Case No. A140203
Sonoma County Superior Ct. No. SCV-251712

IN THE COURT OF APPEAL OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

STOP THE CASINO 101 COALITION, ET AL.,
Plaintiffs and Appellants,

vs.

EDMUND G. BROWN, JR.,
Defendant and Respondent.

ON APPEAL FROM THE SUPERIOR COURT
IN AND FOR THE COUNTY OF SONOMA
HONORABLE ELLIOT L. DAUM

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF COUNTY OF NAPA, CITY OF AMERICAN CANYON, NAPA COUNTY FARM BUREAU, NAPA VALLEY GRAPEGROWERS, AND NAPA VALLEY WINEGROWERS

AND PROPOSED BRIEF
IN SUPPORT OF

PLAINTIFFS AND APPELLANTS
STOP THE CASINO 101 COALITION, ET AL.

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I.

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

To the Honorable William R. McGuiness, Administrative Presiding Justice of Division Three of the First Appellate District of the California Court of Appeal:

Pursuant to California Rule of Court 8.200(c), County of Napa, City of American Canyon, Napa County Farm Bureau, Napa Valley Grapegrowers, and Napa Valley Winegrowers respectfully request leave to file an *amicus curiae* brief that is combined with this application in support of Appellants Stop the Casino 101 Coalition, et. al.

The brief was authored entirely by counsel for the County of Napa and City of American Canyon and was not authored in whole or in part by counsel for a party. No person or entity other than the County of Napa and the City of American Canyon and their counsel made a monetary contribution to the preparation or submission of this *amicus curiae* brief. Inasmuch as the decision in this case will impair local government's ability to tax and regulate the lands within their jurisdiction as well as all *amici's* ability to protect Napa's cherished agricultural preserve, *amici* seek permission to file this *amicus curiae* brief.

A. STATEMENT OF THE IDENTITY OF THE AMICI CURIAE AND THEIR INTEREST IN THIS APPEAL

Amici curiae County of Napa ("County") and City of American Canyon ("City"), a political subdivision of the State of California, and a general law City in the State of California, respectively; along with local community and industry organizations: Napa County Farm Bureau, Napa Valley Grapegrowers, and

Winegrowers of Napa County (collectively referred to as "Napa Community Organizations"); hope to assist this Court in analyzing the array of federal Indian law issues raised in this action. Specifically, *amici* wish to draw this Court's attention to Supreme Court and other federal authority as it pertains to Plaintiffs' correct assertion that state consent is constitutionally required before federal jurisdiction may lawfully displace state police power over lands unilaterally taken into trust by the federal government for the benefit of Indians and/or Indian tribes.

The Napa County Farm Bureau is one of 53 county organizations under the umbrella of the California Farm Bureau Federation and the American Farm Bureau Federation which operates by the philosophy that more can be accomplished for the good of agriculture by working together rather than by working as individuals. Today, the Napa County Farm Bureau represents over 850 local farmers and ranchers, including individuals involved in production agriculture and non-farm members who support our goals, activities, and services.

The Napa Valley Grapegrowers (NVG) represents over 690 Napa County grapegrowers, vineyard owners and associate businesses. The NVG is a community of wine industry leaders committed to working together to advance the heritage and reputation of the Napa Valley appellation. Representing the majority of planted vineyard land in Napa County, the NVG is passionate about helping growers produce quality grapes in a sustainable fashion that enhance their value

and preserve Napa's long history of world-class winegrapes. As a steward of the land and a resource to its members, the NVG provides educational seminars, events and services that assist growers in addressing the issues they face, while preserving Napa Valley's unique grape growing heritage for the members of tomorrow.

Winegrowers of Napa County ("Winegrowers") is a non-profit trade group consisting of winery, vineyard manager, and grape grower members. Overall, Winegrowers' members produce a significant share of Napa County's total annual wine production and farm a sizeable portion of Napa County vineyards. The mission of Winegrowers is to promote and preserve sustainable agriculture as the highest and best use of the natural resources of Napa County.

Plaintiffs/Appellants are a coalition group and several local residents who are opposed to the Graton Resort and Casino, which is situated on a 245-acre parcel (the "Property") located within the city limits of Rohnert Park, in Sonoma County. Pursuant to the Graton Rancheria Restoration Act, 25 U.S.C. Section 1300n, the Property was taken into trust by the United States in 2010. *See* Opening Brief for Plaintiff at p. 10.

Napa County, in which City of American Canyon and Napa Community Organizations are located and operate, abuts Sonoma County, and each of the *amici*, as well as their citizens and members, are directly affected by the

environmental, traffic, and socio-economic impacts of the Graton Resort and Casino, which is located approximately 15 miles from the Napa County boundary lines.

Amici face a situation in Napa County similar to that faced by appellants in this case. A group of Indians, which allegedly has traced some lineage back to the Alexander Valley Rancheria, is seeking to organize a tribal government, gain federal recognition, obtain lands in Napa County in an area, which has been governed by state and county laws since the time California State was formed. As municipal governments that exercise regulatory and other jurisdiction over the lands within their jurisdictional boundaries, *amici* have a fundamental objection to any effort by the federal government to unilaterally and unlawfully diminish the sovereign territory of the State of California and its political subdivisions and cities within political subdivisions. As demonstrated below, the federal government's assertion of jurisdiction over the Property, in the absence of the explicit cession of jurisdiction by the State of California, is unconstitutional. *See Points A and B of the Argument, infra.*

The taking and holding of lands for the benefit of Indians and Indian tribes by the Department of the Interior ("Interior") is commonplace. According to its website, Interior currently holds in trust 44 million surface acres of land for the benefit of Indian tribes, and another 11 million acres for the benefit of Indians. *See*

Statistics and Facts, U.S. Department of Interior <http://www.doi.gov/ost/about_us/statistics-and-facts.cfm> (as of July 17, 2014). Numerous Indian trust lands already exist in Sonoma and Lake Counties, both of which abut Napa County. *See California Indian Trust Land Map* <http://www.waterplan.water.ca.gov/tribal2/docs/GW_Basins_and_Tribal_Trust_Lands_map.pdf> (as of July 17, 2014).

Amici County and City have previously voiced their significant governmental concerns over the impact of the federal land-into-trust process, which would diminish the jurisdiction of states and their political subdivisions over their lands. Not long ago, in an effort to oppose the unconstitutional diminution of their sovereign territories, also via a requested trust acquisition, *amici* County and City pursued intervention in the action styled as *Mishewal Wappo Tribe of Alexander Valley v. Salazar* (ND. Ca. 5:09-cv-02502)[1], inasmuch as the plaintiff in that action seeks both tribal restoration and Interior's acceptance of unspecified lands within Napa and Sonoma Counties into trust. In affirming the revocation of the intervenor status previously granted to Napa and Sonoma Counties in that

[1] *See Mishewal Wappo Tribe of Alexander Valley v. Salazar*, No. 5:09-cv-02502-EJD (N.D. Ca), ECF #41 (Motion to Intervene as Intervenor-Defendant County of Napa); ECF #51 (Statement of Non-Opposition to Motions to Intervene of Sonoma, Napa, and Lake Counties); ECF #52 (Order Granting Motions to Intervene); ECF # 68 (Joint Motion to Intervene filed by City of American Canyon and the American Canyon Fire Protection District); and ECF #75 (Motion to Intervene by City of Napa).

action, the Ninth Circuit Court of Appeals nevertheless acknowledged the Counties' concerns over the impact of a trust acquisition on their jurisdictional reach: "The Counties contend that any transfer of land within their borders implicates their significantly protectable taxation, sovereignty, and regulatory interests, regardless of whether the Counties own the land, and regardless of the type of development intended by the transferee." *Mishewal Wappo Tribe of Alexander Valley v. Salazar*, *supra*, 534 Fed.Appx. 665, 667.

In light of the *amici's* understandable and demonstrated concern over the purported divestiture of their sovereignty through the land-into-trust process and the impact on their communities, *amici* respectfully request that this Court consider the following arguments, which demonstrate the unconstitutionality of any purported diminution of state jurisdiction in the absence of the explicit cession of such jurisdiction.

B. AMICI HAVE A SUBSTANTIAL INTEREST IN THE OUTCOME OF THIS CASE BECAUSE THE FEDERAL GOVERNMENT'S ACCEPTANCE OF LAND INTO TRUST FOR INDIANS DIMINISHES THE JURISDICTIONAL AUTHORITY OF THE STATE AND ITS POLITICAL SUBDIVISIONS.

1. Federal Statutory Authority to Take Land into Trust

This case involves a single Congressional act to restore a land base for the Federated Indians of Graton Rancheria ("FIGR"), pursuant to the Graton Restoration Act, 25 U.S.C. §1300n, which authorizes the Secretary of the Department of the Interior to take into trust, for the FIGR, any lands located within Sonoma and Lake counties. A more general authority for such federal land to trust acquisitions is found in the Indian

Reorganization Act of 1934 (codified at 25 U.S.C. § 465), which gives the Secretary broad authority to acquire lands for Indians who were recognized and under federal jurisdiction in 1934.[2] These federal statutes do not limit the Secretary's power to take into trust lands that are already owned by the federal government, such as federal public lands located within states.[3] Rather, the authority granted by Congress empowers the Secretary to take into trust any state lands that the Secretary chooses, even state sovereign lands over which the state exercises exclusive taxing and regulatory power. Indeed, the Property at issue in this case, has been within the sovereign territory of California and Sonoma County for the past 150 years, with state and local governments exercising taxing and regulatory power over the land to the exclusion of the federal government.

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[2] Section 5 of the 1934 Indian Reorganization Act, 25 U.S.C. § 465, provides, in pertinent part, as follows:

> § 465. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption
>
> The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> * * *
>
> Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

[3] Jurisdiction over federal public lands is shared between the state and federal governments. *See generally Kleppe v. New Mexico*, 426 U.S. 529, 535-545 (1976). The federal government, pursuant to the Property Clause (art. IV, § 3, cl. 2), "surely retains the power to enact legislation respecting those lands …." (*id*. at 542), and, as the property owner, may dispose of it.

See Appellants' Opening Brief at 10. The federal government had no interest in the land whatsoever until it obtained title to the Property from a private landowner in 2010.

2. Trust Lands as "Indian Lands"

It is beyond dispute that the federal government's acquisition of lands for Indians whether authorized by a tribe-specific Congressional act or Section 465 establishes "Indian country," and thereby diminishes the fundamental jurisdictional rights of states and their political subdivisions, such as the *amici*. *See* 25 C.F.R. Section 1.4(a) ("none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States . . ."); *South Dakota v. United States Dep't of the Interior*, 665 F.3d 986, 990 (8th Cir. 2012) ("States generally lack authority to regulate Indian tribes and tribe members on trust property."); *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1006 (8th Cir. S.D. 2010) ("Indian country falls under the primary civil, criminal, and regulatory jurisdiction of the federal government and the resident Tribe rather than the states."); *United States v. Roberts*, 185 F.3d 1125, 1131 (10th Cir. 1999) ("lands owned by the federal government in trust for Indian tribes are Indian Country pursuant to 18 U.S.C. § 1151"); *Narragansett Indian Tribe v. Narragansett Elec. Co.*, 89 F.3d 908, 920 (1st Cir. 1996) ("Taking land in trust is a considered evaluation and acceptance of responsibility indicative that the federal government has "set aside" the

lands"); *see also* 28 U.S.C. § 1360(b) ("Nothing in this section shall authorize the . . . encumbrance, or taxation of any real . . . property . . . belonging to any Indian or any Indian tribe . . . that is held in trust by the United States.")

Accordingly, local governments such as the *amici* have "an interest in the removal of property from [their] civil jurisdiction." *See Scotts Valley Band of Pomo Indians v. United States*, 921 F.2d 924, 927 (9th Cir. 1990) . As a result, state and local government challenges to trust acquisitions are numerous. *See e.g., County of Charles Mix v. United States Dep't of the Interior*, 674 F.3d 898, 900 (8th Cir. S.D. 2012); *State v. Salazar*, 2012 U.S. Dist. LEXIS 136086 (N.D.N.Y. Sept. 24, 2012); *Sac & Fox Nation v. Babbitt*, 92 F. Supp. 2d 1124, 1125 (D. Kan. 2000); *Nevada v. United States*, 221 F. Supp. 2d 1241, 1243 (D. Nev. 2002); *City of Lincoln City v. United States Dep't of the Interior*, 229 F. Supp. 2d 1109, 1112 (D. Or. 2001); *South Dakota v. United States Dep't of the Interior*, 69 F.3d 878, 882 (8th Cir. S.D. 1995)

County and City exercise broad governmental powers under the laws of California, in furtherance of their sovereignty, including the taxation and regulation of lands within their borders. For example, County and City each has adopted a General Plan, pursuant to the requirements of California Government Code Section 65300, et seq.,[4] In addition, Napa County has adopted unique and protective land use regulations

[4] Government Code Section 65300 provides, in pertinent part, that "[e]ach planning agency shall prepare and the legislative body of each county and city shall adopt a comprehensive, long-term general plan for the physical development of the county or city, and of any land outside its boundaries which in the planning agency's judgment bears relation to its planning."

to ensure the long term sustainability protect the County's agricultural heritage, viticulture, and green space.[5] Napa County's long-standing agricultural preservation law is described in *Devita v. County of Napa*, 9 Cal. 4th 763, 770-771, 790-792 (1995). In 1990, Napa County voters approved Measure J, a land use initiative requiring a vote of the people in order for the county to redesignate agricultural, watershed or open space land and make it available for development. Again in 2008, the Napa County voters approved Measure P, which extended this agricultural preservation law to the year 2058. Read more at: http://www.cp-dr.com/node/2170 (as of July 17, 2014).

Inasmuch as the federal government's acquisition of lands in trust would impair *amici* County and City's ability to tax and regulate the lands within their jurisdiction, as well as all *amici*'s ability to protect and preserve its cherished agricultural resources, such acquisition must include the expressed cession of jurisdiction by the State of California. *See* Brief of Amici, Point B, *infra*.

C. AMICI SEEK TO PRESENT ADDITIONAL AUTHORITY REGARDING STATE-FEDERAL SOVEREIGNTY NECESSARY TO DETERMINE THE INSTANT APPEAL.

The parties to this appeal have not adequately presented the constitutional and statutory framework needed to evaluate the issues before this Court. The two principal issues addressed herein are:

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[5] The protection of natural resources is a fundamental interest of state and local governments (s*ee City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197-1199 (9th Cir. 2003) ("A municipality has a proprietary interest in protecting its natural resources from harm.")

(1) Whether the U.S. Constitution permits the federal government to take state land into trust and stripping state of its jurisdiction under the Graton Restoration Act without obtaining formal consent of the State of California;

(2) Even if such Constitutional authority is found, whether the state's police power terminates upon the United States' acceptance of land into trust, or continues until such time as the state consents to the transfer jurisdiction or formally cedes its jurisdiction to the federal government.

As we explain below, lands that fall within a state's borders, over which the state exercises its territorial sovereignty in the form of taxing and regulatory authority, are protected by the Constitution against federal land acquisitions that would seek to displace state governance in any respect. That core aspect of federalism is hard-wired in art. IV, § 3.[6] The national government as a general matter cannot divest sovereign authority reserved to and residing in the states with respect to their lands -- aside from the single, narrow, Constitutionally-prescribed exception under the Enclave Clause that allows the federal government to acquire forts and other needful buildings, subject to the state's consent, to promote mutual goals such as national defense. *See* U.S. Const. art. I, § 8, cl. 17; *Virginia v. Reno*, 955 F.Supp. 571 (E.D. Va. 1997). Even in the case of that limited exception, as well as in the related exercise of eminent domain power over state lands to

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[6] U.S. Const. art. IV, § 3 provides:

> New states may be admitted by the Congress into this union; but no new states shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the Congress.
>
> The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

further such enumerated federal interests, the state retains regulatory power over such federally-acquired lands unless and until the state formally cedes its jurisdiction and the federal government formally accepts that cession of jurisdiction. The express constitutional authority given to the national government to acquire state territorial sovereignty for these limited, specified purposes, and the defined and orderly process for re-allocating jurisdictional responsibility from the state to the federal government over such lands, provide the relevant guideposts for evaluating the constitutionality of federal takings of state sovereign lands.

The U.S. Constitution does not permit the national government to take into trust for the benefit of Indians any lands that fall within a state's territorial sovereignty if the state objects. Congress may think it has such a power by its purported to authorization of taking of state lands under 25 U.S.C. § 465 or individual tribal restoration acts such as the Graton Restoration Act. However, no provision of the Constitution confers such authority upon the central government.

In addressing the issue of whether particular sovereign powers have been granted by the Constitution to the federal government or have been retained by the states under the Tenth Amendment, the United States Supreme Court has stated that:

> [t]hese questions can be viewed in either of two ways. In some cases the court has inquired whether an Act of Congress is authorized by one of the powers delegated to the Congress in Article I of the Constitution. ... In other cases, the Court has sought to determine whether an Act of Congress invades the province of state sovereignty reserved by the 10th Amendment. . . . [T]he two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth

> Amendment expressly disclaims any reservation of that power to the States; if power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress. . . . The Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on Article I power.

New York v. United States, 505 U.S. 144, 155-57 (1992) (internal citations omitted); *see also Seminole Tribe,* 517 U.S. at 59-64 (Indian Commerce Clause does not grant Congress power to abrogate state sovereignty).

Dated: July 17, 2014

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II. ARGUMENT.

THE CONSTITUTION DOES NOT ALLOW THE FEDERAL GOVERNMENT TO ACQUIRE STATE SOVEREIGN LANDS FOR ANY FEDERAL PURPOSE -- INCLUDING CREATING AN INDIAN RESERVATION -- WITHOUT THE CONSENT OF THE STATE.

POINT A. The Constitution Guarantees State Territorial Sovereignty.

Article IV, section 3 of the United States Constitution guarantees "state territorial integrity." *Garcia v. San Antonio Metropolitan Transit Authority* (1985) 469 U.S. 528, 550. Such express guarantees are rare in the Constitution and this particular guarantee means that "Congress may not employ its delegated powers to displace" state territorial integrity. *Id*. The decision of the Supreme Court in *Pollard v. Hagan* (1845) 44 U.S. 212 (*Pollard*) illustrates the fulsome nature of state sovereignty and the fact that "the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty or eminent domain, within the limits of a state or elsewhere, except in cases in which [the right of eminent domain] is expressly granted."[7] *Id*. at p. 223; *id.* at p. 224 (rejecting purported

[7] At the time of the *Pollard* decision, the right of the federal government to acquire state lands through eminent domain, for such authorized and constitutionally permissible ends as forts, road, and needful building under the enclave clause, was in doubt. The federal government's rights to pursue eminent domain is not in doubt any longer, but that power is constitutionally permissible only when the federal government is discharging its enclave clause responsibilities, and in that case only creates overlapping state-federal jurisdiction – the eminent domain process does not displace state jurisdiction without state consent or cession. *Id.*

federal power to exercise municipal sovereignty within a state as being "repugnant to the Constitution"). The issue in *Pollard* was whether the national government had a claim to lands below the high water mark in the newly-created State of Alabama and could transfer title to those soils to an individual citizen.

The Supreme Court concluded that "Alabama is therefore entitled to the sovereignty and jurisdiction over all the territory within her limits" just as any other state to be on "Equal Footing," and further held that this territorial jurisdiction included lands below the high water mark along navigable rivers. *Id*. at pp. 228-229. The Supreme Court further noted that the State of Alabama exclusively held the right of eminent domain with respect to the soils under the State's navigable waters:

> This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the states within their respective territorial jurisdictions and they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title to the shores and soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers. But in the hands of the states this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the constitution.

Id. at p. 230. *See also Hick v. Bell* (1853) 3 Cal. 219, 227 ("Numerous other cases can be cited in which the decisions are uniform, that the United States has no municipal sovereignty within the limits of the States."). The concern for state sovereignty identified by the Supreme Court in *Pollard* – based on an individual citizen possessing title to lands and soils under navigable waters and potentially undermining state sovereignty – is amplified many times over in the case of a land-to-trust acquisition for a tribe, which necessarily and unavoidably seeks to exercise tribal authority in derogation of state authority. If one citizen holding title to submerged lands presented an unacceptable challenge to state sovereignty in *Pollard*, so, too, must an Indian tribe holding beneficial title to federal trust lands, where the state or local government objects to that acquisition.

The patent unconstitutionality of nonconsensual federal takings of state sovereign territorial lands is demonstrated by three hypothetical federal actions:

1. The President of the United States (with Senate ratification) enters into a treaty giving the State of California to the King of Spain.

2. Congress passes a law permitting a few counties in northern California to become a new state, e.g., the State of Jefferson.

3. The Secretary of the Department of the Interior, pursuant to 25 United States Code section 465, takes into trust the island of Manhattan for the benefit of Indians that once resided there.[8]

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[8] The apparent boundless federal authority under 25 United States Code section 465 has been criticized by use of similar illustrations:

(Footnote continued on next page)

The above hypotheticals, while factually preposterous, illustrate a critical legal point: Any nonconsensual federal taking of state sovereign land violates the constitutional guarantee of state territorial integrity in Article IV, section 3 of the United States Constitution. This is true whether the federal action destroys the state's sovereign territory altogether by subjecting the entire state to foreign governance; cedes a portion of a state to another state; or creates an Indian enclave within a state. In each case, state sovereignty over state lands is impaired or destroyed in violation of Article IV, section 3.

Another guidepost for understanding the Constitution's embrace of robust state sovereignty arises in the context of state sovereign immunity from suit, as

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> By its literal terms, the statute permits the Secretary to purchase a factory, an office building, a residential subdivision, or a golf course in trust for an Indian tribe, thereby removing these properties from state and local tax rolls. Indeed, it would permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present. There are no perceptible "boundaries," no "intelligible principles," within the four corners of the statutory language that constrain this delegated authority -- except that the acquisition must be "for Indians." It delegates unrestricted power to acquire land from private citizens for the private use and benefit of Indian tribes or individual Indians.

South Dakota v. United States Dept. of the Interior (8th Cir. 1995) 69 F.3d 878, 882 (emphasis added), *vacated and remanded by* (1996) 519 U.S. 919, *on remand vacated by, and remanded by* (8th Cir. 1996) 106 F.3d 247.

discussed by the Supreme Court in *Alden v. Maine* (1999) 527 U.S. 706 (*Alden*). The Court in *Alden* examined the state's right to assert sovereign immunity from suit under the Tenth Amendment. In reviewing the structure of the United States Constitution, which embraces dual federal-state exercise of sovereignties, the Supreme Court observed that States possess "a residuary and inviolable sovereignty:" *Id.* at p. 715 (quoting The Federalist No. 39, p. 245 [C. Rossiter ed. 1961] [J. Madison]). The Court in *Alden* further noted that:

> [The Constitution] reserves to [the States] a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status. The States "form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere."

Id. at p. 714 (quoting The Federalist No. 39, p. 245 [C. Rossiter ed. 1961] [J. Madison]). The Court in *Alden* concluded that:

> Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power. The Amendment confirms the promise implicit in the original document: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Id. 527 U.S. at pp. 713-714 (quoting U.S. Const., 10th Amend.).

Accordingly, even though the Constitution establishes a national government with broad, often plenary authority over matters within its recognized competence, the founding document "specifically recognizes the States as sovereign entities." *Seminole Tribe of Florida v. Florida*, *supra*, 517 U.S. at p. 71, fn. 15; *accord*, *Blatchford v. Native Village of Noatak* (1991) 501 U. S. 775, 779 ("[T]he States entered the federal system with their sovereignty intact"). The Supreme Court in *Printz v. United States* (1997) 521 U.S. 898 further described the vital role that states play in the dual sovereign structure of the Constitution:

> [a]lthough the States surrendered many of their powers to the new Federal Government, they retained "a residuary and inviolable sovereignty," The Federalist No. 39, at 245 (J. Madison). This is reflected throughout the Constitution's text . . . including (to mention only a few examples) the prohibition on any involuntary reduction or combination of a State's territory, Art. IV, § 3; . . . . Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment's assertion that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Id. at pp. 918-919. *See also New York v. United States*, *supra*, 505 U.S. at pp. 156-159, 177.

In holding that the State of Maine could not be sued in federal court for a violation under federal law without the State's consent through a waiver of its

sovereign immunity from suit, the Supreme Court in *Alden* stated, "'It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.'" *Id*. at p. 716 (quoting The Federalist No. 81, p. 487 [A. Hamilton]) (emphasis deleted).

It is equally obvious that it is inherent in the nature of state sovereignty – indeed it is compelled by the principles of state territorial sovereignty described above, respecting lands within state borders over which the state has taxing and regulatory authority – that states are constitutionally empowered to resist efforts by another sovereign (whether federal, state, or foreign) to violate that state's territorial sovereignty, including by taking into trust sovereign state lands. Stated another way, the national government can only obtain jurisdiction over state sovereign lands by the explicit Constitutional authority granted to it: the Enclave Clause and implied condemnation powers attendant to the Enclave Clause. But even in this limited context state consent or cession is required, without which the federal government has no constitutionally preferred status, and the state continues to exercise governmental power over the lands. *See Collins v. Yosemite Park & Curry Co.* (1938) 304 U.S. 518, 528-529. The continuation of state jurisdiction after federal land acquisitions is made clear by the district court opinion in *Prof. Helicopter Pilots Assn. v. Lear Siegler Services, Inc.* (M.D. Ala. 2004) 326 F.Supp.2d 1305, 1311:

> Although the federal government may obtain land without the consent of a state, it may not obtain jurisdiction in such a manner. Before the 1937 decision of "the Supreme Court in *James v. Dravo Contracting Company* . . . , it was the accepted view that the United States acquired exclusive jurisdiction over any lands purchased with the consent of the State for any of the purposes enumerated in article I, section 8, clause 17, of the Constitution . . . ." *U.S. v. Corey*, 232 F.3d 1166, 1192 (9th Cir. 2000). Therefore, "any provision of a State statute retaining partial or concurrent jurisdiction was inoperable. In the *Dravo* case[, however,] it was held that a State may properly retain partial or concurrent jurisdiction." *Id.* That is, "without the State's 'consent' the United States does not obtain the benefits of Art. I, sec. 8, cl. 17, its possession being simply that of an ordinary proprietor." *Paul*, 371 U.S. at 264 (citing *Dravo*, 302 U.S. at 141-42, 58 S.Ct. 208). Furthermore, irrespective of "whether the land is acquired by purchase or condemnation on the one hand or by cession on the other-a State may condition its 'consent' upon its retention of jurisdiction over the lands consistent with the federal use." *Paul*, 371 U.S. at 265, 83 S.Ct. 426 (citing *Dravo*, 302 U.S. 146-49, 58 S.Ct. 208).

POINT B. The Indian Commerce Clause Does Not Authorize Congress to Pass Laws Permitting the Secretary of the Interior To Acquire State Sovereign Lands Without State Consent.

The Indian Commerce Clause, United States Constitution Article I, section 8, clause 3, provides, in part, as follows: "The Congress shall have Power to . . . regulate Commerce . . . with the Indian Tribes . . . ." This text has been construed by the Supreme Court of the United States to give Congress "plenary authority" over "Indian affairs." *See Michigan v. Bay Mills Indian Community* (2014) 134

S.Ct. 2024.[9] Even if that expansive interpretation of the Indian Commerce Clause were historically accurate and legally sound (it is not, *see* subpoint "C," *infra*), such exclusive federal power over Indian "affairs" does not justify abrogating state sovereignty that is protected under the Constitution, including the guarantee of state territorial sovereignty in Article IV, section 3 of the United States Constitution. This is made clear in the Supreme Court's decision in *Seminole Tribe*, which concluded that Congress lacked the authority to waive State sovereign immunity from suit with respect to negotiating Indian gaming compacts under the Indian Gaming Regulatory Act. The State of Florida's sovereign immunity could only be waived by the state.

The Court in *Seminole Tribe* found that "[e]ven when the Constitution vests in Congress complete law-making authority over a particular area" it does not provide Congress with the authority to divest a state of its sovereignty that was protected there by the Eleventh Amendment[10]. *Seminole Tribe of Florida v. Florida*, *supra*, 517 U.S. at p. 72. Likewise, both Article IV, section 3 of the United States Constitution and the Enclave Clause act as explicit limits on

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[9] No other source of constitutional authority exists for Congress to regulate Indian affairs. *Adoptive Couple v. Baby Girl* (2013) 133 S.Ct. 2552; Natelson, *The Original Understanding of the Indian Commerce Clause* (2007) 85 Denv. U. Law Rev. 201.

[10] The Seminole Court held that Congress lacked authority under the Indian Commerce Clause to abrogate the states' Eleventh Amendment immunity.

Congressional authority and bar the Secretary from taking the Property into trust pursuant to 25 United States Code section 465 or the Graton Rancheria Restoration Act without the State's consent. Federal land-to-trust takings, which physically convert state sovereign territory into Indian lands under federal and tribal jurisdiction, impinge on state sovereignty far more than the loss of state sovereign immunity from suit with respect to Indian gaming compacts. While the Supreme Court has not reached this precise question, the decision in *Seminole Tribe* supports negating Congressional authority to take lands out of state jurisdiction for the benefit of Indians whether under 25 United States Code section 465 or the Graton Rancheria Restoration Act without state consent. The federal government cannot abrogate the express guarantee of state sovereign territory in Article IV, section 3 and the Enclave Clause – which together leave state territorial sovereign intact with a single narrow exception that still requires state consent –under the guise of regulating "commerce" for Indians. The Constitutional guarantee of state territorial sovereignty exists whether the acquired lands are to be held in trust for Indians or for any other reason that Congress might articulate.

Permitting the Indian Commerce Clause to trump Article IV, section 3 and the Enclave Clause's express limitations on federal power to acquire state lands impermissibly reallocates the balance of power between state and federal sovereigns, undoes the carefully negotiated principles of federalism and states'

rights that the Constitution specifically embraces in the state territorial sovereignty "guaranteed" by Article IV, section 3 and violates the very concept of states as robust sovereigns that joined the union with their sovereignty intact.

The language and history of the Indian Commerce Clause show it was intended only to address trade and commercial relationships between Indians and non-Indians. Unlike the equivalent provision in the prior Articles of Confederation, the Indian Commerce Clause eschews any reference to "managing Indian affairs" and instead restricts the reach of the clause to "commerce." These and other undisputed historical facts were reviewed by Justice Clarence Thomas in his concurring opinion in *Adoptive Couple v. Baby Girl*, *supra*, 133 S.Ct. 2552. Justice Thomas addressed the meaning of the Indian Commerce Clause in the context of a proceeding under the Indian Child Welfare Act in which the biological father (an enrolled member of the Cherokee tribe) contested the placement of his child (1/256th Indian blood) with non-Indian adoptive parents. Justice Thomas openly questioned whether the Indian Commerce Clause supported "Congress' intrusion into this area of traditional state authority." *Id.* at p. 2566.[11] His concurring opinion provides a detailed historical review of the Indian Commerce

[11] Justice Thomas observed that "the assertion of plenary authority must …. stand or fall on Congress' power under the Indian Commerce Clause" because no other potential sources of authority support congressional power over Indians. *Id.* at 2566 (*citing* Natelson, *The Original Understanding of The Indian Commerce Clause* (2007) 85 Denv. U. L.Rev. 201).

Clause (*id.* at pp. 2567-2570), and concludes that "neither the text nor the original understanding of the Clause supports Congress' claim to such 'plenary' power." *Id.* at p. 2567. Justice Thomas made the following observations based on the historical record:

- The Indian Commerce Clause gives Congress authority "[t]o regulate *Commerce*…with the Indian tribes" (emphasis original).
- "At the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering as well as transporting for these purpose."
- "When Federalists and Anti-Federalists discussed the Commerce Clause during the ratification period, they often used trade (in its selling/bartering sense) and commerce interchangeably."
- "'[C]ommerce with Indian tribes' was invariably used during the time of the founding to mean trade with Indians."
- "Regulation of Indian commerce generally referred to legal structures governing 'the conduct of the merchants engaged in the Indian trade, the nature of the goods they sold, the prices charted and similar matters.'"

Id.

According to Justice Thomas, "[a] straightforward reading of the text, thus, confirms that Congress may only regulate commercial interactions – 'commerce' – taking place with established Indian communities – 'tribes.' That power is far from plenary." Justice Thomas further observed that:

> At the time of the founding, the Clause was understood to reserve to the states the general police powers with respect to Indians who were citizens of the several States. The Clause instead conferred on Congress the much

> narrower power to regulate trade with Indian tribes – that is, Indians who had not been incorporated into the body-politic of any State.

Id. at p. 2567.

Justice Thomas cites, throughout his concurring opinion, a law review article authored by Professor Robert G. Natelson, that provides a carefully documented historical account of the Indian Commerce Clause: *The Original Understanding of The Indian Commerce Clause* (2007) 85 Denv. U. L.Rev. 201 (hereafter, "*Natelson*"). *See Adoptive Couple v. Baby Girl*, *supra*, 133 S.Ct. at p. 2566. Professor Natelson explains with historical detail that "the drafting history of the Constitution, the document's text and structure, and its ratification history all show emphatically that the Indian Commerce Clause was not intended to be exclusive." After surveying the historical record, Professor Natelson concludes:

> The Indian Commerce Clause was adopted to grant Congress power to regulate Indian trade between people under state or federal jurisdiction and the tribes, whether or not under state or federal jurisdiction. Within its sphere, the Clause provided Congress with authority to override state laws. It did not otherwise abolish or alter the pre-existing state commercial and police powers over Indians within state borders. It did not grant to Congress a police power over the Indians, nor a general power to otherwise intervene in tribal affairs.

Natelson, *The Original Understanding of The Indian Commerce Clause* (2007) 85 Denv. U. L.Rev. 201, 265; *see also* Schraver & Tennant, *Indian Tribal Sovereignty – Current issues* (2012) 75 Albany L.Rev. 133, 138 ("Many scholars, representing

diverse viewpoints, reasonably question whether the Framers, by enumerating power over Indian *commerce* intended to give Congress exclusive authority over Indian *affairs* . . . " [emphasis added]).

Thus, the text and historical context of the Indian Commerce Clause do not support Congress exercising exclusive power over all tribal matters, or provide explicit authority to the national government to acquire any state land without state consent. The Indian Commerce Clause certainly does not permit the federal government to hold such acquired land in beneficial trust for an Indian tribe and subject that land to federal and tribal jurisdiction, including permitting the tribe to exercise its quasi-sovereign power over the land as a "reservation" in derogation of state jurisdictional authority. The nonconsensual conversion of state lands within the core territorial sovereignty of the state (lands over which the state has exercised exclusive governance and taxing and regulatory authority for generations) into a federally-created enclave within which federal and tribal jurisdiction displaces state taxing authority and largely displaces state regulator authority, violates basic principles of federalism in the Constitution – principles that require state consent before that shift in jurisdictional authority can occur.[12]

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[12] *Amici* are not aware of any evidence that the State of California has knowingly consented to the Property going into trust for the FIGR or ceded its jurisdiction over the Property to the federal government and the FIGR. In order for consent and cession to be deemed valid, the State of California must act with

(Footnote continued on next page)

Notably both the Graton Rancheria Restoration Act and 25 United States Code section 465 do not say anything about the trust lands' jurisdictional status other than the lands will be free from state taxation. By implication, state regulatory authority has not been automatically displaced.

Thus, under a proper reading of the Constitution, including an informed, historically-accurate understanding of the Indian Commerce Clause, and the plain language of the federal statute by which lands were taken into trust for the FIGR, state jurisdiction has not been displaced. State and local regulatory authority should continue to be exercisable over the lands and remain so unless and until the state consents to the transfer of the land or cedes jurisdiction to the federal government.

POINT C. Federal Courts That Have Rejected Tenth Amendment Challenges to Federal Land-Into-Trust Acquisitions Misconstrue The Reach of the Indian Commerce Clause And Should Not Be Followed.

A number of lower federal courts – but not the Supreme Court -- have rejected Tenth Amendment and Enclave Clause constitutional challenges by states

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knowledge that the state is not compelled by Congress to recognize a reservation for the FIGR; that the shift from state jurisdiction to federal jurisdiction has not occurred as a matter of law under the Graton Rancheria Restoration Act; and that a transfer of jurisdiction will occur only if California formally and expressly cedes its jurisdiction and the federal government accepts it. This does not appear to have happened. Cession of California's jurisdiction cannot occur by implication or via the Governor's approval of gaming compacts or the Legislature's ratification of same.

to federal land-into-trust acquisitions under 25 U.S.C. § 465. *E.g. Carcieri v. Kempthorne* (1st Cir. 2007) 497 F.3d 15; *State v. Salazar*, *supra*, 2012 U.S. Dist. Lexis 136086. In doing so, these federal courts uncritically accept the concept of federal "plenary authority" in "Indian affairs." With no examination of the text, context, purpose or history of the Indian Commerce Clause, these courts find the land-into-trust authority within Congress's plenary power.

The Eighth Circuit decision in *County of Charles Mix v. United States Dep't of the Interior* (8th Cir. 2012) 674 F.3d 898, 900 (*County of Charles Mix*) suggests that the courts may be likely to give Tenth Amendment arguments more weight and consider the constitutional implications of unilateral, nonconsensual land acquisitions by the federal government under 25 United States Code section 465. The Eight Circuit in *County of Charles Mix* avoided reaching the Tenth Amendment claim asserted by the county because the lands in question were lands that were owned by the tribe in fee, and were located within borders of the tribe's reservation. *Id*. at pp. 901-902. The Secretary of the Interior had processed the tribe's fee-to-trust application under the Department's "on-reservation" regulations under 25 C.F.R. § 151.10 (acquisition of reservation lands) rather than 25 C.F.R. § 151.11 (acquisition of off reservation lands). *Id*. at p. 902. The Eighth Circuit concluded that as a result of this on-reservation fee-to-trust acquisition, the Secretary's actions did not divest the state (or any political subdivision of the state)

of its authority over sovereign state land. *Id*. The Eighth Circuit's decision expressly leaves open the possibility that an aggrieved state (or political subdivision of a state) could mount an effective Tenth Amendment challenge to an "off-reservation" fee-to-trust acquisition under section 465 that involves taking state sovereign land, *id*., as in the case of the Property here.

Even if the Supreme Court's plenary power interpretation of the Indian Commerce Clause is controlling, despite its historical inaccuracy, no constitutionally permissible construction of that plenary power authorizes the federal government to take state sovereign lands and displace state jurisdiction. But that indirect authority runs directly counter to the Constitution's "guarantee" of State territorial sovereignty in Article IV, section 3 of the United States Constitution that is a "rare" and explicit guarantee that "Congress may not employ its delegated powers to displace." *See Garcia v. San Antonio Metropolitan Transit Authority*, *supra*, 469 U.S. at p. 550. The Constitution's balanced conception of federalism is thrown out of balance by giving the federal government unfettered power to claim state sovereign lands for federal purposes without the state's consent or voluntary cession following federal acquisition.

The Supreme Court has not reached this specific issue. *Amici* believe a serious constitutional question is raised whenever states are forced to cede land and jurisdiction by a federal law, and that the Indian Commerce Clause, even broadly

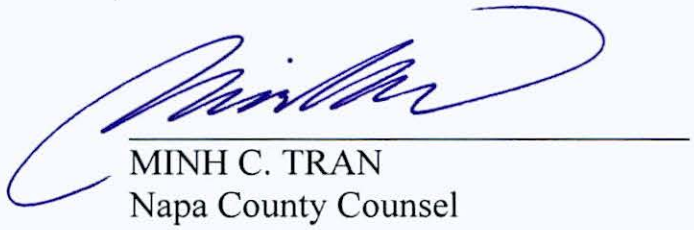
construed, cannot authorize removing state lands from state jurisdiction when the state objects; state consent and express cession of jurisdiction is required as a matter of constitutional fiat. Indeed, when the federal government acquires land within a state by eminent domain to create a national park, state jurisdiction persists over the condemned lands until formally ceded by the state and accepted by the federal government. *See Collins v. Yosemite Park & Curry Co.*, *supra*, 304 U.S. at pp. 528-529; *Prof. Helicopter Pilots Assn. v. Lear Siegler Services, Inc.*, *supra*, 326 F.Supp.2d at p. 1311.

Accordingly, the federal government in this case holds title to the Property as an ordinary proprietor, and exercises no sovereignty over it, unless and until the State of California consents and cedes its jurisdiction.

III. CONCLUSION

For all the reasons set forth herein, it is respectfully requested that this Court reverse and/or modify, as appropriate, the Memorandum of Decision of the lower court, dated August 1, 2013, which, *inter alia*, granted Defendant's motion for summary adjudication, and that this Court grant, in its entirety, Plaintiffs' motion for summary adjudication.

Dated: July 17, 2014



MINH C. TRAN
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Dated: July 17, 2014

/ S /

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Dated: July 17, 2014

/ S /

NORMA TOFANELLI, President
Napa County Farm Bureau

Dated: July 17, 2014

/ S /

JENNIFER PUTNAM
Executive Director and CEO
Napa Valley Grapegrowers

Dated: July 17, 2014

/ S /

MICHELLE BENVENUTO, Director
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Napa County Farm Bureau

CERTIFICATE REGARDING NUMBER OF WORDS IN BRIEF
Rule 8.204(c)(1)
California Rules of Court

The undersigned hereby certifies, pursuant to Rule 8.204(c)(1), that this brief consists of 8,025 words, including footnotes, as measured by the "word count" feature of Microsoft Word software.

Dated: July 17, 2014

MINH C. TRAN
Attorney for Napa County

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, Rule 8.208, interested entities or persons are listed below:

Name of Interested Entity or Person	Nature of Interest
1. None	None
2.	
3.	
4.	

Dated: July 16, 2014

Respectfully Submitted,

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Napa County

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Dated: July 16, 2014

Respectfully Submitted,

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Pursuant to California Rules of Court, Rule 8.208, interested entities or persons are listed below:

Name of Interested Entity or Person	Nature of Interest
1. None	None
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3.	
4.	

Dated: July 15, 2014

Respectfully Submitted,

Napa County Farm Bureau

By: Norma J. Tofanelli
Norma Tofanelli, President

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Pursuant to California Rules of Court, Rule 8.208, interested entities or persons are listed below:

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1. None	None
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3.	
4.	

In addition, the undersigned certified, pursuant to California Rules of Court, Rule 8.520, that no party, person, or entity made a monetary contribution intended to fund the preparation or submission of this brief.

Dated: 7/14/14

Respectfully Submitted,

Winegrowers of Napa County

Michelle Benvenuto, Executive Director
Winegrowers of Napa County

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1. None	None
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Dated: July 15, 2014

Respectfully Submitted,

Napa Valley Grapegrowers

Jennifer Putnam
Executive Director & CEO
Napa Valley Grapegrowers

PROOF OF SERVICE

Stop The Casino 101 Coalition, et al. v. Edmund G. Brown as Governor
First Appellate District, Division 3, Case No. A140203
Sonoma County Superior Court Case No. SCV251712

I am a resident of the United States and of the State of California. I am employed in the County of Napa. My business address is 1195 Third Street, Suite 301, Napa, California. My business telephone is (707) 253-4521; fax number (707) 259-8220. My Email address is susan.ingalls@countyofnapa.org. I am over the age of eighteen years. I am not a party to the within action or proceeding. I am familiar with the practice of Napa County Counsel's Office, for the collection and processing of correspondence for mailing with the United States Postal Service. In accordance with the ordinary course of business, the above-mentioned document(s) would have been deposited with the United States Postal Service on the same day on which it was placed at Napa County Counsel's Office. On the date indicated below, I served the following document(s);

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF COUNTY OF NAPA, CITY OF AMERICAN CANYON, NAPA COUNTY FARM BUREAU, NAPA VALLEY GRAPEGROWERS, AND NAPA VALLEY WINEGROWERS

AND PROPOSED BRIEF IN SUPPORT OF PLAINTIFFS AND APPELLANTS STOP THE CASINO 101 COALITION, ET AL.

☒ by transmitting via e-mail or electronic transmission to the person(s) at the e-mail address(es) set forth below on this date before 5:00 p.m.
(Except for Sonoma County Superior Court, Honorable Elliot Daum, only sent via U.S. Mail, First Class)

☒ by placing, or causing to be placed, a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Napa County, California, addressed as set forth below. (CCP § 1012, 1013, and 1013(a))

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Sonoma County Superior Court Honorable Elliot Daum Empire College Court Annex 3035 Cleveland Avenue, Suite 200 Santa Rosa, CA 95403 **Via US Mail, First Class**	

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on July 17, 2014, at Napa, California.

Susan M Ingalls

SUSAN M. INGALLS