, 2013, Schmit submitted a request for title and summary for a "proposed statewide referendum of AB 277," and on July 19, 2014, the Attorney General issued a title and summary, entitling the measure "Referendum to Overturn Indian Gaming Compacts." [*Id.*, ¶ 33, p. 12-13.] On November 20, 2013, Secretary of State Bowen certified the Referendum Petition as qualifying for the November 2014 general election ballot. [*Id.* ¶ 33, p. 13.]

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LEGAL STANDARD

A demurrer tests the sufficiency of a cross-complaint by assuming the truth of any factual allegations and raising issues of law. *Hoffman v. Smithwood RV Park, LLC* (2009) 179 Cal.App.4th 390, 399. Courts "treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions or fact or law." *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318. A demurrer is proper and should be sustained where a claim for declaratory relief is wholly derivative of claims that fail as a matter of law. See *Ball v. FleetBoston Fin'l Corp.* (2008) 164 Cal.App.4th 794, 800; *Hoffman*, supra, 179 Cal.App.4th at 407. A demurrer is also proper "when the complaint shows on its face the claim is not ripe for adjudication" *Breneric Associates v. City of Del Mar* (1998) 69 Cal.App.4th 166, 188.

I. THE TRIBE FAILS TO ALLEGE FACTS SUFFICIENT TO SUPPORT A CAUSE OF ACTION

A. In Ratifying the Compact Through AB 277, the Legislature Exercised Its Inherent Lawmaking Power and Enacted a Statute Subject to Referendum

Article IV, section 1, of the California Constitution declares, "The legislative power of this State is vested in the California Legislature . . . , but the people reserve to themselves the powers of initiative and referendum." Article II, section 9, of the Constitution defines the referendum power as "the power of the electors to approve or reject statutes or parts of statutes *except urgency statutes*, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State." Cal. Const., art. II, § 9 (emphasis added).

The powers of referendum and initiative are not granted to the people but rather reserved to the people. Therefore, it is "'the duty of the courts to jealously guard this right of the people,' and the courts have described the initiative and referendum as articulating 'one of the most precious rights of our democratic process.'" *Zaremberg v. Superior Court* (2004) 115 Cal.App.4th 111, 115 (quoting *Rossi v. Brown* (1995) 9 Cal.4th 688, 695). Accordingly, California courts have adopted a "judicial policy to apply a liberal construction to [the referendum] power wherever it is challenged in order that the right be not properly annulled. If doubts can be reasonably resolved in favor of the use of this reserved power, courts will preserve

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it." *Indep. Energy Producers Ass'n v. McPherson* (2006) 38 Cal.4th 1020, 1032. A referendum measure "must be upheld unless [its] unconstitutionality clearly, positively, and unmistakably appears." *Rossi v. Brown*, *supra*, 9 Cal.4th at 711.

The Tribe's argument that, in ratifying the compact, the Legislature "did not exercise its inherent lawmaking authority to enact legislation" [Cross-Complaint, ¶ 3, p. 2] fails as a matter of law. The Cross-Complaint makes no argument and offers no authority for the position that a bill duly passed by a majority of both houses and signed by the Governor does not enact a statute subject to referendum.

1. The Legislature chose to ratify AB 277 by enacting a statute subject to referendum

Section 19(e) of the California Constitution states, "The Legislature has no power to authorize, and shall prohibit, casinos of the type currently operating in Nevada and New Jersey." Section 19(f) provides a narrow exception:

> Notwithstanding subdivisions (a) and (e), and any other provision of state law, the Governor is authorized 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 tribes on Indian lands in California in accordance with federal law.

Cal. Const., art. IV, § 19(f) (emphasis added).

Thus, under the Section 19(f), the Legislature may authorize Indian gaming that it would otherwise be prohibited from authorizing under subdivision (e).

Though class-III Indian gaming may be conducted only pursuant to a compact, 25 U.S.C. § 2710(d)(1)(C), IGRA "does not define what is necessary for a tribe and state to 'enter[] into' a compact." *Pueblo of Santa Ana v. Kelly* (10th Cir. 1997) 104 F.3d 1546, 1553. Rather, "state law determines the procedures by which a state may validly enter into a compact." *Ibid*; *Saratoga County Chamber of Commerce Inc. v. Pataki* (N.Y. App. Div. 2002) 293 A.D.2d 20, 22, *aff'd as modified*, (2003) 100 N.Y.2d 801 ("[W]e look to state law rather than IGRA to determine whether a state has validly bound itself to a compact").

The California Constitution, while it grants the Legislature the authority to ratify

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compacts, is silent as to how the Legislature does so. With no prescription or guidance from either IGRA or the California Constitution, the Legislature has determined for itself that

> [t]hese compacts *shall be ratified by a statute* approved by each house of the Legislature, a majority of members thereof concurring, and signed by the Governor, unless the statute contains implementing or other provisions requiring a supermajority vote, in which case the statute shall be approved in the manner required by the Constitution.

Gov. Code, § 12012.25(c) (emphasis added).

Absent the prohibition by superior authority, it is within the Legislature's plenary power to decide how it will approve compacts. See *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180 (stating that the Legislature has plenary power subject only to prohibitions in the Constitution; and "if there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action").

Before the Legislature enacted Government Code section 12012.25(c) and the voters passed Proposition 1A, the Legislature inquired into whether a compact could be ratified by statute and whether such a statute would be subject to referendum. In 1998, Senator Burton addressed these questions to the Legislative Counsel. [Daluiso Decl., ¶ 3, Ex. 2.] The Legislative Counsel stated that such an approval was subject to referendum because "the ratification by the Legislature of a tribal-state gaming compact constitutes a change in law that cannot be accomplished except by statute." [*Id.* at p. 3.] "In our view, the execution of a tribal-state gaming compact . . . represents a change in the state's public policy on gambling, and the ratification of such a compact is an expression of both the Legislature's intent with respect to that policy and its intent to bind the state to the terms of that agreement."[1] [*Ibid.*] The Legislative Counsel further

[1] The Legislative Counsel more recently appears to have changed positions as to whether ratifying the compact by statute is required. In 2007, the Legislative Counsel stated, "A resolution is sufficient for ratification by the Legislature of a Tribal-State gaming compact." [Daluiso Decl., ¶ 4, Ex. 3, p. 1.] Nevertheless, the Legislative Counsel did not opine as to the propriety of the Legislature's practice of ratification by statute. Its analysis, however, confirms that it is the Legislature's right to do so. "[G]iven that the language of subdivision (f) is silent regarding the method of ratification, and in light of both the Legislature's manifest power to create rules governing its own proceedings and the lack of any express constitutional limitation on its power to ratify by resolution, it is our view that the Legislature is not required to ratify by means of a statute, but instead may do so by means of a resolution adopted by each house." [*Id.* at p. 7.] This does not suggest that the Legislature must ratify by resolution, but rather emphasizes that the Legislature is free to choose the manner in which it approves and legally enters into compacts.

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stated, "[I]f the bill by which this ratification was accomplished is not an urgency statute, then it is subject to the people's power of referendum."[2] [*Ibid.*]

In passing AB 277 and enacting Government Code section 12012.59 as the means of ratifying the compact, the Legislature made clear that AB 277 was subject to referendum by not passing the bill as an urgency statute, which would have precluded submitting AB 277 to a referendum under the Constitution. The Legislature is well aware of this option because it has previously ratified compacts by urgency statutes, which were therefore expressly exempt from the referendum process. See Gov. Code, § 12012.40 (enacting Assembly Bill 687 ratifying five amended compacts); *California Commerce Casino, Inc. v. Schwarzenegger* (2007) 146 Cal.App.4th 1406, 1413 ("Assembly Bill 687 was enacted as an urgency statute to take immediate effect . . ."). Thus, had the Legislature wished limit the power of referendum, it knew how, and could have done so. It did not.

2. AB 277 took the form of a statutory enactment and is therefore unquestionably subject to referendum

The Tribe relies on *American Federation of Labor v. Eu* (1984) 36 Cal.3d 687, for the proposition that "the referendum power is restricted to the adoption or rejection of law" and a tribal-state compact is not a state "law." [Cross-Complaint, ¶ 4, pp. 2-3.] While, as discussed below, the compact itself reveals legislative action, the issue is whether AB 277 enacted a law for the purposes of determining the validity of a referendum. Under this analysis, *American Federation of Labor* cannot support the Tribe's contention.

In *American Federation of Labor*, the California Supreme Court heard an original petition for writ of mandate to order respondent Eu, the Secretary of State, to refrain from placing the Balanced Federal Budget Statutory Initiative on the ballot. *American Federation of Labor*, *supra*, 36 Cal.3d at 691-692. The initiative had two primary components. The first was a mandate that the Legislature adopt a resolution urging Congress to submit a balanced budget amendment to the

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Furthermore, the opinion provides yet more evidence in support of the fact that Legislature could have approved the compact another way so as to eliminate the possibility of referendum but chose not to.

[2] Legislative Counsel Opinions are entitled to "great persuasive weight, 'since they are prepared to assist the Legislature in it consideration of pending legislation'" *Barratt Am., Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685, 697.

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states. *Id.* at 692. This mandate did not create or amend a statute or add a constitutional amendment. The second feature of the initiative involved amending the Government Code to withhold legislators' salaries if they failed to adopt the resolution. *Ibid.* The Supreme Court held, "[T]he measure exceeds the scope of the initiative power . . . [because] *the crucial provisions of the initiative do not enact a statute or a law*. They adopt, and mandate the Legislature to adopt, a resolution which does not change California law." *Id.* at 694 (emphasis added). "Resolutions serve, among other purposes, to express views of the resolving body . . . [and do] not require the same formality of enactment [as statutes], and [are] not presented to the Governor for approval." *Id.* at 709. The part of the initiative that sought to amend the Government Code to withhold legislators' salaries, however, "*takes the form of a statutory enactment* and, standing alone, *could not be criticized on the ground that it fails to 'adopt' a 'statute' within the scope of article II.*" *Id.* at 714 (emphasis added). This part of the initiative, however, would only go into effect if the Legislature failed to comply and adopt the resolution; because the resolution was invalid, the changes to the Government Code were invalid. *Id.* at 715.

Accordingly, because AB 277 "takes the form of a statutory enactment" – it began as a bill and was then passed by both houses and signed into law by the Governor [Daluiso Decl., ¶ 2, Ex. 1] – subjecting AB 277 to a referendum cannot be questioned, and no California court has ever acknowledged such a question.

3. AB 277 did not merely give assent to a "contract," but rather enacted legislation

The Tribe argues that the compact is nothing more than a contract – an agreement between the two sovereigns – and the ratification is merely the Legislature "giving its approval to the terms of that mutual agreement."[3] [Cross-Complaint, ¶4, p. 3.] The Tribe further argues that the

[3] Cases from other jurisdictions have held that a state's approval of a compact is necessarily a legislative action because it alters existing law and makes statewide policy decisions that are the province of the Legislature. See *Florida House of Representatives v. Crist* (Fla. 2008) 999 So.2d 601, 603 ("[T]he Governor does not have the constitutional authority to bind the State to a gaming compact that clearly departs from the State's public policy by legalizing the types of gaming that are illegal everywhere else in the state"); *Saratoga Chamber of Commerce v. Pataki* (2003) 100 N.Y.2d 801, 824 ("Compacts . . . necessarily make fundamental policy choices that epitomize 'legislative power.' Decisions involving licensing, taxation and criminal and civil jurisdiction require a balancing of differing interests, a task the multimember, representative Legislature is entrusted to perform under our constitutional structure").

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compact does not exercise the Legislature's "lawmaking authority to unilaterally regulate the conduct of a party subject to its legislative control." [*Ibid.*] This, however, is too narrow a view.[4]

The Tribe relies on *Worthington v. City Council of Rohnert Park* (2005) 130 Cal.App.4th 1132, for the principle that unilateral regulation is required for an action to be "legislative." [Cross-Complaint, ¶4, p. 3.] In *Worthington*, plaintiffs filed a petition for writ of mandate to place a referendum on the ballot to reject the city's approval of a memorandum of understanding ("MOU") with an Indian tribe prior to the tribe's having land restored as part of its reservation pursuant to its Restoration Act. *Worthington*, *supra*, 130 Cal.App.4th at 1135. The MOU set out an agreement between the city and the tribe regarding mitigation contributions in the event that a casino was approved by the federal government. *Id.* at 1138. The Superior Court denied the petition, finding that the city's approval of the MOU was merely an administrative act rather than a legislative act. *Id.* at 1136. The Court of Appeal affirmed. *Ibid.* "The only question resolved by this appeal is whether the City resolution adopting the MOU is subject to referendum" under Article II, section 11, of the California Constitution.[5] *Id.* at 1139. The Court held, "*[T]he federal and state governments have sole authority to exercise legislative power in* [*the area of Indian gaming*] and . . . the City's actions were administrative and not subject to the referendum process." *Id.* at 1140.

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[4] The Tribe has previously acknowledged the legislative character of the compact and its ratification when it argued in this action that in passing AB 277 the Legislature enacted a statute that ratified the Governor's concurrence. "By ratifying a Compact . . . the Legislature, 'through the exercise of its own legislative prerogative,' has independently validated the Governor's concurrence . . . ." [Tribe's Brief Questions Raised at Hearing on July 16 2013, p. 9 (citing *Professional Eng'rs in Cal. Gov't v. Schwarzenegger* (2010) 50 Cal.4th 989, 1047).] This "independent validation" according to the Tribe was in the form of a statutory enactment, not in the form of a mere assent to an agreement negotiated between two sovereigns. [*Id.* at p. 7, (citing *Hoffman v. City of Red Bluff* (1965) 63 Cal.2d 584, 592 ("[I]f something has been done, or done in a particular way, which the [L]egislature might have made immaterial, the omission or irregular act may be cured by a subsequent *statute*" (emphasis added)).]

[5] *Worthington* deals with Article II, section 11 – the referendum power for local ordinances – as opposed to Article II, section 9 – the referendum power for statutes enacted by the Legislature. The Tribe also relies on *Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, in the Cross-Complaint, which also focuses on Section 11 rather than Section 9. Cases such as *Worthington* and *Voters* must analyze whether an act by local government that could be characterized as legislative is actually an administrative act. See *Worthington*, *supra*, 130 Cal.App.4th at 1141 ("Acts of a local governing body which, in a purely local context, would otherwise be legislative and subject to referendum may, however, become administrative in a situation in which the state's system of regulation over a matter of statewide concern is so pervasive as to convert the local legislative body into an administrative agent of the state" (citation omitted) (internal quotation marks omitted)). There is no parallel analysis for a statute enacted by the Legislature. Such an enactment is necessarily a legislative act subject to referendum. See *American Federation of Labor*, *supra*, 36 Cal.3d at 714. There is no superior authority at issue in this case (e.g., the U.S. Constitution, IGRA, or the California Constitution) to constrain the Legislature from ratifying a compact by enacting a statute subject to referendum.

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Worthington directly contradicts the Tribe's argument that the State does not have authority to exercise legislative power in the area of Indian gaming. Rather, *Worthington* stands for the proposition that local governments have no such authority. Furthermore, in its Cross-Complaint, the Tribe truncates the *Worthington* Court's definition of legislative action when it claims legislation involves only unilateral regulation. [Cross-Complaint, ¶4, p. 3.] The Court's complete statement was: "a governmental entity legislates when it unilaterally regulates, *or in addition to declaring a public purpose, makes provisions for the 'ways and means of its accomplishment.'*" *Worthington*, *supra*, 130 Cal.App.4th at 1143 (citing *American Federation of Labor*, *supra*, 36 Cal.3d at 712) (emphasis added).

The compact demonstrates such legislative action. The preamble states, "[T]his Compact protects the interests of the Tribe and its members, the surrounding community, and the California public . . . ." [Daluiso Decl., ¶ 5, Ex. 4, p. 5.] The compact then provides for the ways and means of balancing and protecting these interests. Section 1.0 of the compact lists the purposes and objectives:

> The terms of this Compact are designed to: . . . (b) Develop and implement a means of regulating Class III Gaming to ensure its fair and honest operation in a way that protects the interests of the Tribe, the State, its citizens and local communities . . . . (c) Promote practices designed to ensure the integrity of Class III Gaming, through licensing and control of persons and entities employed in or providing goods and services to, the Gaming Operation, protect against the presence or participation of persons whose criminal backgrounds, reputation, character, or associations make them unsuitable for participation in gaming, thereby maintaining a high level of integrity in tribal government gaming, and protect the patrons and employees of the Gaming Operation and the local communities.

[*Id.* at p. 6.]

While "unilateral regulation" is not the sole defining feature of a legislative act, such regulation is nonetheless accomplished through AB 277 and the compact, as both plainly govern conduct and bind parties outside the Legislature. Ratification of the compact is not merely the assent to an agreement negotiated by the Governor because ratification requires policy and regulatory authorizations that only the Legislature can accomplish through legislative action. For example, AB 277, section 1(b)(1), exempts, and specifically enumerates, certain actions as

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"projects" for the purposes of the California Environmental Quality Act ("CEQA"), Cal Pub. Res. Code § 21000 et seq. Such exemptions could only be accomplished by a statutory declaration of law, binding on parties outside the Legislature.

The State legislates through the compact when it authorizes the types of gaming allowed at the site and forbids others. [Daluiso Decl., ¶ 5, Ex. 4 ,sec. 3.1(c), p. 12 ("Nothing herein shall be construed to authorize the operation of game known as roulette . . . or any game that incorporates the use of a die or dice").] The compact also limits the number of gaming devices allowed at the gaming site and provides that only one casino be operated on the site. [*Id.* sec. 4.1, p. 13.] Under the Constitution, the Legislature must authorize gaming; an agreement between the two parties in and of itself cannot.

While the Tribe bears most of the regulatory burden under the compact, the compact gives new duties and powers to state agencies to regulate gaming in concert with the Tribe. [See e.g., *Id.* secs. 4.8(d), p. 23 (granting State Gaming Agency authority to audit Net Win calculations), 6.4.1, p. 31 ("licensing process provided for in this Compact shall involve joint cooperation between the Tribal Gaming Agency and the State Gaming Agency"), 6.4.4, p. 38 (requiring all Gaming Resource Suppliers to obtain suitability determination from the State Gaming Agency). Again, this is more than mere assent to an agreement.

The compact applies not only to the Tribe but to other California tribes as well. The North Fork Tribe must share its revenue with the Wiyot Tribe based on the Wiyot Tribe's agreement to forego gaming on its own land. [*Id.* sec. 5.2, p. 28] The Tribe must contribute to a revenue sharing fund to help other tribes who have forgone gaming or cannot engage in gaming. [*Ibid.*] The Tribe must also make payments to the Chukchansi Tribe to mitigate the economic impact the proposed casino will have on Chukchansi's existing casino. [*Id.* sec. 4.5, p. 15.] The compact, therefore, regulates the development and expansion of Indian Gaming in California.

No local government would have the authority to incorporate such requirements into a MOU. A local government cannot legislate in the area of Indian gaming; only the State can. *Worthington*, *supra*, 130 Cal.App.4th at 1140. The compact itself destroys the Tribe's contention that ratification was simply the affirmation of an agreement negotiated by the Governor.

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4. Section 19(f)'s use of the term "ratification" does not preclude compact approval by statute

The Tribe's contention that the term "ratification" has a well-established meaning that "has long been held to *exclude* the people's exercise of the initiative or referendum power" [Cross-Complaint, ¶ 3, p. 2] is a nonstarter. First, the Legislature, exercising its plenary power to decide how to approve compacts, did not acknowledge this purportedly long standing rule in unequivocally stating that tribal-state compacts "compacts *shall be ratified by a statute*." Gov. Code, § 12012.25(c) (emphasis added). Second, the cases upon which the Tribe relies are not only ancient cases involving the passage of the eighteenth amendment to the U.S. Constitution, but are completely inapplicable to the facts of this case.

The eighteenth amendment cases, relied on by the Tribe, stand for the proposition that the U.S. Constitution expressly provides for the manner in which states ratify amendments to the U.S. Constitution, and because the states cannot prescribe their own methods of ratification, ratification by state legislatures cannot be subject to referendum. See *Hawke v. Smith* (1920) 253 U.S. 221; *Barlotti v. Lyons* (1920) 182 Cal. 575.

In reviewing the eighteenth amendment cases, the California Supreme Court made the distinction relevant to this case in *American Federation of Labor v. Eu*: The referendum power "did not extend to the ratification of constitutional amendments, since a state in ratifying an amendment was not asserting legislative power under its own constitution, but exercising power delegated to the state legislatures by article V of the *federal* Constitution." *American Federation of Labor*, *supra*, 36 Cal.3d at 711-712 (emphasis added).

In regard to the approval of tribal-state compacts in California, by contrast, the U.S. Constitution, IGRA, and the California Constitution are all silent as to the manner of approval. IGRA's provision for state approval of a compact, 25 U.S.C. § 2710(d)(1)(C), is a prerequisite for federal approval rather than a delegation of power to the state.[6] The California Constitution

[6] Section 2710(d) makes clear that class III Indian gaming can occur only where it is first authorized under State law and this authorization is independent of IGRA, not a delegation of federal power. See 25 U.S.C § 2710(d)(1)(B)(Class III gaming is lawful only if "located in a State that permits such gaming for any purposes by any person, organization or entity"). See also IGRA discussion Part 1(B), *supra*.

requires that compacts be ratified by the Legislature. Thus, in ratifying the compact by enacting a statute, the Legislature was "asserting legislative power under its own constitution." *American Federation of Labor*, *supra*, 36 Cal.3d at 711-712. Ratifying the compact by enacting AB 277 was, therefore, unquestionably a legislative action under the Legislature's own legislative prerogative.

B. Subjecting AB 277 to a Referendum Does Not Conflict with IGRA

The Tribe's argument that the referendum conflicts with IGRA rests on the unsupportable assertion that the State's duty to negotiate under IGRA means that a state cannot deny a compact. [Cross-Complaint, ¶¶ 5, 8, pp. 3-4, 6.]

1. IGRA does not require a state to enter into a compact or prescribe the means for doing so

While a compact is required under IGRA for class III gaming to occur on Indian land, 25 U.S.C. § 2710(d)(1)(C), "IGRA does not 'force' states to compact with Indian tribes regarding Indian gaming." *Cheyenne River Sioux Tribe v. State of S.D.* (D.S.D. 1993) 830 F.Supp. 523, 527 *aff'd*, (8th Cir. 1993) 3 F.3d 273. Such coercion would violate the 10th amendment to the U.S. Constitution. *Ibid.* Rather, through IGRA, "Congress strongly encourages states and tribes to negotiate for the mutual benefits that can flow to and from each other." *Yavapai-Prescott Indian Tribe v. State of Ariz.* (D. Ariz. 1992) 796 F.Supp. 1292, 1296 (citing S. Rep. No. 446 at 13) (stating that if states refuse to engage in the compacting process, the Secretary may then prescribe the means under which gaming may occur). To that permissible end, IGRA requires that upon the request of a tribe the state negotiate in good faith a compact with the tribe for the conduct of class III gaming. 25 U.S.C. § 2710(d)(3)(A); *Yavapai-Prescott Indian Tribe*, *supra*, 796 F.Supp at 1297 ("IGRA's terms do not force the State to enter into a compact, it only demands good faith negotiation in order to meet state, as well as tribal and federal, interests").

As discussed above, IGRA does not provide the means or method under which a state enters into a compact with a tribe, and "state law determines the procedures by which a state may validly enter into a compact." *Pueblo of Santa Ana*, *supra*, 104 F.3d at 1553. Thus, IGRA imposes no impediment to any process a state uses to officially enter into compacts with tribes.

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Consequently, the contention that the referendum would violate the Supremacy Clause of the U.S. Constitution [Cross-Complaint, ¶ 7, p. 5] must also fail.

2. Referendum power is not incompatible with State's obligations under IGRA

The Tribe argues that "the referendum is fundamentally incompatible with the State's ability and obligation [under IGRA] to negotiate in good faith with an Indian Tribe: There is no give-and take bargaining in the referendum process." [Cross-Complaint, ¶ 5, p. 3.] The Tribe relies on *Voters for Responsible Retirement* for the proposition that because the electorate is absent from the negotiating table the referendum would encourage a bad faith bargaining process. [*Ibid.* (citing *Voters for Responsible Retirement*, *supra*, 8 Cal.4th at 783).] IGRA and California law, however, both contemplate the bifurcated negotiation and approval process at issue.

Voters is not on point in this case. In *Voters*, the Trinity County Board of Supervisors approved MOUs with the Trinity County Employees' Association and the Trinity County Road Employees Association, which provided that the County would implement the Public Employee Retirement System ("PERS"). *Id.* at 770. The approval of the MOUs was done in conjunction with the negotiation of an amendment to the County's contract with PERS. *Ibid.* Pursuant to Government Code sections 20460 and 20461, the Board approved the contract amendment by passing Ordinance No. 1161. *Ibid.* A group of citizens collected the required number of signatures to submit the Ordinance to a local referendum and petitioners filed a petition for writ of mandate to compel the Board to put the ordinance to referendum. *Id.* at 771. The trial court denied the writ stating that the Ordinance was not the proper subject for referendum. *Ibid.* The Court of Appeal reversed. *Ibid.* The California Supreme Court reversed the Court of Appeal. *Id.* at 786.

Elections Code section 3751 excepts certain types of county ordinances from the 30-day effective date rule, providing instead that these ordinances go into effect immediately. *Id.* at 777. According to the Court, [W]hen the Legislature desired to denominate certain types of ordinances that were not subject to county referendum procedures, it did so not by specifically declaring these ordinances ineligible for referendum, but rather by providing that they go into effect immediately." *Ibid.* Government Code section 25123 also provides that that all county ordinances

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shall become effective 30 days from final passage, except for certain classes of ordinances which are to go into effect immediately. *Ibid.* Under subsection (e) of section 25123, "the adoption or implementation of memoranda of understanding with employee organizations are one class of ordinances 'specifically required by law to take effect immediately' . . . and are therefore exempt from the referendum procedures . . . ." *Id.* at 778. After upholding the constitutionality of section 25123, the Court concluded that Ordinance No. 1161 was not subject to referendum.

There are two problems applying *Voters* to the facts of this case. First, *Voters* deals with the narrow issue of the Legislature's ability to the restrict the referendum power in regard to local ordinances rather than the ability to restrict the referendum power in regard to statutes enacted by the Legislature. In *Voters*, both the Elections Code and the Government Code barred this local ordinance from referendum. By contrast, the only statutes not subject to the referendum power are urgency statutes. See Cal. Const., art. II, § 9. Second, IGRA does not conflict with a bifurcated process of negotiation and ratification. States are required by IGRA to negotiate, but not required to approve compacts.

The situation in this case is analogous to that in *United Public Employees v. City and County of San Francisco* (1987) 190 Cal.App.3d 419. In *United Public Employees*, several labor organizations representing public employees brought a writ of mandate to compel the city to enter into a binding agreement with the organizations. *Id.* at 421. The organizations argued that the city violated the Meyers-Milias-Brown Act ("MMBA") "by declaring its intent to submit any prospective agreement . . . to the voters for approval, as required by the city charter." *Ibid.* The trial court denied the writ. The Court of Appeal affirmed. *Ibid.* The organizations argued that because the MMBA requires the city to meet and confer in good faith and endeavor to reach an agreement with the organizations, the city could not then subject any agreement to a public vote because it would illegally restrict the Board of Supervisors from finalizing an agreement it negotiated. *Id.* at 422. The Court of Appeal disagreed.

The sole issue before the Court was "whether the MMBA's 'meet and confer' process is incompatible with the power of the electorate in a charter city to 'reserve the right to either grant or deny' benefits of public employment." *Ibid.* The Court began with the proposition that the city

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charter "represents the supreme law of the City and County of San Francisco, subject, of course, to conflicting provisions in the United States and California Constitutions, and to preemptive state law." *Ibid.* (citations omitted). While the MMBA required that the city and the labor organizations meet and confer to attempt to reach an agreement, "[t]he MMBA does not prescribe the manner in which an agreement between a local government and an employee organization should be put into effect – in fact, it is silent as to what occurs after a nonbinding memorandum of understanding is submitted to the governing body 'for determination.'" *Id.* at 423. Nothing in the MMBA prevents a charter city from submitting any agreement between the city and the labor organizations to a vote as provided by the charter. *Ibid.* While the Court agreed that the vote would encumber the bargaining process, the Court stated that it was not appropriate for it to opine on the wisdom of the city's decision not to empower the Board of Supervisors to adopt an agreement. *Id.* at 425. The Court failed "to see how this meet-and-confer process is rendered 'meaningless' by the reservation of power in the city's electorate to approve, in the form of a charter amendment, any agreement that might be reached." *Id.* at 425-426.

In response to *United Public Employees*, the *Voters* court, while not deciding on the correctness of *United Public Employees*, stated in dicta, "If the referendum were interjected into this process, then the power to negotiate an agreement and the ultimate power to approve an agreement would be wholly divorced from each other with the result that bargaining process established by the MMBA could be undermined." *Voters for Responsible Retirement*, *supra*, 8 Cal.4th at 784. The Tribe seizes on this dicta from a case that otherwise is completely inapplicable to the facts. But the reasoning of *United Public Employees* holds in this case. IGRA provides for a bifurcated approval process by mandating negotiation but not requiring approval. The California Constitution authorizes the governor to negotiate, but it is the Legislature that must approve a compact. It makes no sense to ask why the Governor who negotiated the compact cannot simply approve it; the Constitution requires the Legislature to ratify it. Because the Legislature ratified the compact by enacting a non-urgency statute, the referendum is proper.

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C. A Referendum on AB 277 Does Not Conflict with the Timing of Compact Approval

At the core of the Tribe's cross-complaint, and the declaration the Tribe is really seeking but fails to pray for, is the contention that, because the Secretary has published the approval of the compact in the Federal Register, the Tribe's compact is "in effect" and the referendum cannot change that because neither California law nor IGRA contemplates the interference of the referendum. [Cross-Complaint, ¶ 6, p. 4.] This contention ignores that the compact itself requires two separate authorizations to be effective: "This compact shall not be effective unless and until all of the following have occurred: (a) the Compact is ratified in accordance with State law; and (b) Notice of approval is published in the Federal Register . . . ." [Daluiso Decl., ¶ 5, Ex. 4, sec. 14.1., p. 106.] Thus, under the agreement the Tribe signed, federal approval is not enough; "unless and until" the compact is ratified under State law, the compact "shall not be effective."

As a matter of California and federal law, however, the argument that the referendum would conflict with timing requirements fails for three reasons.

First, as discussed above, California law clearly contemplates subjecting the ratification of compacts to the referendum where compacts are ratified by statutes that are not passed as urgency statutes. In enacting AB 277 as it did, the Legislature fully intended the enactment to be subject to referendum. Thus the compact is not in effect under California law or under its own terms. [*Ibid.*]

Second, while the Secretary of the Interior may assume without inquiry that the California Secretary of State's submission of the ratified compact is compliant with California law, *Pueblo of Santa Ana v. Kelly* (10th Cir. 1997) 104 F.3d 1546, 1557, the Secretary's approval of the compact in the Federal Register "cannot, under [IGRA], vivify that which was never alive." *Id.* at 1548; see also *Hotel Employees and Restaurant Employees International Union v. Davis* (1999) 21 Cal.4th 585, 611 (stating that a "compact must be validly entered into by a state before it can go into effect"). The North Fork's compact was not in effect under California law when the Secretary of State forwarded it to the Secretary of the Interior, nor was it in effect when the Secretary of the Interior published the approval in the Federal Register. Should the referendum succeed in rejecting AB 277, federal approval will be meaningless because it cannot overcome

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the fact that the compact has not been approved under State law. *Pueblo of Santa Ana, supra*, 104 F.3d at 1557. And again, by its own terms, the compact will not be in effect. [Daluiso Decl., ¶ 5, Ex. 4, sec. 14.1.]

Third, the Secretary may reconsider a previously approved compact on his own authority where the compact has been found to have been approved in violation of state law. [Daluiso Decl., ¶ 6, Ex. 5.] In 2007 the Department of the Interior Office of the Solicitor informed the Governor of New York and the Oneida Indian Nation that the Secretary intended to reconsider the 1993 approval of a compact between the Oneida Nation and the State of New York. [*Id.* at p. 1.] Following the Secretary's 1993 approval of the compact and publication in the Federal Register, "various citizens groups, state legislators, and others filed lawsuits to challenge the Governor's authority to enter into the . . . compact[]." [*Id.* at p. 2.] While these lawsuits were moving through the courts, the state legislature passed a statute authorizing the Governor to enter into compacts with tribes. [*Ibid.*] Despite this interim legislation, the Court of Appeals, the highest court in New York, determined that the compacts signed in 1993 by the Governor were invalid under state law. [*Id.* at p. 3.] The state court litigation concluded in 2006 with the Unites States Supreme Court's denial of certiorari. [*Id.* at p. 6.] Relying on the Tenth Circuit's decision in *Pueblo of Santa Anna, supra*, 104 F.3d, and the inherent authority of an agency to reconsider its decision, the Solicitor stated, "The Department cannot simply ignore" the finding that the compacts violated state law, and "must at a minimum reconsider whether the 1993 approval was correct." [Daluiso Decl., ¶ 6, Ex. 5, p. 6].

The Tribe's argument that somehow the referendum would conflict with federal approval or be made irrelevant because the compact has already been federally approved lacks any basis in law and directly contradicts section 14.1 of the Compact.

D. The Short Title on the Referendum Petition Is Not Misleading

As with every other contention in the Cross-Complaint, the Tribe's contention that the short title is defective because it refers to "amended" compacts rather than an original compact also fails as a matter of law because the short title cannot be misleading.

Neither IGRA nor California law provide definitions that distinguish between compacts

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and amended compacts. IGRA does not mention the term "amended" compacts but merely requires that class III gaming be conducted pursuant to a compact. See 25 U.S.C. § 2710(d)(1)(C). Under California law, there is no legal distinction or definitional distinction between a compact and an amended compact. Any distinction is merely descriptive. Government Code section 12012.45, for example, states, "The following tribal-state gaming compacts and amendments of tribal-state gaming compacts entered into in accordance with [IGRA] are hereby ratified." Gov. Code § 12012.45(a). The statute then lists ratified compacts and amendments. Because neither IGRA nor California law legally distinguish between compacts and amended compacts, the error alleged cannot have misled voters.

The Tribe, however, attempts to conjure a distinction by alleging that the title "may well have misled voters into signing the petition, particularly given that a State may not *deny* a compact to conduct class III gaming on Indian lands in the first instance, but is under no obligation to *amend* a tribe's existing compact." [Cross-Complaint, ¶ 8, p. 6.] This assertion is contrary to law. Voters cannot have been so misled.

As discussed above, the State is not compelled to enter into a compact with a tribe. Section 19(f) of the California Constitution, on the one hand, provides that the Governor may "negotiate and conclude compacts, subject to ratification by the Legislature." In other words, a compact negotiated, concluded, and executed by the Governor may result in an approved compact only if it is ratified. To view this provision as the Tribe does makes ratification irrelevant and superfluous. IGRA, on the other hand, mandates only that a state negotiate in good faith but does not require a state to enter into a compact. *Yavapai-Prescott Indian Tribe*, *supra*, 796 F.Supp at 1297. Thus, as a legal matter, it is impossible for a voter to have been misled as the Tribe alleges. A state can refuse to enter into a compact in the first instance or refuse to amend a compact. And even if it were possible to mislead voters in such a way, the Tribe fails to allege that any voters were actually misled, making any allegations of confusion speculative and theoretical. See *Costa v. Superior Court* (2006) 37 Cal.4th 986, 1096 n.32 (rejecting Court of Appeal's reliance on the theoretical possibility of confusion where there was "absolutely no evidence" that any defects in an initiative petition "led to widespread publicity or confusion, or that the [defects in the petition]

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realistically affected the view of . . . *any* potential signer").

The case the Tribe relies on for the proposition that a misleading referendum title cannot substantially comply with the requirements of the Elections Code is not on point. In *Clark v. Jordan* (1936) 7 Cal.2d 248, the short title of an initiative listed certain taxes that would be abolished or rescinded. *Id.* at 250. The proposal itself, however, substituted a new tax for one of the taxes abolished. *Ibid.* The California Supreme Court held that because the short title did not reference the substitution, it was misleading and did not substantially comply with the Code. "[T]he title fails to disclose that any new taxes of any kind are to be imposed." *Id.* at 251. The short title, in the words of the Court, includes "all the sweet and excludes all the bitter. Such a title is clearly misleading and not substantially in compliance with section 1197b of the Political Code." *Ibid.*

In *Clark* the short title failed to inform voters that they would be subject to a new tax. Failing to identify that tax in the short title, while positively identifying eliminated taxes, objectively misled voters. In this case, the alleged error is not objectively misleading because there is no relevant distinction between a compact and an amended compact.

II. NORTH FORK'S CROSS-COMPLAINT SEEKS IMPROPER PREELECTION REVIEW OF A PENDING REFERENDUM

California Elections Code Section 13314 provides that:

> (a)(1) An elector may seek a writ of mandate alleging that an error or omission has occurred, or is about to occur, in the placing of a name on, or in the printing of, a ballot, sample ballot, voter pamphlet, or other official matter, or that any neglect of duty has occurred, or is about to occur.
>
> (2) A peremptory writ of mandate shall issue only upon proof of both of the following:
>
> (A) That the error, omission, or neglect is in violation of this code or the Constitution.
>
> (B) That issuance of the writ will not substantially interfere with the conduct of the election.

The Section further provides that venue for a proceeding "shall be exclusively in Sacramento County" where "[a] statewide measure that is to be placed on the ballot is the subject of the

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proceeding." Elec. Code, § 13314(b)(3); *Cook v. Superior Court* (2008) 161 Cal.App.4th 569, 573 ("The statute . . . is very specific that venue for such a proceeding is 'exclusively in Sacramento'"). This provision of the Elections Code not only points to the impropriety of pre-election review in this case, but also allows the court discretion to dismiss this case under section 1061 of the Code of Civil Procedure.

A. Pre-Election Review Is Improper in This Case

"A demurrer may be sustained when the complaint shows on its face the claim is not ripe for adjudication" *Breneric Associates v. City of Del Mar* (1998) 69 Cal.App.4th 166, 188. A claim is ripe when it is both fit for judicial decision and would impose hardship to the parties if withheld from the court's consideration. *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 172. The rule in California governing pre-election review of referenda contains both elements, and the Cross-Complaint fails to allege facts sufficient to show the cause of action is ripe.

The general rule is that referenda are not subject to pre-election review: "it is usually more appropriate to review constitutional and other challenges to ballot propositions or initiative measures after an election rather than to disrupt the electoral process by preventing the exercise of the people's franchise, in the absence of some clear showing of invalidity." *Brosnahan v. Eu* (1982) 31 Cal.3d 1, 4; *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 665-66. This rule favoring postelection review contemplates that "no serious consequences will result if consideration of the validity of a measure is delayed until after an election . . . . If the measure passes, there will be ample time to rule on its validity. If it fails, judicial action will not be required." *Legislature v. Deukmejian*, *supra*, 34 Cal.3d at 666.

An exception to the general rule is found where "the electorate does not have the power to adopt the proposal in the first instance . . . [and] the measure must be excluded from the ballot." *American Federation of Labor*, *supra*, 36 Cal.3d at 695 (citing *Brosnahan*, *supra*, 31 Cal.3d at 6 (Mosk, J., concurring)). Referenda or initiatives deemed invalid on such grounds should be kept from the voters because

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> [t]he presence of an invalid measure on the ballot steals attention, time and money from numerous valid propositions on the same ballot. It will confuse some voters and frustrate others, and an ultimate decision that the measure is invalid, coming after the voters have voted . . ., tends to denigrate the legitimate use of the [referendum] procedure.

Id. at 696.

This policy governing pre-election review is consistent with the policy of protecting the people's right of referendum as "'one of the most precious rights of our democratic process.'" *Zaremberg*, *supra*, 115 Cal.App.4th at 115 (quoting *Rossi*, *supra*, 9 Cal.4th at 695).

In the Cross-Complaint, the Tribe contends that "the electorate does not have the power to adopt the proposal in the first instance," but the Tribe fails to bring a cause of action that will exclude it from the ballot. The Tribe's sole concern is the status of its compact, and it seeks to evade the rule against pre-election review by entangling the validity of the referendum with status of the compact. The only relief the Tribe prays for, however, is a declaration that the referendum is invalid. [Cross-Complaint, Prayer for Relief, ¶ 1, p. 13.] Because this declaration will not exclude the referendum from the ballot, such a declaration is not fit for judicial decision before the November 2014 election.

Pre-election review is also improper in this case because the Tribe has failed to allege that "any serious consequences will result if consideration of the validity of a measure is delayed until after an election." *Legislature v. Deukmejian*, *supra*, 34 Cal.3d at 666. The Tribe concedes the lack of any serious consequences on the face of the Cross-Complaint by failing to file a petition for writ of mandate under the Elections Code 13314 to compel the Secretary of State not to place the referendum on the ballot. If there is no need for such a writ, there is no need for pre-election review of the referendum. The Tribe has alleged no hardship that will result from waiting until after the election.

To meet the standard for pre-election review, the Tribe cannot amend its Cross-Complaint. Seeking a writ of mandate to prevent the referendum from being placed on the ballot requires that it be brought by an elector under Elections Code section 13314 in Sacramento. The Election Code further requires that "[t]he Secretary of State shall be named as a respondent or a

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real party in interest in any proceeding under this section concerning a measure or a candidate described in Section 15375, except for a candidate for judge of the superior court." Elec. Code § 13314; *see Cook v. Superior Court* (2008) 161 Cal.App.4th 569, 578 (issuing peremptory writ dismissing case because without the Secretary of State named as a party and because of her "*statutorily required* role in the process" complete relief was not possible).

B. This Court Has Discretion to Dismiss a Cause of Action for Declaratory Relief

The Court's power to render declaratory relief is discretionary, and it may refuse to exercise the power "in any case where its declaration or determination is not necessary or proper at the time under all the circumstances." Code Civ. Proc. § 1061. Where a statute provides a "speedy and adequate remedy," the Court has discretion to dismiss a cause of action for declaratory relief. *Communist Party of U.S. of America v. Peek* (1942) 20 Cal.2d 536, 540.

In *Communist Party of U.S. of America*, plaintiffs Communist Party of the United States and three individual members sued defendants California Secretary of State, California Attorney General, and the Registrar of Voters of the County of Los Angeles. The suit challenged the validity of several statutes in three causes of action: (1) an action for declaratory relief seeking a declaration that the statutes were unconstitutional; (2) a petition for a writ of mandate to compel the defendants to perform the statutory duties necessary to qualify the plaintiff Communist Party to participate in the August 1942 primary election; and (3) an action under Elections Code Section 2900 (the predecessor of Elections Code 13314) alleging that an error or omission is about to occur in the conduct of a primary election and seeking an order directing the defendants to correct the error. *Id.* at 539. The trial court sustained demurrers without leave to amend as to each cause of action. *Ibid.* The Supreme Court of California affirmed as to the first two causes of action. *Id.* at 540. As to the declaratory relief claim, the Supreme Court found that:

> Under Code of Civil Procedure, section 1061, the court may refuse in its discretion to grant the relief sought in an action for a declaratory judgment. It appears from the face of the pleading that a speedy and adequate remedy for this purpose is provided by Elections Code, section 2900. Under such circumstances it cannot be said that the trial court abused its discretion in refusing to grant declaratory relief.

Ibid.

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Similarly, in *Steen v. City of Los Angeles* (1947) 182 P.2d 602, 603, plaintiff sued defendants for a declaratory judgment that plaintiff should be restored to his position as a city employee after being terminated. *Id.* at 602-603. The trial court entered judgment in favor of defendants after trial. *Ibid.* The Court of Appeal affirmed. *Ibid.* Plaintiff, in an earlier action, had filed an application for a writ of mandate to require defendant commission to give him a pre-discharge hearing and the Supreme Court determined plaintiff was entitled to such a writ. *Id.* at 603. However, in *Steen* plaintiff did not seek a writ of mandate and instead filed his action for declaratory relief. *Ibid.* The trial court held that "in substance that plaintiff had a full and complete remedy available to him by way of a hearing before defendant commission, and for this reason declined to grant the declaratory relief which plaintiff sought." *Ibid.* In affirming the judgment for defendants, the Court of Appeal reasoned that plaintiff had an adequate remedy available to him by applying to the Superior Court for a writ of mandate to compel the commission to investigate the charges against plaintiff. *Id.* at 604.

The actual controversy the Tribe alleges in the Cross-Complaint relates to the referendum's "impact on the current status and future effectiveness of the Compact" and the Tribe's desire for a determination of the "respective rights and duties of the parties." [Cross-Complaint, ¶ 35, p. 13.] Thus, for the Tribe, the relevance of the referendum's validity goes solely to whether, as it believes, the ratification of AB 277 by the Legislature constituted sufficient State approval for the compact to be in effect under State law. But a referendum on an action by the Legislature is a matter of statewide concern constitutionally grounded in a fundamental right reserved by the people. The much narrower rights and duties of the parties under the compact are not only insufficient to subject the statewide referendum to pre-election review, but the members of the North Fork tribe have been provided a "speedy and adequate" remedy – a challenge to the referendum under Elections Code Section 13314.

The Tribe acknowledges this available remedy on the face of the Cross-Complaint when it argues that the short title violates Section 9011 of the Elections Code. [Cross-Complaint, ¶ 8, p. 5.] Section 13314 provides that "a writ of mandate shall issue upon proof . . . [t]hat the error, omission, or neglect is *in violation of this code* or the Constitution." Elec. Code § 13314(a)(2)(A).

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On the one hand, the Tribe seeks to invalidate the referendum under the Elections Code, while on the other hand, it avoids the remedy offered for such a violation by seeking a declaratory judgment. Again, the Tribe seeks to pick apart a matter of statewide concern initiated by constitutional right to suit its own much narrower needs.

No doubt, the Tribe will contend that because it does not qualify as an elector under the Elections Code, it must bring its challenge to the referendum as a claim for declaratory relief. But the Tribe is comprised of electors who are entitled to seek a writ of mandate under the Elections Code. While the individual members likely cannot seek a declaration regarding the status of the compact, the validity of the referendum and the validity of the compact, though related, are two separate things, contrary to the attempt by the Tribe to entangle the two. This incompatibility only emphasizes the procedural flaws in the Cross-Complaint. The validity of the referendum is matter of statewide concern guarded intently by the Constitution. The status of the compact is a narrow matter concerning the rights and duties of the parties.

If the Tribe seeks to invalidate the referendum before the election, members of the Tribe must file a petition for writ of mandate in Sacramento under Elections Code section 13314. If the Tribe merely seeks a declaration that the referendum is invalid as it pertains to the rights and duties of the parties to the compact, it must wait. Either way, this Court should sustain the demurrer on the ground that the referendum is not ripe for review or dismiss the cause of action under section 1061 of the Code of Civil Procedure.

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CONCLUSION

Because the Tribe's arguments fail as a matter of law, Schmit requests that this Court sustain this demurrer without leave to amend.

Dated: April 30, 2014

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By: _____

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Stand Up for California!, etc, et al. vs. Edmund G. Brown, Jr., etc., et al.
Madera Superior Court, Case No. MCV062850

PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 600 Anton Boulevard, Suite 1400, Costa Mesa, CA 92626-7689.

On April 30, 2014, I served, in the manner indicated below, the foregoing document described as **Real Party in Interest Cheryl Schmit's Memorandum of Points and Authorities in Support of Demurrer to Cross-Complaint** on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes, at Costa Mesa, addressed as follows:

See the attached Service List

☒ BY REGULAR MAIL: I caused such envelopes to be deposited in the United States mail at Costa Mesa, California, with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the United States Postal Service each day and that practice was followed in the ordinary course of business for the service herein attested to (C.C.P. § 1013(a)).

☐ BY FACSIMILE: (C.C.P. § 1013(e)(f)).

☒ BY ELECTRONIC MAIL: My office caused such document(s) to be delivered electronically to the email address(es) on the attached service list.

☐ BY OVERNIGHT DELIVERY: I caused such envelope to be delivered by air courier, with next day service, to the offices of the addressees. (C.C.P. § 1013(c)(d)).

☐ BY PERSONAL SERVICE: I caused such envelopes to be delivered by hand to the offices of the addressees. (C.C.P. § 1011(a)(b)).

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on April 30, 2014, at Costa Mesa, California.

Rosemary McKay

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SERVICE LIST
Stand Up for California!, etc, al. vs. Edmund G. Brown, Jr., etc., et al.
Madera Superior Court, Case No. MCV062850

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