
In the
Court of Appeal
of the
State of California
FIFTH APPELLATE DISTRICT

F088551

PICAYUNE RANCHERIA OF THE CHUKCHANSI INDIANS,

Plaintiff-Respondent,

v.

EDMUND G. BROWN, JR.,

Defendant-Respondent,

NORTH FORK RANCHERIA OF MONO INDIANS,

Intervener and Appellant.

APPEAL FROM THE SUPERIOR COURT OF MADERA COUNTY
HON. MICHAEL J. JURKOVICH · NO. MCV072004

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS	
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Date: May 1, 2025

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INTRODUCTION

This Court is intimately familiar with the facts and circumstances that require that the judgment below be affirmed. Appellant North Fork Rancheria of Mono Indians seeks to offer Class III gaming at a location in Madera County—the Madera Site. Because of when the Madera Site was taken into trust by the federal government, North Fork can offer such gaming (or any gaming) “only if the Governor of the State in which the gaming activity is to be conducted concurs[.]” (25 U.S.C. § 2719(b)(1).) In 2012, then-Governor Brown initially concurred with respect to the Madera Site, but the People of California exercised the power “reserve[d] to themselves” through referendum and impliedly annulled the concurrence so that it never had effect. (Cal. Const., art. IV, § 1.) North Fork does not want to acknowledge this outcome.

If these facts feel familiar to the Court, it is because this Court has already dealt with them. In *Stand Up for California! v. State* (2021) 64 Cal.App.5th 197 (*Stand Up II*), this Court held that the People of California impliedly “annulled” the Governor’s concurrence and did so “as an expression of their intent to reject class III gaming on the 305-acre Madera site[.]” (*Id.* at 216.)

Following *Stand Up II*, Respondent Picayune Rancheria of the Chukchansi Indians sought to reduce *Stand Up II*'s analysis to a binding judgment, confirming that the annulment rendered the concurrence void *ab initio*. North Fork refused, taking the position that the concurrence had validity prior to the referendum, and that they therefore could offer gaming despite the People's exercise of their constitutionally reserved power. In effect, North Fork sought to negate—in full—this Court's analysis in *Stand Up II*, despite having lost. Years of litigation followed, including, ultimately, cross motions for summary judgment. Consistent with this Court's teaching in *Stand Up II*, the Court below granted Picayune's motion, denied North Fork's cross motion, and held that the Governor's concurrence was void *ab initio*. (4 Appellant's Appendix [AA] 1089-93.)¹

North Fork appealed. And this Court now has the opportunity to confirm what North Fork refuses to acknowledge. The People's implied annulment of the Governor's concurrence, confirmed in *Stand Up II*, had the effect of rendering that concurrence void *ab initio*.

¹ Citations to Appellant's Appendix (AA) are formatted as follows: [Volume] AA [page range].

In an implicit concession, and despite having been the party to appeal, North Fork does not lead with the merits. Indeed, North Fork devotes the majority of its opening brief to everything but the merits. North Fork contends that this case is moot because the six-year statute of limitations has passed to challenge either the decision of the federal government to take the Madera Site into trust or the Secretary of the Interior's decision to issue procedures governing gaming at the Madera Site.

Respectfully, North Fork's mootness argument is an exercise in misdirection. For one thing, Picayune does not challenge the decisions to take the Madera Site into trust or to issue gaming procedures; nor does it seek to limit North Fork's development of the property for other commercial purposes. For another, it is somewhat ironic that North Fork now argues that the superior court's judgment "can have no practical effect" (North Fork Br. 34), when North Fork argued at the time it sought to intervene that "if Picayune were to succeed in obtaining a declaration or writ of mandamus invalidating the Governor's concurrence, North Fork's gaming project would be placed in jeopardy." (1

Respondent's Appendix [RA] 24-25.)² Irony aside, North Fork is wrong on the substance of its mootness argument.

As this Court recognized in *Stand Up II*, there are many *independent* requirements for a tribe to offer gaming on land like the Madera Site—the fee-to-trust decision and the issuance of secretarial procedures being separate and independent ones from the Governor's concurrence. Or, put differently, the “concurrence is *one* of [the] conditions that must be satisfied for class III gaming to be allowed at the site.” (*Stand Up II*, 64 Cal.App.5th at 216 [emphasis added; citation omitted].) If the Governor's concurrence is held to be void *ab initio* (as this Court's *Stand Up II* holding strongly suggests that it should be), then a separate condition for gaming will be missing, and the will of the People can be “jealously guard[ed].” (*Id.* at 213.)

Even apart from the misdirection, North Fork's arguments are themselves attempts to render toothless this Court's earlier decision. In *Stand Up II*, this Court devoted considerable attention *on the merits* to the validity of the Governor's concurrence. If the validity of the Governor's concurrence has no bearing on North

² Citations to Respondent's Appendix (RA) are formatted as follows: [Volume] RA [page range].

Fork’s ability to offer gaming, then it is unclear why this Court saw fit to address the issue in *Stand Up II*—or why the California Supreme Court saw fit to address the Governor’s power to concur in *United Auburn Indian Community of Auburn Rancheria v. Newsom* (2020) 10 Cal.5th 538 (*United Auburn*). But this Court recognized—as does the Indian Gaming Regulatory Act (25 U.S.C. § 2701 *et seq.*) (“IGRA”)—that the Governor’s concurrence is separate and independent. (*Stand Up II*, 64 Cal.App.5th at 216.) No concurrence, no gaming. That is what the law holds.

And, regardless, there are other *future* decisions—such as the Chair of the National Indian Gaming Commission’s (“NIGC”) approval in 2024 of a management contract that North Fork entered into to govern gaming at the Madera Site and that requires *full* compliance with IGRA (25 C.F.R. §§ 531.1(a), 533.7)—that are well within any applicable statute of limitations.³ North Fork surely knows this, too, but mentions none of it.

³ For the six-year statute of limitations, see 28 U.S.C. § 2401(a), which does not begin to run until injury. (*Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.* (2024) 603 U.S. 799, 813 [“Because injury, not just finality, is required to sue under the APA, Corner Post’s cause of action was not complete and present until it was injured by Regulation II.”].)

Once North Fork finally gets to the merits, it has little new or compelling to say. North Fork attempts to impose a construction on *Stand Up II* that is both implausible and in conflict with the decision’s holdings. North Fork raises arguments—such as its appeal to California’s “strong presumption against retroactivity” (North Fork Br. 46)—that *Stand Up II* already considered and rejected. North Fork also fundamentally misunderstands IGRA, which is not, as North Fork would have it, a federal statute with maximum preemptive effect, but is, instead, a classic example of a “cooperative-federalism scheme” that reserves a meaningful role for state law and state actors. (*United Auburn*, 10 Cal.5th at 543.) This Court, the California Supreme Court, and the Ninth Circuit have all recognized that the Governor’s exercise of his concurrence power is regulated by state law. (See *Stand Up II*, 64 Cal.App.5th at 210; *United Auburn*, 10 Cal.5th at 548; *Confederated Tribes of Siletz Indians of Or. v. United States* (9th Cir. 1997) 110 F.3d 688, 697.) North Fork quietly tries to change that.

What North Fork seeks, in effect, is a deprivation of the People’s reserved rights under the California Constitution. This North Fork cannot do. The United States Supreme Court has long

recognized that “[a] State is entitled to order the processes of its own governance[.]” (*Alden v. Maine* (1999) 527 U.S. 706, 752.) Here, this Court has already concluded that as a matter of state *constitutional* law, the People of California retained the right to annul a Governor’s concurrence. (*Stand Up II*, 64 Cal.App.5th at 216.) Because the Court below recognized that and recognized that such annulment rendered Governor Brown’s concurrence void *ab initio*, affirmance should follow.

In short, this Court should (again) reject North Fork’s efforts to avoid the People’s will. The People of California have spoken, and they have said “no” to North Fork’s casino. The lower Court’s grant of summary judgment in Picayune’s favor should be affirmed.

COMBINED STATEMENT OF FACTS AND PROCEDURAL HISTORY

Though updated to discuss the specific procedural aspects of this appeal, the summary of the facts that follows largely mirrors the combined statement of facts and procedural history from Picayune’s opening brief in Case No. F086849, which is currently before the Court.

I. NORTH FORK'S PROPOSED CASINO PROJECT

Picayune is a federally recognized Indian tribe that holds Rancheria lands located in Coarsegold, Madera County, California. (1 AA 10.) Picayune operates a casino on its Rancheria lands, which it has occupied since time immemorial, and which the tribe uses to support its members in a variety of ways, such as by providing education, housing, and healthcare services. (1 RA 35.)

North Fork is a federally recognized Indian tribe. (3 AA 664; see *Stand Up II*, 64 Cal.App.5th at 202.) In March 2005, North Fork submitted a fee-to-trust application to the Bureau of Indian Affairs within the U.S. Department of the Interior, requesting that the Department take into trust for North Fork's benefit a 305-acre parcel in Madera County (as noted above, the Madera Site). (2 AA 335-36; see *Stand Up II*, 64 Cal.App.5th at 202.) North Fork seeks to build and operate a large casino on the Madera Site. (2 AA 335-36; see *Stand Up II*, 64 Cal.App.5th at 202.) The Madera Site is approximately 26.4 miles from Picayune's Rancheria lands. (1 AA 10; see *Stand Up II*, 64 Cal.App.5th at 202.) Picayune has long opposed North Fork's proposed off-reservation casino because it

would cause significant harm to Picayune and its members. (1 AA 16.)

II. NORTH FORK NEEDS A VALID GOVERNOR'S CONCURRENCE

Covering ground this Court already dealt with in *Stand Up II*, IGRA provides “a statutory basis for the operation of gaming by Indian tribes[.]” (25 U.S.C. § 2702(1).) IGRA affirmatively *prohibits* gaming on lands taken into trust by the federal government after October 17, 1988, unless an exception applies. (25 U.S.C. § 2719(a), (b).) One such exception, set forth at 25 U.S.C. section 2719(b)(1)(A), is the one on which North Fork seeks to rely for the Madera Site.

To invoke that exception, North Fork must satisfy three separate conditions:

1. For the Secretary of the Interior to “determine[] that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community[]” (25 U.S.C. § 2719(b)(1)(A));
2. For the Governor of the State in which the Class III gaming is to occur to concur in the Secretary’s conclusion (25 U.S.C. § 2719 (b)(1)(A)); and
3. A valid Tribal-State compact or valid Secretarial Procedures (25 U.S.C. § 2710(d)(1)(C)).

This Court and others already recognize that each condition must be met and is separate. (*Stand Up for California! v. U.S. Dept. of the Interior* (D.D.C. 2016) 204 F.Supp.3d 212, 250 [“each is a separate requirement for gaming to take place on newly-acquired, non-reservation lands[]” (fn. omitted)], *affd.* (D.C. Cir. 2018) 879 F.3d 1177; *Stand Up II*, 64 Cal.App.5th at 216). “One of those conditions—the Governor’s concurrence—is the subject of this litigation.” (*Stand Up II*, 64 Cal.App.5th at 201.)

On September 1, 2011, the Secretary issued a two-part determination for North Fork’s proposed casino project. (1 AA 12; see *Stand Up II*, 64 Cal.App.5th at 202.) Approximately one year later, on August 30, 2012, then-Governor Brown issued a letter concurring in the Secretary’s two-part determination (as noted above, the “Governor’s concurrence”).⁴ (1 AA 12; see *Stand Up II*, 64 Cal.App.5th at 202.) The very next day, on August 31, 2012, the Governor and North Fork executed a tribal-state gaming compact for North Fork’s proposed casino project, though the

⁴ Gavin Newsom assumed the governorship on January 7, 2019, and is substituted as the defendant in this action in place of former Governor Brown. (Code Civ. Proc., § 368.5; *Cornejo v. Lightbourne* (2013) 220 Cal.App.4th 932, 936, fn. 2.)

Governor expressed reservation in doing so. (1 AA 12; 3 AA 656-774; see *Stand Up II*, 64 Cal.App.5th at 203.)

III. THROUGH PROPOSITION 48, THE PEOPLE REJECT NORTH FORK'S PROPOSED CASINO PROJECT

Under the California Constitution, tribal-state gaming compacts are “subject to ratification by the Legislature.” (Cal. Const., art. IV, § 19, subd. (f).) Accordingly, the compact expressly stated that it would not become effective until, among other things, “[t]he Compact is ratified in accordance with State law[.]” (3 AA 769.) On or about June 27, 2013, the Legislature passed Assembly Bill No. 277 (AB 277) to ratify the compact. (*Id.*)

In July 2013, Stand Up for California! asked the Attorney General to provide a title and summary for a proposed statewide referendum rejecting AB 277. (See *Stand Up II*, 64 Cal.App.5th at 204.) At the 2014 General Election, sixty-one percent (61%) of Californians voted to reject AB 277. (1 AA 13; *Stand Up II*, 64 Cal.App.5th at 205.) “As a result, AB 277 never went into effect.” (1 AA 13; see *Stand Up II*, 64 Cal.App.5th at 205.)

IV. PICAYUNE FILES SUIT AGAINST THE GOVERNOR; NORTH FORK INTERVENES

In March 2016, Picayune commenced this action to secure a judgment declaring the concurrence “did not take effect and is not in effect” and to obtain a writ of mandate directing the Governor “to vacate and set aside the concurrence and to take all action as may be necessary to notify the Secretary that the concurrence did not take effect and is not in effect[.]” (1 AA 17.) North Fork was granted leave to intervene on July 8, 2016. (1 RA 31.) In seeking intervention, North Fork took the position that “[i]f Picayune were to succeed in obtaining a declaration or writ of mandamus invalidating the Governor’s concurrence, North Fork’s gaming project would be placed in jeopardy.” (1 RA 24-25.)

North Fork and the Governor each filed demurrers to Picayune’s Complaint. (1 AA 19.) On December 2, 2016, the Court below sustained the demurrers. (1 AA 21.) Given concurrent appellate proceedings raising similar questions, however, the Court vacated its order sustaining the demurrers and stayed proceedings pending resolution of those related proceedings. (1 AA 28.)

**V. *STAND UP II* HOLDS THE PEOPLE
ANNULLED THE GOVERNOR'S
CONCURRENCE**

In March 2013, Stand Up for California! and Barbara Leach filed a complaint in the Superior Court for the County of Madera challenging the Governor's authority to issue the concurrence. (*Stand Up for California! v. California* (2016) 6 Cal.App.5th 686, 693 (*Stand Up I*), overruled in part by *United Auburn*, 10 Cal.5th at 548.) As in this litigation, North Fork was granted leave to intervene and, along with the Governor, demurred to Picayune's complaint. (*Id.* at 693.) Also as in this litigation, the Court below sustained the defendants' demurrers in March 2014. (*Id.*) Plaintiffs timely appealed, and in December 2016 this Court issued its decision in *Stand Up I*, concluding that, in the circumstances presented, the Governor lacked authority to concur and thus the concurrence was invalid. (*Id.* at 705.)

Shortly before this Court's decision in *Stand Up I*, the Third Appellate District was presented with a similar appeal involving a different parcel in *United Auburn Indian Community of the Auburn Rancheria v. Brown*. (See (2016) 4 Cal.App.5th 36, affd. *United Auburn*, 10 Cal.5th 538.) The Third Appellate District reached the opposite conclusion as this Court, concluding the

Governor could concur in some circumstances. (See *id.* at 42.) Petitions for review were filed in both cases. (*Stand Up II*, 64 Cal.App.5th at 206.) The California Supreme Court granted review in both cases but “deferred consideration [of *Stand Up I*] pending the outcome of *United Auburn*.” (*Id.*)

On August 31, 2020, the California Supreme Court issued its decision in *United Auburn*. “The Supreme Court held ‘that current California law permits the Governor’s concurrence in the Interior Secretary’s determination to allow class III gaming on Indian land taken into trust for an Indian tribe after IGRA was enacted[,]’” but also held such power “isn’t an indefeasible one[.]” (*Stand Up II*, 64 Cal.App.5th at 207, 209 [quoting *United Auburn*, 10 Cal.5th at 563].) After issuing *United Auburn*, the Supreme Court transferred the *Stand Up* case back to this Court with instructions to reconsider the matter in light of *United Auburn*, which it did. (*Stand Up II*, 64 Cal.App.5th at 201.)

In *Stand Up II*, this Court determined that the People “reject[ed] [] class III gaming at the Madera site” through their vote on Proposition 48. (*Stand Up II*, 64 Cal.App.4th at 216.) Thus, this Court held that “the people’s rejection of Proposition 48 impliedly expressed their will to annul the Governor’s August 30,

2012 concurrence for the Madera site.” (*Id.*) The State and North Fork each petitioned the Supreme Court for review of this Court’s *Stand Up II* decision. (North Fork’s Petition for Review, filed in *Stand Up for California! v. California*, No. S269471 (Cal. June 22, 2021); Governor’s Petition for Review, filed in *Stand Up for California! v. California*, No. S269471 (Cal. June 22, 2021.)) On September 1, 2021, the Supreme Court denied the petitions for review. (Supreme Court of California’s Order Denying North Fork’s and the Governor’s Petitions for Review, entered in *Stand Up for California! v. California*, No. S269471 (Cal. Sept. 1, 2021.))

VI. THE COURT BELOW GRANTS PICAYUNE’S SUMMARY JUDGMENT MOTION

Following this Court’s decision in *Stand Up II*, this case came back to life in the Court below, and Picayune filed a motion for judgment to reduce *Stand Up II*’s analysis to a binding judgment. (1 AA 33.) Both the Governor and North Fork opposed Picayune’s motion and filed their own motions for judgment on the pleadings. (*Id.*) Picayune subsequently filed a motion for leave to file a First Amended Complaint and a First Amended Petition for Writ of Mandate, which the Governor and North Fork opposed. (*Id.* at 34.) The Court below granted Picayune leave to amend its

Complaint but denied leave to amend its Petition and sustained the Governor’s demurrer with prejudice to Picayune’s mandamus claim. (1 AA 52.) On December 28, 2022, Picayune filed its First Amended Complaint, and the Governor and North Fork both filed demurrers. (1 AA 55-64.) On July 16, 2023, the Court entered an order sustaining the Governor’s demurrer and overruling North Fork’s. (1 AA 220.)⁵

The parties subsequently filed competing motions for summary judgment. As relevant here, North Fork tried to avoid the merits and advanced a number of (defective) procedural arguments that targeted aspects of the relief Picayune sought. (1 AA 224-46.) Picayune, for its part, argued that it was entitled to declaratory relief on the question whether the Governor’s “concurrence ever ha[d] any legal effect under California law in light of its annulment by Proposition 48[.]” (4 AA 1021.) And Picayune explained that *Stand Up II* “leads to the inescapable conclusion that Proposition 48 *retroactively* annulled the

⁵ In a parallel proceeding before this Court (No. F086849), Picayune has appealed from the decisions of the Court below denying Picayune leave to amend its Petition and sustaining the Governor’s demurrer to Picayune’s First Amended Complaint.

concurrence as if it never existed[]” such that it was “void *ab initio*.” (4 AA 1023.)

On May 28, 2024, the Court below issued a Tentative Ruling granting Picayune’s motion and denying North Fork’s. (4 AA 1054-71.) In its Tentative, the Court rejected North Fork’s argument that the Court lacked jurisdiction to grant Picayune the relief that it sought, because—even if certain issues regarding North Fork’s ability to offer class III gaming on the Madera Site required resolution in federal court—the Court could grant relief on Picayune’s “declaratory relief cause of action, which essentially seeks clarification on whether the referendum rendered the governor’s concurrence void *ab initio*[.]” (4 AA 1063.) The Court also rejected North Fork’s related arguments that the case was moot and constituted an impermissible collateral attack on a decision made by the Secretary. (4 AA 1063-67.) The Court explained that a case is moot only when there is no “actual controversy” between the parties, such that a court cannot “grant the plaintiff any effectual relief.” (4 AA 1064 [internal quotation marks omitted].) Because Picayune and North Fork “dispute[d] whether the concurrence was previously in effect such that North Fork can still rely on it to establish . . . a necessary condition for

gaming under IGRA[.]” and because “a ruling resolving this specific issue directly impacts . . . whether gaming is permitted on this specific piece of property,” the Court held that “[t]he validity of the Governor’s concurrence” remained “a live issue” on which the Court could grant effectual relief. (4 AA 1066-67.)

Turning to the merits, the Court held that the Governor’s concurrence was “void *ab initio*.” (4 AA 1067-71.) The Court quoted this Court’s decision in *Stand Up II*, which held that the People of California had “impliedly expressed their will to annul the Governor’s . . . concurrence” through their vote on Proposition 48. (4 AA 1068-69 [quoting *Stand Up II*, 64 Cal.App.5th at 216].) And the Court explained that “[a]lthough the *Stand Up II* opinion does not specifically use the phrase ‘*ab initio*’ the plain language and context of the discussion does support using the general, retroactive, definition of annulment.” (4 AA 1069.) The Court reasoned, “*Stand Up II* clearly interpreted . . . Proposition 48 as intended to foreclose the operation of a gaming facility on the Madera parcel[.]” and the best interpretation of *Stand Up II* is therefore “one that supports this outcome to the extent controlled by state law, meaning that the Governor’s concurrence has been retroactively determined to have never been effective.” (4 AA 1070.)

On May 31, the Court held a hearing and adopted the Tentative as the order of the Court, and on June 26, the Court entered judgment in favor of Picayune. (4 AA 1073.) North Fork timely appealed. (4 AA 1098.)

VII. FEDERAL COURTS DIRECT PICAYUNE TO RAISE CHALLENGE TO GOVERNOR'S CONCURRENCE IN STATE COURT

The background above describes the litigation in *this* Court system. North Fork argues that this case is moot, however, based in part on federal court litigation in which Picayune challenged certain federal approvals regarding the Madera Site. (See North Fork Br. 29.) North Fork is mistaken and does not provide the Court with the full background. This Court was aware of the federal court litigation when it decided *Stand Up II* (*Stand Up II*, 64 Cal.App.5th at 205 [describing the cases in the District of Columbia and Eastern District of California]), and those federal courts deferred to this court system where the Governor could be joined for resolution of the state law issue at the heart of this case.

In December 2012, Picayune, Stand Up for California!, and others sued the Department of the Interior and the Bureau of Indian Affairs in the District of Columbia, challenging several decisions by the Secretary of the Interior regarding the Madera

Site. (*Stand Up for California!*, 204 F.Supp.3d at 212.) Among other claims, Picayune argued that the Department’s decision to take the Madera Parcel into trust for North Fork violated IGRA because it relied on the Governor’s invalid concurrence. (*Id.* at 235.) In a decision the D.C. Circuit later affirmed (*Stand Up for California! v. U.S. Dept. of Interior* (D.C. Cir. 2018) 879 F.3d 1177, 1186), the District Court concluded that it could not resolve the validity of the concurrence, reasoning that “the Court agrees with the plaintiffs that a Governor’s authority to concur in an IGRA two-part determination is an issue of state law, but disagrees with the plaintiffs that this Court may address the validity of the California Governor’s concurrence under California law.” (*Id.* at 251.) The Court continued: “[T]he State of California is missing from this lawsuit, and any challenge to the validity of the Governor’s concurrence may not proceed in the State’s absence.” (*Id.*) Because the Governor could not be joined, the court reasoned, it would dismiss any claim predicated on the invalidity of the Governor’s concurrence. (*Id.* at 254 “[P]laintiffs’ claims in any way involving the Governor’s concurrence must be dismissed due to the absence of an indispensable party.”].)

In a subsequent suit challenging federal approvals, the Eastern District of California agreed with the D.C. courts that the Governor was a necessary party. (*Picayune Rancheria of Chukchansi Indians v. U.S. Dept. of the Interior* (E.D. Cal. Aug. 18, 2017, No. 1:16-CV-0950-AWI-EPG) 2017 WL 3581735, at *10 [“[t]he State of California remains a necessary party for the same reasons articulated by the District of Columbia district court[]”] (citation omitted).) The Court expressly pointed to the fact that this Court’s decisions in *Stand Up I* were not yet final and were proceeding *with* the Governor in this court system. (*Id.* at *9-10.) In other words, the federal courts have confirmed that it is for this Court to decide concurrence-related questions.

STANDARD OF REVIEW

A motion for summary judgment “shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” (Code Civ. Proc., § 437c, subd. (c).) Where, as here, “only legal issues are presented for the court’s determination[,]” summary judgment is appropriate. (*Cal. Pub.*

Recs. Rsch., Inc. v. County of Yolo (2016) 4 Cal.App.5th 150, 185 [citation omitted].)

This Court reviews the trial court's grant of summary judgment *de novo*. (*Paz v. California* (2000) 22 Cal.4th 550, 557.) The Court's review, however, is also "governed by a fundamental principle of appellate procedure, namely, that '[a] judgment or order of the lower court is *presumed correct*,' and thus, 'error must be affirmatively shown.'" (*Arnold v. Dignity Health* (2020) 53 Cal.App.5th 412, 423 [quoting *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564].) Under this principle, the appellant "bears the burden of showing error." (*Frank & Freedus v. Allstate Ins. Co.* (1996) 45 Cal.App.4th 461, 474.) And "to obtain a reversal, the appellant must establish the error resulted in a miscarriage of justice." (*Id.* [citing Cal. Const., art. VI, § 13].) North Fork does not and cannot meet these standards.

ARGUMENT

This appeal picks up where the last left off, and it does so only because North Fork seeks at all costs to avoid having this Court confirm what it meant. As *Stand Up II* recognized, when the People of California voted on Proposition 48, they intended to prevent North Fork from moving forward with its casino project.

(*Stand Up II*, 64 Cal.App.5th at 216.) *Stand Up II* held, accordingly, that Proposition 48 annulled the Governor's concurrence, which is a necessary precondition to offer gaming at the Madera Site. The only reasonable interpretation of this Court's decision is that the Governor's concurrence was rendered void *ab initio*. A contrary reading would leave open the possibility that the concurrence was valid prior to Proposition 48, and that North Fork could offer gaming in reliance on that period of validity. As this Court said in *Stand Up II*, "[t]he probability of this approach accurately identifying the people's will is, in our view, extremely low." (64 Cal.App.5th at 216.) And yet, North Fork resists the power of the People and this Court's "duty to jealously guard the right of the people to the initiative and referendum." (*Id.* at 213.)

Having essentially lost on the merits in *Stand Up II*—but stubbornly refusing to acknowledge it—North Fork attempts to make this case about jurisdiction. North Fork argues that the case is moot because the statute of limitations has passed to challenge the Secretary's 2012 decision to take the Madera Site into trust and the Secretary's 2016 decision to issue procedures in lieu of a state compact (each of which, as noted at p. 9, *supra*, is a different

condition necessary to offer gaming). And North Fork contends that the validity of the Governor's concurrence is an academic issue on which any opinion from this Court would be advisory. Not so. Not close.

North Fork would have this Court believe that Picayune is, in this suit, challenging the fee-to-trust decision or the issuance of secretarial procedures. Picayune is not. Instead, Picayune is challenging the separate condition which federal courts have said is for California courts to resolve: the validity of the Governor's concurrence itself. And this Court already addressed the validity of the concurrence—a decision that would have been an impermissible advisory opinion if North Fork's position were correct (as would the Supreme Court's decision in *United Auburn*).

This Court should look past North Fork's efforts to misdirect and affirm the trial court's holding that the Governor's concurrence was void *ab initio*. The validity of the concurrence is the key state law issue in the dispute over the Madera Site, and this Court, having already decided *Stand Up II*, is uniquely positioned to resolve it. This Court should affirm.

I. THE COURT BELOW WAS CORRECT TO CONCLUDE THE PEOPLE’S ANNULMENT RENDERED THE CONCURRENCE VOID *AB INITIO*

The validity of the Governor’s concurrence is a key issue in the parties’ dispute over the Madera Site. North Fork cannot offer gaming without a valid concurrence. (See 25 U.S.C. § 2719(b)(1)(A); *Stand Up II*, 64 Cal.App.5th at 216.) As both this Court and the California Supreme Court have held, the concurrence question is also a fundamentally *state* law issue that state courts are uniquely positioned to decide. (See *Stand Up II*, 64 Cal.App.5th at 210; *United Auburn*, 10 Cal.5th at 548.) In granting Picayune’s motion for summary judgment, the Court below faithfully applied this Court’s decision in *Stand Up II*. (See 4 AA 1089-93.)

A. *Stand Up II*’s Reasoning and the People’s “Annulment” Confirm that the Governor’s Concurrence Was Void *Ab Initio*

In *Stand Up II*, this Court applied *United Auburn*’s acknowledgement that the Governor’s concurrence is defeasible and found the People had done just that—annulled a concurrence. *United Auburn* had said that California law authorized the Governor to issue a concurrence as a baseline matter, but it had

also recognized that the Governor’s power “isn’t an infeasible one[.]” (10 Cal.5th at 563.) The question this Court answered in *Stand Up II* was whether Proposition 48 had “defeas[ed]” the Governor’s concurrence. This Court’s answer was a resounding “yes.”

The Court began by analyzing what it means to be “infeasible.” In a section of its opinion titled “Retroactive Annulment,” the Court explained that “defeasible” means “capable of being or liable to being voided, annulled, or undone[.]” and that “infeasible” means “not capable of or not liable to being annulled or voided or undone.” (*Stand Up II*, 64 Cal.App.5th at 211-212 [quoting *Webster’s 3d New Internat. Dict.* (1993) at pp. 590, 1147].) Based on these dictionary definitions—and the Court’s understanding that, in California, “all governmental power, legislative or otherwise, is derived from the people” (*id.* at 211 [quoting *Dye v. Council of City of Compton* (1947) 80 Cal.App.2d 486, 489–490])—the Court concluded that “the Governor’s exercise of the defeasible concurrence power is itself an act capable of being avoided or undone by the people.” (*Id.* at 212.)

After confirming that a statewide referendum was “an appropriate mechanism for annulling a Governor’s concurrence”

(*Stand Up II*, 64 Cal.App.5th at 214.), and that such a referendum could “annul the Governor’s concurrence” even if it did not “expressly reference the concurrence power” (*id.*), the Court concluded that Proposition 48 did in fact annul the Governor’s concurrence (*id.* at 216). North Fork had argued that “Proposition 48 addressed the compact-ratifying statute, kept it from coming into effect, and did not pertain to the concurrence[.]” (*Id.* at 215.) In other words, North Fork had argued that the People of California intended to reject the tribal-state compact while preserving the Governor’s concurrence and leaving open the possibility that class III gaming would be conducted on the Madera Site pursuant to procedures issued by the Secretary. (See *id.* at 216.) This Court was unpersuaded, explaining that “[t]he probability of this approach accurately identifying the people’s will is, in our view, extremely low.” (*Id.*)

Instead, the Court concluded, “the voter’s rejection of the compact-ratifying statute is reasonably interpreted as an expression of their intent to reject class III gaming on the . . . Madera site[.]” (*Stand Up II*, 64 Cal.App.5th at 216.) This rejection, moreover, “implied the voters disapproved the Governor’s concurrence . . . because that concurrence is one of

IGRA’s conditions that must be satisfied for class III gaming to be allowed at the site.” (*Id.*) Accordingly, this Court held, “Proposition 48 impliedly expressed [the People’s] will to annul the Governor’s August 30, 2012 concurrence for the Madera site.” (*Id.*; alteration added.)

The language and logic of *Stand Up II* point to one possible interpretation of the Court’s decision: the Governor’s concurrence was void *ab initio*. Indeed, it is hard to know what else this Court could have meant. Beginning with the opinion’s language, *Stand Up II* used a form of the word “annul” more than twenty times when describing the legal effect that Proposition 48 had on the Governor’s concurrence.⁶ “*Annulment*” has a plain legal meaning: “The act of nullifying or making void.” (*Black’s Law Dict.* (12th ed. 2024).) In the marriage context, for example, “an annulment renders a marriage void from the beginning.” (*Id.*) “[D]issolution

⁶ The point has not been lost on the many secondary authorities that likewise have used the word “annul” when describing *Stand Up II*’s holding. (E.g., 7 Witkin, Summary of Cal. Law (11th ed. 2024 supp.) Const. Law, § 58 “[V]oters by referendum impliedly annulled Governor’s concurrence[.]”; *id.* § 194 “[V]oters impliedly annulled governor’s earlier concurrence[.]”; 174 Am.Jur. 1 (2023) Trials, § 37 (2025 update) “[T]he people of a state may exercise their will, through a referendum, to annul their governor’s concurrence . . . so as to preclude Class III gaming on the land.” [emphasis added].)

of marriage” or divorce, by contrast, “terminates the marriage as of the date of the judgment of dissolution.” (*Id.*; see *In re Lund’s Est.* (1945) 26 Cal.2d 472, 481-482 [“A marriage annulled is held to be void *ab initio*; a decree of nullity is a determination that the marriage never existed[.]”]; *Sefton v. Sefton* (1955) 45 Cal.2d 872, 874 [“[A]n annulment decree has the effect of declaring a marriage void *ab initio*.”].)⁷

“Nullification,” likewise, is “[t]he act of making something void or of no effect.” (*Black’s Law Dict.* (12th ed. 2024).) In election law, for example, “the legal consequence” of nullifying an election “is the same as though the person challenged had never been a candidate[;] [t]hat is what ‘nullity’ means in a variety of legal contexts.” (*Pierce v. Harrold* (1982) 138 Cal.App.3d 415, 433.) In *Pierce*, the defendant’s electoral victory was nullified, and a new election had to occur because “no candidate received a majority of the votes cast.” (*Id.*) In a follow-on case discussing the ramifications of *Pierce*, the court held that the remaining

⁷ Numerous courts throughout the country agree that an annulment renders something void *ab initio*. (See, e.g., *Am Cont’l Ins. Co. v. Steen* (2004) (en banc) 151 Wash.2d 512, 520; *Price v. Cole* (Mass. App. Ct. 1991) 574 N.E.2d 403, 405; *In re Williams* (Bankr. C.D. Cal. 1991) 124 B.R. 311, 316; *E. Refractories Co. v. Forty Eight Insulations Inc.* (2d Cir. 1998) 157 F.3d 169, 172.)

candidates did not have to pay again to be on a new voter's guide because the previous "June election was declared a nullity," and "[t]he practical and legal upshot of *Pierce* can be viewed as a finding the June election did not occur." (*Dutcher v. Olson* (1984) 153 Cal.App.3d 1189, 1192.) The same meaning is applied for nullification in civil procedure. In *Los Angeles v. Morgan* (1951) 105 Cal.App.2d 726, the court explained that where a court lacked jurisdiction to enter a judgment, "the judgment is for all purposes a nullity—past, present, and future." (*Id.* at 732.)

Moving to *Stand Up II*'s logic, this Court understood that the goal of Proposition 48 was to "reject class III gaming on the . . . Madera site[.]" (64 Cal.App.5th at 216.) That goal could be achieved only if one or more of the necessary preconditions to conduct gaming were removed. The Court recognized that the Governor's "concurrence is one of IGRA's conditions that must be satisfied for class III gaming to be allowed at the site," and it reasoned, accordingly, that Proposition 48 must have intended to eliminate that condition, such that it could not be relied upon in the future. (*Id.*) A decision that the Governor's concurrence remained valid until the People voted on Proposition 48—and thus that North Fork could seize on that brief period of validity to offer

class III gaming for all time pursuant to procedures issued by the Secretary—would render Proposition 48 and this Court’s holdings toothless. The only way for Proposition 48 to have its intended effect was for the Governor’s concurrence to be treated as a legal nullity, “void” and having “no effect.” (*Black’s Law Dict., supra.*) In other words, void *ab initio*, as the Court below concluded.

**B. North Fork Cannot Conduct Gaming
Without a Valid Concurrence**

Because the Governor’s concurrence is void *ab initio*, North Fork should not be able to offer gaming at the Madera Site. As explained above, IGRA permits gaming on lands taken into trust by the federal government after 1988 only if certain conditions apply. As relevant here, gaming is permitted if the Secretary of the Interior “determines that a gaming establishment . . . would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, *but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary’s determination[.]*” (25 U.S.C. § 2719(b)(1)(A) [emphasis added].) Under the plain text of IGRA, then, a valid concurrence by the Governor is necessary for North

Fork to offer any gaming regulated by the Act—including class III gaming—at the Madera Site.

This Court has already recognized that North Fork cannot offer gaming without a valid concurrence. Indeed, in explaining why Proposition 48’s “rejection of class III gaming at the Madera site implies the voters disapproved the Governor’s concurrence[.]” the Court reasoned that the Governor’s “concurrence is one of IGRA’s conditions that must be satisfied for class III gaming to be allowed at the site.” (*Stand Up II*, 64 Cal.App.5th at 216 [citing 25 U.S.C. § 2719(b)(1)(A)].) The Supreme Court in *United Auburn* likewise explained that “IGRA requires the Governor’s concurrence before class III gaming can occur on certain trust lands[.]” (10 Cal. 5th at 548, fn. 4.) And the federal court in the D.C. litigation described the Governor’s concurrence as “a separate requirement for gaming to take place on newly-acquired, non-reservation lands.” (*Stand Up for California!*, 204 F.Supp.3d at 250, fn. omitted.)

Even North Fork recognized at one point in this litigation that it needed a valid concurrence in order to offer gaming. In its reply in support of its application for leave to intervene, North Fork argued that “the Governor’s concurrence . . . was a

prerequisite for North Fork to develop its gaming establishment on the Madera Site,” and that “the disposition of this action may impair or impede North Fork’s ability . . . to move forward with the development of its gaming establishment.” (1 RA 16.) North Fork should be judicially estopped from taking a contrary position at this juncture, particularly given that its application for leave to intervene was granted. (See *People v. Castillo* (2010) 49 Cal.4th 145, 155 [“Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position.” (internal quotation marks omitted)].)

C. California State Court Is the Appropriate Forum To Resolve the Validity of the Concurrence

Whether the Governor’s concurrence was void *ab initio* is a question of California “constitutional law” (*Stand Up II*, 64 Cal.App.5th at 210), which California courts are uniquely positioned to resolve. Indeed, both federal courts to hear Picayune’s challenges regarding the Madera Site have indicated that the validity of the Governor’s concurrence *must* be resolved in state court. In the District of Columbia action, the court explained that it could not resolve “claims in any way involving the

Governor's concurrence" because the State was an indispensable party that could not be joined due to sovereign immunity. (*Stand Up for California!*, 204 F.Supp.3d at 254.) And the court noted with respect to the case before it that it was "not the appropriate time" or "the appropriate lawsuit for resolution of" issues involving the Governor's concurrence, because "the legality of the gubernatorial concurrence . . . has not been finally resolved by the California state court system[.]" (*Id.* at 255.)

The court in the Eastern District of California action likewise held with respect to claims involving the Governor's concurrence power that California was a necessary party. (*Picayune*, 2017 WL 3581735, at *10.) And it likewise noted that state court litigation was ongoing in which California was a party and was defending the validity of gubernatorial concurrences. (*Id.* at *9-10.) The court also rejected Picayune's argument that this Court's decision in *Stand Up I* could have preclusive effect in federal court because that decision was still subject to review by the California Supreme Court and therefore was not final. (*Id.* at *9.)

The upshot of these decisions is that the federal courts have deferred to the California state courts on the validity of the

Governor's concurrence. Assuming, consistent with *Stand Up II*, that the question is resolved in Picayune's favor and the concurrence is deemed void *ab initio*, there will be no doubt that North Fork lacks one of the preconditions necessary in order to offer gaming at the Madera site. And if North Fork nevertheless chooses to proceed with its casino project, Picayune will be able to rely on a final, binding state court judgment in any subsequent challenges.

II. NORTH FORK'S ARGUMENTS ARE WRONG

The picture just painted is a compelling one. It is also fully consistent with—and, indeed, logically entailed by—this Court's earlier analysis. Perhaps because the analysis is straightforward, North Fork does not lead with the merits, recognizing that battle has already been lost. Instead, North Fork's brief begins with jurisdictional arguments in the hopes that the Court will lose the plot. Specifically, North Fork argues that the case is moot because the statute of limitations has expired to challenge the fee-to-trust and secretarial procedure decisions. (North Fork Br. 34-38.) And North Fork contends that any decision regarding the validity of the Governor's concurrence would be an impermissible advisory opinion. (*Id.* at 38-45.)

North Fork is mistaken. In this suit, Picayune does not challenge any past actions by the Secretary. Rather, it challenges the validity of the concurrence itself—a state law question that both the *United Auburn* Court and this Court implicitly recognized that they had jurisdiction to address. And the reasoning of the *Stand Up II* decision—which negated a necessary condition for North Fork to offer gaming at the Madera Site—confirmed then and confirms now that the validity of the concurrence continues to present a live controversy. With North Fork’s jurisdictional arguments cleared away, all that is left are baseless objections that the Court either explicitly or implicitly rejected in *Stand Up II*.

A. This Case Is Not Moot

“A case becomes moot when events render it impossible for a court, if it should decide the case in favor of plaintiff, to grant him any effective relief whatever.” (*Golden State Water Co. v. Pub. Utils. Com.* (2024) 16 Cal.5th 380, 393 [cleaned up, citations omitted].) A case is not moot, by contrast, when a decision from the court “can have a practical, tangible impact on the parties’ conduct or legal status.” (*In re D.P.* (2023) 14 Cal.5th 266, 277, citation omitted.) Here, a ruling that the Governor’s concurrence was void *ab initio* would have such an impact, because it would

remove one of the preconditions that is required for North Fork to offer gaming at the Madera Site. Accordingly, this case continues to present a live controversy.

North Fork's contrary arguments misunderstand the nature of Picayune's challenge. North Fork insists that the real targets of this lawsuit are the Secretary's 2012 decision to take the Madera Site into trust and the Secretary's 2016 decision to issue procedures governing class III gaming at the Madera site. (North Fork Br. 34-38.) And it argues from that premise that Picayune's claims are time barred and constitute impermissible collateral attacks under *Big Lagoon Rancheria v. California* (9th Cir. 2015) (en banc) 789 F.3d 947, 954. As Picayune has explained, however, it is not challenging any of the Secretary's past decisions. (See 4 AA 1043-44 ["Picayune attacks no decision by the Secretary in its FAC."].) Picayune's challenge in this suit, rather, is to the validity of the Governor's concurrence itself. The statute-of-limitations and collateral-attack issues that North Fork raises are therefore irrelevant.

Underlying North Fork's mootness argument is its belief that the validity of the Governor's concurrence has no bearing on its ability to offer gaming at the Madera Site. But the effect of the

Governor's concurrence is a *merits* issue, not a *mootness* issue. And courts are very clear that there is a difference between the two. In *Golden State Water Co. v. Public Utilities Commission*, for example, the California Supreme Court looked to the United States Supreme Court's analysis in *Chafin v. Chafin* (2013) 568 U.S. 165, 180, which held that an appeal from an order returning a child to their country of habitual residence under the Hague Convention on the Civil Aspects of International Child Abduction does not become moot after the child is returned pursuant to such an order. The plaintiff in *Chafin* had argued that the defendant's appeal from such an order was moot because the district court lacked the authority to issue an order "re-returning" the parties' child to the United States. (*Id.* at 174.) The Supreme Court rejected that position, holding that the plaintiff's "argument—which goes to the meaning of the Convention and the legal availability of a certain kind of relief—confuses mootness with the merits." (*Id.*) So too here. Whether the Governor's concurrence is an independently necessary precondition to offer gaming is a merits question, and North Fork cannot rest its mootness argument on an assumption that its view of that merits question is correct.

Furthermore—and as explained in Section I.B above and Section II.B below—the validity of the Governor’s concurrence *does* bear on North Fork’s ability to offer gaming at the Madera Site. If this Court affirms the decision below, and the Supreme Court either affirms or denies review, then Picayune will have secured a definitive determination that North Fork lacks a predicate necessary to proceed with its casino project. True, a declaratory judgment does not always have the same coercive effect as an injunction. (See *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 898.) But it nevertheless defines “the legal relationship between the parties.” (*Id.*) If North Fork’s position is that the case is moot because it plans to offer gaming regardless of whether it has legal authority to do so, then this Court should have no trouble rejecting it. Such a position would mean that a case is moot whenever a defendant has expressed its intention to ignore a court order. That is not how the law works, and it is exceedingly dangerous to suggest that open defiance is a reason to avoid declaring the law. (Cf. *Reed v. Goertz* (2023) 598 U.S. 230, 234 (holding that the plaintiff had standing to seek a declaration that the defendant’s actions lacked a legal basis, because a favorable

“court order would eliminate the [defendant’s] justification” for engaging in the challenged conduct [alteration added]).)

In any event, a declaratory judgment in Picayune’s favor would have preclusive effect in subsequent litigation following this state court litigation, which confirms that this case is not moot. (See *San Diego Police Dep’t v. Geoffrey S.* (2022) 86 Cal.App.5th 550, 564 (a case is not moot if the judgment appealed from “could have collateral consequences in future proceedings[]”).) In the federal case in the Eastern District of California, the court declined to give preclusive effect to *Stand Up I*s holding that the Governor’s concurrence was invalid, but only because the California Supreme Court had granted review. (*Picayune*, 2017 WL 3581735, at *9 [“When the California Supreme Court grants a petition for review, the California Court of Appeal’s decision is not final for purposes of res judicata.”].) If this Court affirms and the Supreme Court affirms or denies review, the judgment in this case will be final.

Subsequent litigation, moreover, need not cast doubt on the Secretary’s 2012 or 2016 decisions. There are other, more recent actions that North Fork and the federal government have taken in connection with the Madera Site—and actions that remain to be taken in the future—that depend on the validity of the Governor’s

concurrence and therefore are subject to challenge. In 2024, for example, the Chair of the National Indian Gaming Commission (“NIGC”) approved a management contract that North Fork entered into to govern gaming at the Madera Site.⁸ Under the applicable regulations, such contracts are void if “gaming covered by the contract” is not “conducted in accordance with” IGRA. (25 C.F.R. §§ 531.1(a), 533.7.) Because North Fork lacks a valid concurrence for its casino project, the management contract is void, and the approval of the contract was unlawful. Even assuming that a six-year statute of limitations applies, any challenge to the Chair’s approval will be timely until 2030. In addition, if North Fork chooses to conduct gaming notwithstanding a final state court decision that the Governor’s concurrence was void *ab initio*, the Chair of the NIGC can bring an action against North Fork for violating the requirements of IGRA. (See 25 U.S.C. § 2713.)⁹

⁸ See News Release, Red Rock Resorts, *North Fork Rancheria of Mono Indians and Station Casinos LLC Announce the Approval of a Management Agreement by the NIGC* (Jan. 11, 2024), <https://redrockresorts.investorroom.com/2024-01-11-North-Fork-Rancheria-of-Mono-Indians-and-Station-Casinos-LLC-announce-the-Approval-of-a-Management-Agreement-by-the-NIGC>.

⁹ Under 25 U.S.C. § 2713(b), the Chair of the NIGC “shall have power to order temporary closure of an Indian game for substantial violation of the provisions of this chapter,” and the NIGC shall

B. The State Law Status of the Concurrence Is Dispositive

In addition to arguing that Picayune’s claims regarding the Secretary’s 2012 and 2016 actions are time barred, North Fork makes the more sweeping assertion that the validity of the Governor’s concurrence became irrelevant for the purpose of *any* challenge to North Fork’s casino project after the Secretary took the Madera Site into trust. According to North Fork, “the relevance of the concurrence is limited to the transmission of a facially valid concurrence to the Secretary, and the Secretary’s reliance on it, under IGRA, to take land into trust.” (North Fork Br. 40-41.) Given that the Secretary took the Madera Site into trust, North Fork argues, “whether Prop 48 has retroactive effect as a matter of state law is of no moment, making resolution of that question a merely academic exercise.” (*Id.* at 44.)

North Fork’s position will surely come as a surprise to this Court, which devoted considerable attention to the validity of the Governor’s concurrence in *Stand Up I* and *Stand Up II*. Those decisions—issued in 2016 and 2021, respectively—are

decide, after a hearing and a vote, “whether to order a permanent closure of the gaming operation.”

irreconcilable with North Fork’s argument that any inquiry regarding the Governor’s concurrence became “academic” after the Secretary took the Madera Site into trust in 2012. So too is *United Auburn*, which was decided in 2020, but which involved land taken into trust nearly a decade earlier. If North Fork is correct that the decision below is an “advisory opinion” that “should be vacated” (*id.* at 45), then the same must be true of *United Auburn* and *Stand Up II*.

Obviously, North Fork cannot be correct. The problem with North Fork’s argument is that it misunderstands the role that state law plays under IGRA. IGRA is a classic example of “cooperative federalism,” which “seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme.” (*Pauma Band of Luiseno Mission Indians of Pauma & Yuima Rsrv. v. California* (9th Cir. 2015) 813 F.3d 1155, 1160; see also *United Auburn*, 10 Cal.5th at 553 [describing “the cooperative-federalism scheme created by IGRA”]; *Stop the Casino 101 Coal. v. Brown* (2014) 230 Cal.App.4th 280, 288 [“IGRA is an example of cooperative federalism” (internal quotation marks omitted; citation omitted)].)

In the context of gaming on lands taken into trust after 1988, the role that IGRA gives to states is “a veto or approval” in the form of a gubernatorial concurrence. (Virginia W. Boylan, *Reflections on IGRA 20 Years After Enactment* (2010) 42 Ariz. St. L.J. 1, 11.) As discussed in Section I.B., a valid concurrence is an independently necessary precondition to offer gaming on such lands. “[T]he effect of the provision is that the Governor must agree that gaming should occur on the newly acquired trust land before gaming can in fact take place.” (*Confederated Tribes*, 110 F.3d at 696.)

The validity of a Governor’s concurrence, moreover, is governed by state law. As the Ninth Circuit explained in *Confederated Tribes*, a “concurrence (or lack thereof) is given effect under federal law, but the authority to act is provided by state law.” (110 F.3d at 697 [alteration in original].) A Governor cannot simply go rogue and concur in the Secretary’s determination that a proposed casino project would be in the best interests of the tribe and would not be detrimental to the community. Instead, “gubernatorial power arises from state constitutional and statutory authority.” (*United Auburn*, 10 Cal.5th at 548.) And a concurrence is valid only if state law “empowers the Governor to

concur.” (*Id.*; see also *id.* [“IGRA does not resolve . . . whether the Governor has a legal basis to concur[.]”]) State law, in turn, expressly subjects the Governor’s power to certain checks—including, here, the People’s reserved power of referendum. (See generally *Stand Up II*, 64 Cal.App.5th 197; see also *Confederated Tribes*, 110 F.3d at 697; *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. United States* (7th Cir. 2004) 367 F.3d 650, 665 [discussing state law checks on gubernatorial concurrence power].)

The dispositive role that state law plays under IGRA distinguishes it from the examples on which North Fork relies. North Fork places great weight on *Leser v. Garnett* (1922) 258 U.S. 130, in which the Supreme Court held that state constitutional provisions and legislative procedures could not interfere with the authority of the state legislature to ratify a federal constitutional amendment. (North Fork Br. 41.) But *Leser* involved a unique situation in which state legislatures were playing a “ratifying function rather than engaging in traditional lawmaking” (*Moore v. Harper* (2023) 600 U.S. 1, 28), and the Supreme Court distinguished *Leser* just two Terms ago in *Moore v. Harper*, in which it held that state legislatures *are* confined by their state

constitutions in other contexts in which the Federal Constitution assigns them a specific role. More generally, North Fork’s *Leser* argument would mean that the Governor’s concurrence power cannot be constrained at all by state statutes or constitutional provisions—a position that *United Auburn* expressly rejected when it held that “the Legislature may restrict or eliminate the Governor’s implicit power to concur.” (10 Cal.5th at 564.)

North Fork also cites a handful of cases involving the retrocession of state jurisdiction to the federal government under 25 U.S.C. § 1323(a). In 1968, President Johnson issued an executive order in which he authorized the Secretary of the Interior to accept States’ retrocessions. (Exec. Order No. 11435, 33 Fed.Reg. 17339 (Nov. 21, 1968).) Some courts—including the Ninth Circuit—subsequently held that an acceptance of retrocession by the Secretary made that retrocession effective, regardless of whether retrocession was valid under state law. (See, e.g., *United States v. Lawrence* (9th Cir. 1979) 595 F.2d 1149, 1151.) North Fork infers from these cases that “a state-court adjudication of the status of the Governor’s concurrence under state law is ‘immaterial’ to the question of its effect under federal law.” (North Fork Br. 44 [quoting *Lawrence*, 595 F.2d at 1151].)

As with *Leser*, the conclusion that North Fork hopes to draw from the retrocession cases runs headlong into many problems, the first of which is *United Auburn*. When it comes to deciding whether a tribe can offer gaming on lands taken into trust after 1988, courts “must determine whether [state] law empowers the Governor to concur.” (10 Cal.5th at 548.) In reaching that conclusion, *United Auburn* relied on the Ninth Circuit’s decision in *Confederated Tribes*—which postdates the retrocession cases and specifically addressed the nature of the Governor’s concurrence power. *Confederated Tribes* explained that “[w]hen the Governor exercises authority under IGRA, the Governor is exercising state authority[,]” and when “the Governor concurs, or refuses to concur, it is as a State executive, under the authority of state law.” (110 F.3d at 697.) To illustrate the nature of state law limitations on gubernatorial power, the Ninth Circuit cited with approval an example from a different federal scheme in which a state legislature had required a governor to obtain local approval before consenting to federal action. (*Id.* at 697-698.) Under North Fork’s conception of the concurrence power, such legislative constraints would have been meaningless.

North Fork is undoubtedly correct that the federal government has “plenary power over Indian affairs and authority to determine states’ role in the relationship with tribes.” (North Fork Br. 43.) But Congress exercised that power by enacting IGRA. And IGRA “recognized the federal and state concerns and provided that both had to be satisfied by requiring action by the appropriate federal and state officials.” (*Confederated Tribes*, 110 F.3d at 693.) There may be *federal* constitutional schemes, such as the ratification of constitutional amendments, where the federal constitution can assign a federal role to state officials unchecked by state constitutional law—though such circumstances are limited. (See, e.g., *Printz v. United States* (1997) 521 U.S. 898, 909 [“Not only do the enactments of the early Congresses, as far as we are aware, contain no evidence of an assumption that the Federal Government may command the States’ executive power in the absence of a particularized constitutional authorization, they contain some indication of precisely the opposite assumption.”].) Regardless, IGRA is not one of those schemes.

Instead, IGRA takes state officials and state constitutional constraints as it finds them. Any other conclusion would run afoul not just of *United Auburn*, which binds this Court (see *Auto Equity*

Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 456), but of bedrock principles of federalism, raising constitutional problems in the opposite direction.

Put differently, “[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state’s control over its officers and agents is not lightly to be attributed to Congress.” (*Parker v. Brown* (1943) 317 U.S. 341, 351.) To the contrary, “it is characteristic of our federal system that States retain autonomy to establish their own governmental processes.” (*Ariz. State Legis. v. Ariz. Indep. Redistricting Comm’n* (2015) 576 U.S. 787, 816.) This core federalism principle is not one of discretion but of right: “A State is *entitled* to order the processes of its own governance[.]” (*Alden*, 527 U.S. at 752 [emphasis added].) “Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign.” (*Gregory v. Ashcroft* (1991) 501 U.S. 452, 460.)

Here, IGRA’s legislative history reflects that for sites like the Madera Site, taken into trust after 1988, Congress chose to give states and state law a full and independent veto right over gaming.

(See Boylan, *supra*, at 11.) With California law having a controlling role as to this condition, it is not for North Fork to suggest that federal law somehow changed California’s constitutional ordering. And this Court has already explained how California’s constitutional ordering works in this case: “[T]he people of California retained the authority to annul a concurrence in the Interior Secretary’s two-part determination after it has been issued by the Governor.” (*Stand Up II*, 64 Cal.App.5th at 212.) “In other words, the Governor’s exercise of the defeasible concurrence power is itself an act capable of being avoided or undone by the people[,]” consistent with “section 1 of article II of the California Constitution.” (*Id.*)

C. The Concurrence Was Void *Ab Initio*

Finally turning to the merits, North Fork argues that the concurrence was not void *ab initio*. (North Fork Br. 45-52.) As explained in Section I.A, *Stand Up II* necessarily rejected this position. North Fork nevertheless tries to muddy the waters by raising a host of baseless objections, many of which this Court has already considered. Picayune addresses each of these in turn.

First, North Fork selectively quotes from *Stand Up II* to argue that the opinion itself indicates that the Governor’s

concurrence had legal effect for some time and thus may still be relied upon. In particular, North Fork seizes on a statement from this Court that the Governor's concurrence "is no longer valid," and it argues that this phrase "necessarily implies a period of prior validity." (North Fork Br. 46.) Unfortunately for North Fork, this lone phrase cannot bear such weight. It is true that the phrase "no longer valid" appears once in this Court's opinion in *Stand Up II*, but it is also true that the word "annul" and its variants appear over twenty times. (See p. 24, *supra*.) As explained above, "annul" has an established legal meaning of "nullifying or making void." (*Black's Law Dict., supra*.)¹⁰ And the logic of *Stand Up II* is irreconcilable with the view that the Governor's concurrence retained validity for some period of time. (*Stand Up II*, 64 Cal.App.5th at 212-216.) North Fork posits that "if someone says

¹⁰ North Fork accuses Picayune of "rest[ing] entirely on its preferred reading of the word 'annul.'" (North Fork Br. 48.) This is specious. Picayune reads "annul" to mean "nullifying or making void," consistent with the first definition in the dictionary. (*Black's Law Dict., supra*.) It is also the reading that accords with California case law, as discussed in Section I.A. (See p. 22-25, *supra*.) And it is the only reading that makes sense of this Court's opinion in *Stand Up II*, because a contrary interpretation would allow North Fork to offer gaming, notwithstanding the People's "intent to reject class III gaming on the" Madera Site. (*Stand Up II*, 64 Cal.App.5th at 216.)

they are ‘no longer hungry’ or ‘no longer employed,’ it does not mean they have never been hungry or employed.” (North Fork Br. 46.) But what if someone says that they are “no longer married”? If that person’s marriage resulted in divorce, then the marriage will be treated as having terminated when the divorce decree was entered; if the marriage was annulled, by contrast, then it will be treated as “void *ab initio*,” such that “the marriage never existed[.]” (*In re Lund’s Est.*, 26 Cal.2d at 481-482.)

North Fork also suggests that the Governor’s concurrence cannot be void *ab initio* because *United Auburn* held that “California law empowers the governor to concur,” and that “the Governor acted lawfully when he” issued a concurrence with respect to a different parcel of land on which a different tribe planned to offer gaming. (North Fork Br. 46 [quoting *United Auburn*, 10 Cal.5th at 543-544].) The whole point of *Stand Up II*, though, was to apply *United Auburn* in a new context—one in which the Governor issued a concurrence that the People resoundingly annulled by a statewide referendum, exercising their reserved constitutional powers.

As this Court explained, “*United Auburn* did not raise the question of the authority of the Legislature or the people to annul

a concurrence given by the Governor,” and “the Supreme Court did not decide the question or discuss it in dicta.” (*Stand Up II*, 64 Cal.App.4th at 210 [citation omitted].) While *United Auburn* certainly held that “California law empowers the governor to concur[]” as a baseline matter, it also held that this power was not “an indefeasible one.” (*United Auburn*, 10 Cal.5th at 563-564.) And this Court concluded in *Stand Up II* that the Governor’s power was defeased—indeed, “annulled”—when the People of California voted on Proposition 48.

Second, North Fork argues that holding the Governor’s concurrence void *ab initio* would be “contrary to basic principles of California law, which include a strong presumption against retroactivity.” (North Fork Br. 46.) Of course, this Court already addressed the subject of retroactivity in *Stand Up II*, where it rejected North Fork’s argument regarding “the troublesome retroactivity question” in a section of its opinion titled “Retroactive Annulment.” (64 Cal.App.5th at 210-212.)

North Fork attempts to relitigate the issue by citing *Quarry v. Doe I* (2012) 53 Cal.4th 945 and *Californians for Disability Rights v. Mervyn’s, LLC* (2006) 39 Cal.4th 223. But neither of those cases involved a referendum. *Quarry* dealt with legislative

changes to the statute of limitations for certain torts (see *Quarry*, 53 Cal.4th at 980), and *Mervyn's* held that an initiative passed by the People applied to pending cases (*Mervyn's*, 39 Cal.4th at 227.) *Stand Up II*, by contrast, made clear that it was dealing with the exercise of the constitutional referendum power as reflected by Proposition 48. (*Stand Up II*, 64 Cal.App.5th at 213.)

This Court expressly understood its obligation “to jealously guard” the People’s referendum right and noted the “general rule requiring referendum provision[s] be liberally construed to uphold that power.” (*Stand Up II*, 64 Cal.App.5th at 213 [citation omitted]) The Court held, moreover, that “[t]he legislative aspect of a [Governor’s] concurrence renders it subject to the power of referendum[.]” (*Id.* at 214 [alterations added].) Accordingly, any common law presumptions regarding retroactivity are irrelevant, as bedrock California law already provides that referendums act retroactively.

Furthermore, when an act is subject to referendum, as a matter of California constitutional law, it *never* goes into effect prior to the vote, and only then if approved: “[T]he legislative power of referendum reserved to the people in our Constitution does not countenance that a legislative act subject to referendum

can be effective before the power of referendum can be exercised.” (*Midway Orchards v. County of Butte* (1990) 220 Cal.App.3d 765, 781-782; see *Rossi v. Brown* (1995) 9 Cal.4th 688, 697 [“When a referendum petition qualifies, the newly enacted measure does not become effective and may not be implemented until it is approved by the voters.” (Citation omitted)].) In other words, the Governor’s concurrence never had legal effect, but instead was rendered void *ab initio* by the People’s vote.

North Fork resists this conclusion, and it attempts to draw support from the fact that *United Auburn* affirmed the Governor’s concurrence power. (North Fork Br. 49.) But North Fork fails to acknowledge that this Court already concluded that Proposition 48 presented a new question, not presented in *United Auburn*: “The parties’ contentions raise a series of questions about the authority of the people to eliminate or invalidate a concurrence given by the Governor. *United Auburn* did not resolve these questions of constitutional law.” (*Stand Up II*, 64 Cal.App.5th at 210.) This Court, in other words, understood itself to be answering a question derivative of, but left open by, the *United Auburn* decision.

North Fork argues on, seeming to suggest that Picayune’s position would place all gubernatorial concurrences “on indefinite hold pending the outcome of as-yet-unscheduled referenda.” (North Fork Br. at 50.) But the Court need not reach the issue, as the tribal-state compact here (which needed legislative approval) was signed the day after the Governor issued his concurrence (1 AA 12), and there is no suggestion that Proposition 48 was itself an untimely challenge to that compact. In other words, this Court need not assert a rule for all seasons where, as here, there was an admittedly timely referendum, and the imagined problems of future cases may never become a reality. (See *Sweatt v. Painter* (1950) 339 U.S. 629, 631 [“We have frequently reiterated that this Court will decide constitutional questions only when necessary to the disposition of the case at hand, and that such decisions will be drawn as narrowly as possible.” (Citation omitted)]; *Marin Mun. Water Dist. v. Dolge* (1948) 172 Cal. 724, 726 [“A court will not decide a constitutional question, unless such construction is absolutely necessary.” (internal quotation marks omitted)].) As the Supreme Court recognized long ago, “[t]hose who view” a particular issue “in terms of an endless ‘parade of horrors’ would do well to bear in mind that many of the hazards of human

existence that can be imagined are circumscribed by the classic observation of Mr. Justice Holmes, when confronted with the prophecy of dire consequences of certain judicial action, that it would not occur ‘while this Court sits.’” (*Cole v. Richardson* (1972) 405 U.S. 676, 685-686 [quoting *Panhandle Oil Co. v. Mississippi ex rel. Knox* (1928) 277 U.S. 218, 223 (Holmes, J., dissenting), overruled on other grounds by *Alabama v. King & Boozer* (1941) 314 U.S. 1].)

Finally, North Fork appeals to principles of federalism and preemption. But it identifies no conflict between Proposition 48 and federal law. (See *Murphy v. NCAA* (2018) 584 U.S. 453, 477 [explaining that preemption occurs where “[c]ongress enacts a law that imposes restrictions or confers rights on private actors[,]” and “a state law confers rights or imposes restrictions that conflict with the federal law[]”].) As explained in Section II.B, IGRA is an example of “cooperative federalism” that gives States “a role in the regulatory scheme.” (*Pauma Band*, 813 F.3d at 1160.)

In particular, as discussed above, IGRA gives states “a veto or approval” in the form of a gubernatorial concurrence. (Boylan, *supra*, at 11.) And that concurrence is a necessary, separate, and independent condition to gaming. (See *Confederated Tribes*, 110

F.3d at 696 [“The important consideration is that both officials must act. Regardless of who acts first, . . . the Governor must agree that gaming should occur on the newly acquired trust land before gaming can in fact take place.”].) When the Secretary issues a determination that gaming would be in the best interests of a tribe and would not be detrimental to the community, and the Governor or the People reaches a contrary conclusion and decides not to concur or to annul a concurrence, the State is not “interfer[ing] with matters reserved exclusively for the federal government.” (North Fork Br. 50.) It is, rather, fulfilling its role under IGRA and doing so under its own constitutional structure.

And as discussed above, the question of whether the Governor has validly concurred is a question of state law. (See p. 17-18, *supra*.) The California Supreme Court said that in *United Auburn*. (See 10 Cal.5th at 548 [“What IGRA does not resolve is whether the Governor has a legal basis to concur; gubernatorial power arises from state constitutional and statutory authority.”].) It did so in reliance on the Ninth Circuit’s analysis in *Confederated Tribes*, which held the same. (See 110 F.3d at 697 [“The concurrence (or lack thereof) is given effect under federal law, but the authority to act is provided by state law.” (Alteration in

original)]). And this Court said the same in *Stand Up II* as well. (64 Cal.App.5th at 210 [“questions about the authority of the people to eliminate or invalidate a concurrence given by the Governor” are “questions of [state] constitutional law”].) If California courts hold that Proposition 48 rendered the Governor’s concurrence void *ab initio*, then that determination is conclusive as to whether the relevant precondition under IGRA is satisfied.

North Fork rests its argument on several preemption cases, but all are distinguishable. In *Felder v. Casey* (1988) 487 U.S. 131, the Supreme Court held that a Wisconsin notice-of-claim statute was preempted because it “conflict[ed] in both its purpose and effects with the remedial objectives of [42 U.S.C.] § 1983.” (*Id.* at 138.) In *Arizona v. United States* (2012) 567 U.S. 387, the Court held that the State could not pursue immigration policies that “undermine[d] federal law.” (*Id.* at 416.) In *Arizona v. Inter Tribal Council of Ariz., Inc.* (2013) 570 U.S. 1, the Court held that “a state-imposed requirement of evidence of citizenship not required by” a uniform federal election form was “inconsistent with the [National Voter Registration Act’s] mandate that States accept and use the Federal Form.” (*Id.* at 15 [internal quotation marks omitted].) And in *Geo Grp., Inc. v. Newsom* (9th Cir. 2022) 50 F.4th 745, the

Ninth Circuit held that a California law prohibiting private prisons was preempted because it “interfere[d] with the federal government’s contracting decisions[.]” (*Id.* at 756.) The common theme among these decisions is that—unlike here—there was a clash between state and federal law. And, notably, none of the decisions involved a scheme like IGRA that delegated a critical role to the State under its own law. North Fork’s cases thus have nothing to say about the Governor’s power to concur under IGRA, or about the role of state law in determining when the Governor’s concurrence power may be validly exercised.

Rather, as discussed above, federalism concerns would arise only if this Court held the opposite—that Congress, *sub silentio* through IGRA, altered a State’s “entitled” right “to order the processes of its own governance[.]” (*Alden*, 527 U.S. at 752.)

CONCLUSION

In the face of North Fork’s intransigence, this Court’s task could not be simpler. The Court has already exercised jurisdiction in *Stand Up II*, addressing the same concurrence at issue here. And the Court has already held that the People of California annulled that concurrence through their vote on Proposition 48.

The Court should reaffirm those decisions, resolve this case on the merits, and hold that the Governor's concurrence was void *ab initio*.

DATED: May 1, 2025

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Dated: May 1, 2025

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