

IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

STATE ex rel SUSAN DEWBERRY,	)	
CAROLE HOLCOMBE, SUZANNE	)	Lane County Circuit Court
DANIELSON, and ARNOLD	)	Case No. 16-03-23044
BUCHMAN,	)	
	)	Case No. A146366
Relators-Appellants,	)	
	)	
v.	)	
	)	
THE HONORABLE THEODORE R.	)	
KULONGOSKI, Governor of the	)	
State of Oregon; and other	)	
EXECUTIVE OFFICERS in the State	)	
of Oregon,	)	
	)	
Defendants-Respondents,	)	
	)	
and	)	
	)	
THE CONFEDERATED TRIBES OF	)	
COOS, LOWER UMPQUA, and	)	
SIUSLAW INDIANS,	)	
	)	
Intervenor-Respondent.	)	

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**RELATORS-APPELLANTS' OPENING BRIEF**

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Appeal of Order Granting Summary Judgment  
Issued by the Hon. Karsten H. Rasmussen, July 13, 2010

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## STATEMENT OF THE CASE

### 1. NATURE OF ACTION; RELIEF SOUGHT

This is an appeal from the Lane County Circuit Court's denial of Relators' writ of mandamus on summary judgment. The writ sought to require the Governor to withdraw his signature from a casino agreement with the Confederated Tribes of Coos, Umpqua, and Siuslaw Indians ("the Tribes"). The trial court found that federal law preempted Oregon's constitutional prohibition on casinos, and then applied that preemption to a state statute (one that pre-dated the federal law allowing Indian casinos), thus providing the Governor with purported legislative imprimatur to sign the casino compact. In other words, the trial court found that federal law retroactively enhanced Oregon legislation with a super-constitutional power that Oregon legislators could not have possessed or intended at the time the statute was passed.

On appeal, Relators ask this Court to hold that Oregon's Governor cannot be given Oregon legislative authority to sign agreements for Indian casinos, in light of Oregon Constitution, Article XV, Section 4(12)'s flat prohibition against casinos. This is particularly true where Oregon's Legislature cannot possibly have intended a statute to have a facially unconstitutional effect at the time of passage, or be intended to effectuate a federal remedial scheme, when such intent is based, *post hoc*, on a federal

statute that did not exist when the Legislature passed the law. Relators also ask this Court to hold that federal law does not preempt Article XV, Section 4(12), specifically as that provision applies to the other portions of the Oregon constitution and Oregon statutes, given that federal law leaves it entirely to state law to determine who can negotiate and sign compacts.

Relators respectfully request this Court reverse the summary judgment in favor of Defendants Governor Kulongoski (now Governor Kitzhaber) and other officials, and Intervenor-Defendants the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians (hereinafter individually “the Governor” and “the Tribes,” respectively, collectively “Defendants”), and order the trial court to grant Relators’ summary judgment motion on remand. The Court is asked to grant Relators’ prayer for relief that the Governor be ordered to rescind his signature on the compact, to forbid executive officers of the state from taking any action in furtherance of the compact, and to discontinue all executive branch actions that facilitate the meeting of obligations in the compact.

## 2. NATURE OF THE ORDER

The circuit court granted summary judgment in favor of the Governor and the Tribes on Relators’ alternative writ of mandamus, and denied Relators’ cross-motions for summary judgment. *Opinion and Order*, May 3, 2010

(“Order”) at 1, ER-36, incorporated by reference in *General Judgment*, July 13, 2010 at 2 (“Judgment”), ER-65. The trial court found that the Governor “had the statutory authority pursuant to ORS 190.110 to authorize the Compact with the Confederated Tribes.” Order at 24, ER-59.

### 3. STATUTORY BASES FOR APPELLATE JURISDICTION

Relators are permitted to appeal the circuit court’s judgment “refusing to allow a mandamus” pursuant to ORS 34.240. Appellate jurisdiction is proper based on ORS 19.270(1).

### 4. DATES OF JUDGMENT AND APPEAL

On June 28, 2010, the trial court entered the Judgment dismissing Relators’ alternative writ of mandamus and granting judgment in favor of the Defendants. ER-65 (“Notice of Entry”). Relators filed their Notice of Appeal on August 18, 2010. This appeal is timely filed pursuant to ORS 19.255(1).

### 5. QUESTIONS PRESENTED ON APPEAL

A. Does Oregon’s Governor have any lawful authority to sign casino compacts with Indian Tribes, in light of Article XV, Section 4(12)’s prohibition on casino gaming in Oregon? Similarly, can IGRA’s putative preemption of

Article XV, Section 4(12) retroactively substitute for the clear absence of any legislative intent in ORS 190.110 to allow the Governor to sign casino compacts?

B. Does the federal Indian Gaming Regulatory Act (IGRA), 25 USC §§ 2701–2721, preempt or otherwise override the Oregon Constitution’s prohibition on casinos, specifically with respect to the Governor’s authority to sign casino compacts?

## 6. CONCISE SUMMARY OF THE ARGUMENTS

A. Even though IGRA is a federal statute, and presumed to override contrary state laws, the authority to sign tribal casino compacts under IGRA is established *exclusively by recourse to state law*. ORS 190.110 provides that the Governor is empowered to sign agreements with Indian Tribes, but that legislation is limited by its own language, and necessarily by the Oregon Constitution’s prohibition on legislative approval of casinos. Even if not limited by the Oregon Constitution, the Legislature cannot have intended ORS 190.110 to allow the Governor to sign casino compacts because the statute *predated* any federal law concerning casino compacts. Finally, federal preemption cannot validate a statute that is unconstitutional under the Oregon Constitution. Thus, Oregon’s Governor fundamentally lacks any authority to

sign casino compacts, and his signature here is void *ab initio*.

B. IGRA is not contrary to and does not preempt Oregon law that prohibits the governor from signing casino compacts. IGRA does not mandate that the governor of a state be the individual who must negotiate and sign a compact, and thus does not “interfere with” and is not “incompatible with” Oregon’s limitation on the Governor’s authority to sign casino compacts through Article XV, Section 4(12). By leaving the process of compact negotiation and signing to the states, IGRA cannot “preempt” state laws which would deprive a particular official of the authority to sign compacts.

## 7. CONCISE SUMMARY OF FACTS AND PROCEDURAL HISTORY

On January 8, 2003, then (and now) current Governor of Oregon John Kitzhaber signed a gaming compact with the Confederated Tribes of Coos, Umpqua, and Siuslaw Indians (“the Tribes”) that ostensibly allows the Tribes to establish and operate a casino on the “Hatch Tract,” just outside the city limits of Florence, Oregon.<sup>1</sup>

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<sup>1</sup> The complete, extensive factual and procedural background in this case was set out in the Oregon Supreme Court’s earlier opinion in this case, at *State ex rel. Dewberry v. Kulongoski (Dewberry II)*, 346 Or 260, 263–67, 210 P3d 884 (2009), as well as in this Court’s earlier opinion at *State ex rel Dewberry v. Kulongoski (Dewberry I)*, 220 Or App 345, 347–350, 187 P3d 220 (2008). Relators incorporate by reference the facts set out in those opinions, as well as the factual submissions of the parties in the summary judgment motion

In 1998, the Tribes sought to place a casino on land that was not initially part of their reservation—the Hatch Tract—and various types of litigation ensued through 2003. Over the State’s then-opposition, the Oregon District Court eventually allowed the use of the Hatch Tract for gambling in July of 2003. *See Oregon v. Norton*, 271 F Supp2d 1270, 1273 (D Or 2003). Within weeks of the end the appeal period for the State in *Norton*,<sup>2</sup> Relators retained counsel through the citizens’ group they had joined, and, after the State’s appeal period had lapsed, brought a petition for a writ of mandamus in the Oregon Supreme Court on September 15, 2003. Declaration of Deborah Todd at ¶¶ 6, 7, 10, ER-14 to ER-15. Following dismissal of that petition on November 28, 2003, Relators filed the petition for a writ of mandamus in this case on December 10, 2003. *Dewberry I*, 220 Or App at 347. The Circuit Court dismissed the petition for mandamus on January 23, 2004. *Id.* at 348 *and court file in this matter*. Relators appealed for the first time in this case.

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below. *See* ER-2–20 .

<sup>2</sup> The mandamus petition to the Oregon Supreme Court was well within the 60 days the State argued as the proper timeframe for an appeal on an analogous writ of review or APA decision, *see Defendants’ Memorandum of Law* at 38, particularly considering that no mandamus action could be ripe until the State allowed the *Norton* judgment (entered July 1, 2003) to become final. Defendants’ equitable argument on laches, which the trial court rejected below, was contingent on ignoring both the *Norton* litigation and the initial petition for mandamus in the Oregon Supreme Court.



On appeal, this Court held that Relators had no plain or adequate remedy in law where the Tribes controlled the justiciability of the declaratory relief case, and thus this mandamus action was proper. *Dewberry I*, 220 Or App at 359. This Court also held that the indispensable party rule of ORCP 29 did not apply to mandamus actions. *Id.* at 352. On review, the Oregon Supreme Court affirmed this Court's ruling. *See Dewberry II*, 346 Or at 269–70, 273.

On remand, the trial court issued the amended writ on September 23, 2009. The Tribes voluntarily sought to intervene, and were allowed to do so by the trial court as “Intervenor-Defendants,” over Relators’ objection to their party designation. ER-1 (Order Allowing Intervention). The trial court scheduled cross-motions for summary judgment, and these motions were briefed and filed by the parties. The trial court allowed Relators to amend their writ, and summary judgment was conducted by stipulation of the parties on the merits of that amended writ. *See* ER-29–35 (Second Amended Writ).

In addition to the procedural history largely set out above, the parties set out additional facts for the summary judgment. Namely, Relators showed that they were all concerned citizens and electors of Florence, Oregon, or the surrounding area. Stipulated Facts at ¶ 14, ER-19. *See also* Declaration of Susan Dewberry at ¶ 1, ER-10; Declaration of Carol Holcombe at ¶ 1, ER-5; Declaration of Suzanne Danielson at ¶ 1, ER-2; Declaration of Arnold

Buchman at ¶ 1, ER-8. In March 2003, Relators and other Florence residents formed the group that was to become the a nonprofit organization called People Against a Casino Town (PACT). *See* Declaration of Deborah Todd, at ¶¶ 1, 3, ER-13. Between late March 2003 and the middle of September, PACT attempted to get the State to appeal the decision, as well as worked on influencing public opinion regarding the casino and meeting with public figures regarding opposition to the casino. *Id.* at ¶¶ 3–8, ER-13-14. The State ultimately refused to appeal the decision, and the Attorney General refused to take any action to enforce Article XV, Section 4(12). *Id.* at ¶¶ 5, 9, ER-14. PACT then retained counsel and brought a petition for a writ of mandamus in the Oregon Supreme Court. *Id.* at ¶¶ 6, 7, 10, ER-14-15.

On the cross motions for summary judgment, the trial court granted the Defendants’ joint motion for summary judgment on the issue of whether the Governor possessed lawful authority to sign the compact with the Tribes. This second appeal now follows.

## **ASSIGNMENTS OF ERROR**

### **I. FIRST ASSIGNMENT OF ERROR**

The trial court erred in granting Defendants’ joint summary judgment motion based on its finding that Oregon’s Governor possessed authority to sign

casino gaming compacts. The Governor has no authority independent of state law to sign tribal-state gaming compacts, and any Oregon constitutional provision or statute that would purport to give him such authority cannot be harmonized with and is in plain violation of Article XV, Section 4(12).

#### A. PRESERVATION OF ERROR

The State and Tribes “jointly move for summary judgment in their favor[.]”  
*Defendants’ and Intervenor Defendants’ Joint Motion* at 1, ER-23.

“The Governor has authority to enter such a compact on behalf of the State.”  
*Defendants’ and Intervenor Defendants’ Joint Memorandum in Support*  
at 1, ER-26.

“Oregon’s governor has no constitutional or statutory authority to sign a casino compact with the Confederated Tribes.”  
*Relators’ Motion for Summary judgment* at 2, ER-22.

“Defendants’ and Intervenor-Defendants’ Joint Motion for Summary Judgment is GRANTED, and Relators’ Motion for Summary Judgment is DENIED.”  
*Opinion and Order* at 1, ER-36.

The Governor had “statutory authority pursuant to ORS 190.110 to authorize the Compact with the Confederated Tribes.”  
*Opinion and Order* at 24, ER- 59.

#### B. STANDARD OF REVIEW

In reviewing a judgment refusing to grant a writ of mandamus, the appellate court is “bound by the trial court’s factual findings if supported by the

evidence in the record ... and [it] review[s] for errors of law.” *Curry v. Thompson*, 156 Or App, 537, 541, 967 P2d 544 (1998), *citing Kirschbaum v. Abraham*, 267 Or 353, 355, 517 P2d 272 (1973); *Haas v. Hathaway*, 144 Or App 478, 480, 928 P2d 331 (1996). Relators’ first assignment of error does not involve any disputed factual findings; therefore, this Court should review for errors of law and need not give any deference to the trial court’s legal conclusions. This standard is the same in the cross-motion context:

In an appeal from a judgment that results from cross-motions for summary judgment, if both the granting of one motion and the denial of the other are assigned as error, then both are subject to review. Each party that moves for summary judgment has the burden of demonstrating that there are no material issues of fact and that the movant is entitled to judgment as a matter of law. We review the record for each motion in the light most favorable to the party opposing it.

*State, ex rel. Dept. of Forestry v. PacifiCorp*, 236 Or App 326, 332, 237 P3d 861 (2010), *quoting Eden Gate, Inc. v. D & L Excavating & Trucking, Inc.*, 178 Or App 610, 622, 37 P3d 233 (2002) (citations omitted).

C.     ARGUMENT: NO SOURCE OF LAW, STATE OR FEDERAL,  
AUTHORIZES AN OREGON GOVERNOR TO SIGN CASINO  
AGREEMENTS

The parties and the trial court all concur that IGRA provides no independent authority for the Governor to sign compacts. The trial court

accepted that IGRA did not provide any authority for the Governor to sign a casino compact, *Opinion and Order* at 20 (so stating), and Defendants' Joint Brief agreed that *Pueblo of Santa Ana v. Kelly*, 104 F3d 1546, 1558 (10th Cir 1997), illustrated that "Congress intended that state law determine the procedure for executing valid compacts." Defendants' Joint Memorandum at 23. Only state law can determine who it is that can negotiate or sign a casino compact.<sup>3</sup> In Oregon, no such source of state law exists.

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<sup>3</sup> Several years ago in New York State, Governors Cuomo and Pataki signed tribal-state gaming compacts without any legislative grant of authority to do so. In rejecting the governors' claims of inherent authority to sign, New York's highest Court held:

[W]e have no difficulty determining that the Governor's actions were policy-making, and thus legislative in character. . . . Unsurprisingly, ***every state high court to consider the issue has concluded that the state executive lacks the power unilaterally to negotiate and execute tribal gaming compacts***[.] Today we join those states in a commitment to the separation of powers and constitutional government.

*Saratoga County Chamber of Commerce, Inc. v. Pataki*, 798 NE2d 1047, 1060–61 (NY 2003) (emphasis added). The courts of several other states concur in this result. *Cf. House of Representatives v. Crist*, 999 So2d 601, 603, 607 (Fla 2008) (governor had no authority to sign compact under "necessary business" clause, and doing so was violation of separation of powers clause); *State Ex Rel. Clark v. Johnson*, 904 P2d 11, 23–24, 26 (NM 1995) ("the governor cannot enter into such a compact solely on his own authority" and, "[w]e do not agree that Congress, in enacting the IGRA, sought to invest state governors with powers in excess of those that the governors possess under state law. Moreover, we are confident that the United States Supreme Court would reject any such attempt by Congress to enlarge state gubernatorial power"); *Panzer v. Doyle*, 680 NW2d 666, 670 (Wis 2004) (governor was without

First, there is no Oregon constitutional provision that provides authority for a governor to set state policy on casino gambling. The Oregon Constitution unequivocally bans the operation of casinos in this State, and all of the Governor's powers must be read in harmony with that provision. Furthermore, the Governor's obligation faithfully to execute the laws, his oath to support the United States Constitution, and his duty to transact necessary business of the state cannot be cobbled together to form such a broad grant of authority to set policy in this way. Irrespective of whether federal law could be read ultimately to require Indian gambling in Oregon, Oregon's **Governor** is not constitutionally permitted to facilitate any casinos in this State.

Second, no Oregon statute grants the Governor authority to enter into tribal-state casino compacts. ORS 190.110 is no exception; indeed, nowhere does it discuss casino compacts. The Legislature cannot have intended a result that would allow casino compacts, which were completely unknown at the time of the passage of ORS 190.110. Indeed, if ORS 190.110 either explicitly or

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authority when he agreed unilaterally to tribal-state compact amendments); *Narragansett Indian Tribe of Rhode Island v. Rhode Island*, 667 A2d 280, 282 (R.I.1995) ("the Governor as Chief Executive lacked both constitutional as well as legislative authority to bind the State of Rhode Island by executing the Tribal-State Compact"); *State ex rel. Stephan v. Finney*, 836 P2d 1169, 1169 (Kan 1992) (governor not authorized to sign compact because it constituted enactment of law and the creation of public policy, rather than the implementation of established law or public policy).

implicitly granted the Governor authority to approve casinos, then it would facially violate Article XV, Section 4(12), and be unconstitutional—regardless of basic federal supremacy concepts.

**1. THE OREGON CONSTITUTION PROHIBITS CASINOS, AND NOWHERE IS THERE INDEPENDENT AUTHORITY TO SET POLICY ON TRIBAL MATTERS.**

Article XV, Section 4(12) of the Oregon Constitution specifically prohibits the Legislature from enacting any law that would explicitly or implicitly grant The Governor the power to sign compacts. A constitutional provision is governed by an examination of the text, the caselaw, and the historical context in which it was written. *See Priest v. Pierce*, 314 Or 411, 415–16, 842 P2d 65 (1992). All of these show that the Article XV, Section 4(12) prohibits casinos. The plain language of Article XV, Section 4(12) provides, that “[t]he Legislative Assembly has ***no power to authorize***, and ***shall prohibit***, casinos from operation in the State of Oregon.” Or Const Art XV § 4(12) (emphasis added). This means “no casinos,” whether the Legislature attempts to authorize them specifically, or tries to delegate legislative authority to do so to the executive. “No power” means exactly what is says, and the Legislature cannot grant to the Governor by a wink and a nod some power that it is plainly excluded from exercising.

By inserting this clear prohibition in the Constitution, “the voters intended to *prohibit the operation of establishments whose dominant use or dominant purpose, or both, is for gambling.*” *Ecumenical Ministries v. State Lottery Commission*, 318 Or 551, 562, 849 P2d 532 (1994) (emphasis added).<sup>4</sup>

There is no further qualification in *Ecumenical Ministries* or elsewhere that would allow the Governor to allow casinos on his own initiative; nor would fundamental separation of powers ideas allow it. *See* Note 3, *supra*.

In addition to this blanket prohibition on casinos, Article V of the

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<sup>4</sup> By way of historical background, as originally adopted in 1857, the Oregon Constitution contained only a single reference to gambling. Original Article XV, section 4, provided that “[l]otteries, and the sale of Lottery tickets, for any purpose whatever, are prohibited, and the Legislative Assembly shall prevent the same by penal laws.” Or Const Art XV § 4 (*Original*), *quoted in Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or 551, 554, 849 P2d 532 (1994). In 1976, Oregon voters adopted an amendment excepting charitable, fraternal, and religious organizations from the prohibition on lotteries. 318 Or at 554. Then in 1984, Article XV, Section 4 was amended through the initiative process to create the State Lottery. 318 Or at 554. At the same time, and in the same initiative, the Oregon voters also added the constitutional provision prohibiting casinos. *Id.* at 555. Following the passage of Article XV, Section 4(12), the State Lottery Commission codified this definition of “casino” by adopting OAR 177-040-0060: “[i]t shall be the policy of the Oregon State Lottery to not contract with any establishment whose dominant use or dominant purpose, or both, is for the sale of lottery games.” OAR 177-040-0060(1). *See Oregon Restaurant Services, Inc. v. Oregon State Lottery*, 199 Or App 545, 112 P3d 398 (2005) (holding that restaurants are not entitled to judicial review of letters from the State declaring that the large percentage of revenues generated from sale of lottery products ran afoul of the “dominant use or purpose” rule). ***In other words, it is the public policy of Oregon—reflected in our Constitution and elsewhere—that the State not enter into any contracts with anyone allowing or providing for casinos.***



Oregon Constitution—setting out the duties and responsibilities of the Governor—nowhere provides authority for the Governor to set state policy on Indian casinos. The trial court and Defendants cited to Article V, Section 10 (the duty “take care that the Laws be faithfully executed”), and Article V, Section 13 (power to “transact all necessary business with the officers of government, and ... require information in writing from the offices of the Administrative, and Military Departments upon any subject relating to the duties of their respective offices”), to justify the signing of the compact.<sup>5</sup> However, neither of these general provisions can be fairly read to encompass a specific grant of authority to set casino gambling policy for the state, or bind the State to agreements with dependent domestic nations such as the Tribes.

The only provision of Article V that arguably even comes close to such a grant of authority is Article V, Section 13. However, a simple look at the context of Section 13—obtaining written reports from “Administrative and Military departments”—shows that this provision deals only with day-to-day business of the Executive Branch. Other states have held that such a provision

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<sup>5</sup> The trial court also cited to Article XV § 3, setting out the oath to support the Constitution of the United States, as a basis for the Governor to sign a casino compact with an Indian Tribe. *Opinion* at 21. Relators do not challenge the Governor’s duty to support and defend the Nation’s founding document, but it is more than a stretch to say that the United States Constitution specifically requires ***Oregon’s Governor*** to sign a compact where IGRA itself does not require as much and the Oregon Constitution forbids it.

is an inadequate foundation on which to base a right to sign IGRA compacts. *See House of Representatives v. Crist*, 999 So2d at 603, 607; *Saratoga County*, 798 NE2d at 1060–61; *State ex rel. Stephan v. Finney*, 836 P2d at 1178 (holding that Kansas’ “transaction of business” provision refers to “day-to-day operation of government under previously established law or public policy,” and not a basis for signing casino compact under IGRA). Article V, Section 13 is in no way a blanket authorization for the Governor to adopt new state policy, much less to contradict another, more specific part of the Constitution.

The trial court’s reading of the Oregon Constitution as providing independent authority for the Governor to sign compacts fails for three reasons. First, if Section 13 authorized the Governor’s conduct here, it would render all other constitutional provisions that carefully delimit the Governor’s powers superfluous; quite possibly *anything* involving other government officials of any state or nation could be considered “necessary business.” Defendants below cited to *Willis v Fordice*, 850 F Supp 523 (SD Miss 1994), and *Langley v. Edwards*, 872 F Supp 1531 (WD La 1995), as authority for the proposition that governors can possess a general constitutional authority to sign compacts. Not only does this ignore the half-dozen jurisdictions that require specific and constitutional legislative authorization for a governor to enter into a compact,<sup>6</sup>

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<sup>6</sup> See Note 3, *supra*.

but this argument ignores entirely the variations between state constitutions.

In distinguishing *Willis*, the *Saratoga County* court noted that Mississippi allows its Governor the unilateral authority to negotiate and sign compacts because it “vests residual powers with the Governor. By contrast, New York,”—like Oregon<sup>7</sup>—“places residual policymaking responsibility with the Legislature.” *Saratoga County*, 798 NE2d at 1061 n11. *Langley* was decided on jurisdictional standing grounds, and the court’s brief discussion in *dicta* regarding the governor’s ability to sign a compact did not reference Louisiana’s constitution at all. 872 F Supp at 1535–36. *Willis* and *Langley* are not valid touchstones from which to decide the scope of the Oregon Governor’s enumerated powers under the unique contours of the Oregon Constitution

Second, the Governor’s creation *ex nihilo* of state public policy to allow casinos—a legislative function, as is made plain by Article XV, Section 4(12)’s assumption that it would normally be the Legislature’s function to set gaming policy—would violate the separation of powers contained in Article III, Section 1.<sup>8</sup> It is fundamental to limited constitutional government and rule of

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<sup>7</sup> See Or Const Art IV § 1(1) (“The legislative power of the State, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly”).

<sup>8</sup> This separation of powers reflects the fundamental American idea that the accumulation of too much power in one governmental entity presents a threat to liberty. James Madison expressed this sentiment more than two

law that an executive such as the Governor acts only under such authority as is expressly granted to him by the Oregon Constitution and statutes that are consistent with the Constitution. The Oregon Constitution clearly separates the powers of State government into three separate branches: legislative, executive, and judicial. Or Const Art III § 1. By enacting the words “[t]he *Legislative Assembly* has no power to authorize . . . [casino] operation in the State of Oregon[,]” the voters of Oregon correctly understood that such authorization would be a legislative function and must come from the Oregon Legislature. See Or Const Art XV § 4(12). As an executive officer—the branch of

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hundred years ago when he wrote: “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”<sup>1</sup> Alexander Hamilton, James Madison & John Jay, *THE FEDERALIST, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES*, No. XLVII, at 329 (1901 ed.). A more contemporary exposition of the well-established jurisprudence in this area explains the implications of the doctrine as follows:

Since the governor is a mere executive officer, his general authority is narrowly limited by the constitution of the state, and he may not exercise any legislative function except that granted to him expressly by the terms of the constitution. Hence, a contract entered into with a third person by the governor upon his assumption of authority, which contract is within the province of the legislative department only, will not bind the state; the governor’s act is purely *ultra vires*.

38 Am. Jur. 2d, Governor § 4, at 934–35. In fact, the language of Oregon’s prohibition on casinos is further evidence that the act of authorizing a casino, *if at all*, would be a legislative function.

government that enforces laws made by the Legislature and interpreted by the judiciary—the Governor had no power to create gaming policy on his own, especially in violation of the constitutional prohibition on casinos. No national power—preemption or not—can change the fundamental division of authority and structure of a state government in a federal system.

Third, and most significantly, this reading of Section 13 can in no way be rationally harmonized with Article XV, Section 4(12)’s explicit prohibition on casinos in Oregon. Even if one improperly assumed that Oregon’s governor possesses some kind of all-encompassing residual authority under Section 13, he could not sign casino compacts under this authority because the public policy of Oregon plainly prohibits casinos. *See Ecumenical Ministries*, 318 Or at 562 (“the voters intended to ***prohibit the operation of establishments*** whose dominant use or dominant purpose, or both, is for gambling”) (emphasis added). It is untenable for the Governor to claim a policy-making power that the Legislature is expressly and constitutionally barred from exercising.

Likewise, this Court cannot ignore Article XV, Section 4(12), but must instead “harmonize” any potentially conflicting constitutional provisions:

[Where the People] adopt a constitutional amendment that by its fair import modifies that pre-existing right, the later amendment must be given its due. *See Hoag v. Washington Oregon Corp.*, 75 Or 588, 612, 144 P 574, 147 P 756 (1915) (“It is a familiar rule of construction that, where two provisions of a written [c]onstitution are

repugnant to each other, that which is last in order of time and in local position is to be preferred \* \* \*.”). To hold otherwise would be to deny to later-enacted provisions of the constitution equal dignity as portions of the same fundamental document.

*In re Fadeley*, 310 Or 548, 560, 802 P2d 31 (1990). Later constitutional provisions must also be accorded “equal dignity” to original provisions. *See Carey v. Lincoln Loan Co.*, 342 Or 530, 542, 157 P3d 775 (2007) (“The post-1910 amendments [to Article VII] . . . are of equal dignity as the 1910 amendment that adopted Article VII (Amended) and therefore could—and did—correct, modify, and repeal parts of that earlier constitutional provision”). If Oregon’s governor has constitutional authority to sign compacts with Tribes, then that power must be harmonized with the constitutional prohibition on casinos. As a constitutional amendment added in 1984, Article XV, Section 4(12) is presumed to “correct, modify, and repeal” any possible earlier grants of authority inconsistent therewith. The trial court’s disregard of Article XV, Section 4(12), failed to harmonize or afford any “equal dignity” whatsoever.

Rather than “harmonizing” Article XV, Section 4(12), and giving it the “equal dignity” it deserves, one must do violence to it in order to find that the Governor’s limited enumerated powers render this specific, later constitutional amendment a nullity. General provisions to enforce the laws and transact business have been roundly rejected elsewhere as bases for such authority, and

should fare no better in this case.<sup>9</sup> The Oregon Constitution cannot give the Governor any authority to sign casino compacts.

## 2. **ORS 190.110 DOES NOT AUTHORIZE CASINO COMPACTS.**

Defendants argued, and the trial court found, that ORS 190.110 authorized the Governor to enter into the Compact here. Yet, the plain language of ORS 190.110 flatly contradicts this notion. Furthermore, federal law does not salvage an Oregon statute that is otherwise unconstitutional under the Oregon Constitution.

### a. *The Plain Language and Legislative History of ORS 190.110 Do Not Mention Casino Compacts.*

In statutory construction, the “goal is to determine the legislature's intent in enacting the statute.” *In re Marriage of Polacek*, 349 Or 278, 284, \_\_\_ P3d \_\_\_ (2010). This Court accomplished that goal by “examination of the statute's text and context, along with any relevant legislative history, and if necessary, by resort to relevant canons of statutory construction.” *Gross v. Employment Dept.*, 237 Or App 671, 680, 240 P3d 1130 (2010), citing *State v. Gaines*, 346 Or 160, 171–73, 206 P3d 1042 (2009).

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<sup>9</sup> See Note 3, *supra*.

Without resorting to a preemption argument, there is no way in which the plain language or legislative history of ORS 190.110 can be construed to be a grant of authority for the Governor to enter into casino compacts with Indian Tribes, let alone a constitutionally permissible one. Defendants all but conceded as much below. *See* Defendants’ Joint Memorandum at 26 (“Gaming compacts could not have been specified by the terms of the statute, because ORS 190.110(3) was enacted before the United States Supreme Court decided *Cabazon* or Congress enacted IGRA”). Indeed, Defendants’ entire argument below, and the trial court’s opinion, were contingent on IGRA preempting Article XV, Section 4(12). The trial court and Defendants necessarily admit that only through IGRA’s preemption of Article XV, Section 4(12) can the Governor secure casino agreements with Tribes through ORS 190.110.

A simple look at ORS 190.110 reveals there is nothing in the statute to suggest it covers casino compacts, or that it is somehow exempt from Article XV, Section 4(12). ORS 190.110(1) provides that “[i]n performing a duty imposed upon it, in exercising a power conferred upon it or in administering a policy or program delegated to it, ... a state agency ... may cooperate for any lawful purpose ... with an American Indian Tribe.” ORS 190.110(1).

Subsection 3 clarifies: “With regard to an American Indian tribe, the power described in subsection[] (1) ... includes the power of the Governor ... to enter



into agreements to ensure that the state ... does not interfere with or infringe on the exercise of any right or privilege of an American Indian tribe[.]” ORS 190.110(3). IGRA compacts are nowhere mentioned; they did not yet exist.

The legislative history is similarly bereft of any indication that the Legislature was able to foresee in 1985 that *California v. Cabazon Band of Mission Indians*, 480 US 202, 209 (1987), would allow gambling on tribal reservations, or that Congress would respond to *Cabazon* with IGRA in 1988. Certainly, as Defendants point out, there was a discussion of large bingo games in the legislative history regarding the 1985 amendments to ORS 190.110, but there could be no contemplation of an Indian Tribe opening up a casino, since at that time, Public Law 280 (codified at 18 USC § 1162) allowed Oregon specifically to regulate gambling (and all other criminal acts) on Tribal lands.<sup>10</sup> So while bingo could be a concern of the 1985 legislature, casinos or casino type gaming could not, given both Oregon’s control over tribal lands in the criminal and gambling contexts, as well as the prohibition on casinos found in Article XV, Section 4(12).

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<sup>10</sup> See *State v. Smith*, 277 Or 251, 256, 560 P2d 1066 (1977) (“In 1953, however, Congress enacted a further statute on this subject, Public Law 280. The apparent reason for the enactment of that statute was the need to curtail lawlessness on Indian reservations. By the terms of that statute, criminal jurisdiction over Indian reservations was granted to five states, including Oregon, but with the important exception of the Warm Springs Indian Reservation”) (emphasis omitted).

Thus, the trial courts' analysis of ORS 190.110 falls short based on the statute's own language and legislative history. Nowhere is there any evidence in the statute that general "agreements" with Tribes would encompass overriding the Oregon Constitution and setting casino gambling policy for the state, nor could there be, since the idea of Indians having a federal right to allow gaming on their lands did not arise until the 1987 *Cabazon* decision and the passage of IGRA in 1988.

b. *The Legislature Could Not have Intended ORS 190.110 to Allow Compacts.*

Even assuming for argument that IGRA preempts Article XV, Section 4(12), still ORS 190.110 does not establish what Indian rights are to be fostered, advanced, or supported by the state, nor does it provide a general grant of authority for the Governor to set policy—let alone casino policy—for the State. If legislative intent governs the construction of statutes, as it unquestionably does in Oregon,<sup>11</sup> then one cannot as a matter of law or logic retroactively impute an intent to a legislative body when it did not, and could not, have had any idea about anything such as tribal casino gaming compacts

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<sup>11</sup> In construing statute, "we are governed by legislative intent[.]" *Norstadt v. Liberty Northwest Ins. Corp.*, 179 Or App 731, 734, 41 P3d 1097 (2002).

that would only exist, if at all, years in the future. Not to mention the fact that all of this would have had to occur in the face of a bald constitutional prohibition on the legislative authorization of casinos. No intent exists here.

Indeed, signing gaming compacts is more than simply “administering policy”—it is setting policy. *See Saratoga County*, 798 NE2d at 1060 (“we have no difficulty determining that the Governor’s actions were policy-making, and thus legislative in character”). There is no legislative delegation of such authority to the Governor,<sup>12</sup> and other courts that have examined the issue have held that a governor acting alone cannot sign casino compacts.<sup>13</sup> Simply put, the Governor does not possess broad policymaking authority related to Tribes.

Further, there can be no “duty imposed,” for purposes of ORS 190.110(1) even under IGRA, when the Governor can refuse to negotiate pursuant to IGRA in the first instance, and then claim Eleventh Amendment

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<sup>12</sup> If the Legislature did delegate the power of making Indian policy to the governor, it “must be accompanied by adequate safeguards.” *City of Wilsonville v. Department of Corrections*, 326 Or 152, 951 P2d 128 (1997), *citing Warren v. Marion County*, 222 Or 307, 314, 353 P2d 257 (1960) (“the important consideration is ... whether the procedure established for the exercise of the power furnishes adequate safeguards to those who are affected by the administrative action”). Allowing the Governor to sign casino compacts without any requirement for public hearings or input (and without any judicial review, if one looked at the State’s past arguments in this litigation), would necessarily be an improper delegation of legislative authority because there are no safeguards whatsoever.

<sup>13</sup> *See Note 3, supra.*

immunity from suit if the Tribes should sue in federal court.<sup>14</sup> More importantly, absent preemption, Oregon’s recognition of its own constitutional limitations is neither “interference” or “infringement” within the meaning of ORS 190.110(3) upon the putative rights of the Tribes. Mere discussions of vague “duties” cannot create a later authorization to participate in what amounts to discretionary activities, in the strictest sense of the term. If the Governor cannot be forced to participate in negotiations, and if he can exempt himself from suit for doing so by asserting immunity, there is simply no “duty

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<sup>14</sup> Assuming it is in a state where the public policy allows casino gambling, a Tribe cannot be thwarted solely by a state official’s inability or refusal to negotiate for a casino compact:

[I]f the state either does not negotiate with a tribe or does not do so in good faith, the tribe may bring suit in Federal District Court. If the court determines the state has not negotiated in good faith, the court will order the parties “to conclude such a compact within a 60-day period.” If an agreement is not reached within that time, the court will appoint a mediator, who “shall select from the two proposed compacts [from the tribe and the state] the one which best comports with the terms of this Act and any other applicable Federal law and with the findings and order of the court.” If the state timely agrees, that compact will become the tribal-state compact. If the state does not agree (*or invokes sovereign immunity under the Eleventh Amendment to the United States Constitution*), the Secretary of the Interior and the tribe will decide upon procedures for conducting class III gaming.

*Dalton v. Pataki*, 835 NE2d 1180, 1189–90 (NY 2005) (emphasis added) (citations omitted). This demonstrates that IGRA is not a mandate in any sense of the term, and there is no “duty imposed” on the Governor.

*imposed*” that would override a clear command of Oregon’s Constitution.

The Legislature has never amended ORS 190.110 in light of IGRA’s passage, so the absence of specific authorization after the fact should also be taken into account as well. Neither the Defendants nor the trial court can point to any action by the Legislature—ever—that would allow the Governor authority to sign IGRA casino compacts. Such an intent has never existed. This Court must interpret ORS 190.110 in conformity with the Legislature’s intent as it existed at the time, not how it looks in hindsight.

c. *Federal Law Cannot Validate an Oregon Statute That Is Unconstitutional under Oregon's Constitution.*

Neither the trial court or the Defendants dispute the notion that casino gambling remains illegal and unconstitutional in Oregon outside of IGRA compacts. For instance, the State, Clackamas County, and Multnomah County could not jointly agree to operate a casino on the counties’ shared border under ORS 190.110(1)—which, absent Article XV, Section 4(12) could generally allow local governments to enter into agreements with the State or each other. Therefore, under Public Law 280,<sup>15</sup> Oregon could prohibit gambling—including casinos—on Indian lands, and thus could lawfully refuse to enter into

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<sup>15</sup> See Note 10, *supra*.

an agreement to allow such casinos, at least in the absence of IGRA. In other words, Defendants’ only argument in favor of the compact is that IGRA allows ORS 190.110 to have an otherwise unconstitutional effect. However, as seen from recent caselaw from this Court, any federal source of law—even when flowing directly from the United States Constitution—does not salvage a state statute that is unconstitutional under the Oregon Constitution.

In *Wieber v. FedEx Ground Package System, Inc.*, 231 Or App 469, 490, 220 P3d 68 (2009), this Court examined the effect of the United States Supreme Court’s ruling in *Honda Motor Co. v. Oberg*, 512 US 415, 432 (1994) (*Oberg Federal*), which required courts to review the size of punitive damages awards by a jury. In *Wieber*, both the majority and the dissent agreed that Article VII (Amended), Section 3 prevented a court’s review of the award apart from seeing if there is “no evidence in the record to support the jury’s factual finding that punitive damages should be awarded[.]” *Wieber*, 231 Or App at 487, citing *Oberg v. Honda Motor Co. (Oberg State)*, 320 Or 544, 549, 888 P2d 8 (1995).<sup>16</sup> Significantly here, both the *Wieber* majority and dissent also agreed that ORS 31.730 was unconstitutional under the Oregon Constitution

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<sup>16</sup> The United States District Court for Oregon has likewise refused to allow judicial review of a punitive damages award under the now-renumbered punitive damages review statute, but cited exclusively to Article I, Section 17 for that holding. *Halbasch v. Med Data, Inc.*, 192 FRD 641, 655–56 (D Or 2000).

even though it codified (to an extent) what was *required* under federal law.

Instead, the majority in *Wieber* established a “two-step” structure for evaluating punitive damages awards consistent with federal Fourteenth Amendment due process protections. 231 Or App at 488 (“it is our constitutional duty to determine, first, whether evidence in the record supports the jury’s finding that punitive damages should be awarded and, second, any extent to which the amount of the punitive damages award is inconsistent with a defendant’s rights under the Due Process Clause”). Indeed, once that factual basis for punitive damages was established, “the Oregon Constitution does not provide authority for this court to further review the jury’s award of punitive damages.” *Wieber*, 231 Or App 489. ORS 31.730—allowing the court to examine the amount of punitive damages—was unconstitutional despite being a partial codification of federal due process requirements. The court turned to the due process guideposts outlined in *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 US 408, 418 (2003), without further recourse to state statutes.

The same logic applies with respect to ORS 190.110 and IGRA compacts. As noted above, absent preemption, ORS 190.110 is flatly unconstitutional if it purports to allow the Governor to sign casino agreements with Indian Tribes. And under *Wieber*, preemption cannot validate a statute that is unconstitutional under the Oregon Constitution, nor does it void the

offending part of the Oregon Constitution so that such a statute might operate as a party desires. Rather, the statute is and remains unconstitutional.

**3. THE GOVERNOR’S SIGNATURE IS VOID, AND THE RELIEF REQUESTED HERE IS THAT HIS SIGNATURE BE RESCINDED.**

In entering into the Compact challenged in this case, the Governor was not “executing” existing Oregon law, or performing any other duty recognized in Article V. Rather, he was acting in a plainly legislative capacity (in violation of the ban on pro-casino legislation, no less): unilaterally deciding to expand casino gambling by binding the State of Oregon to a casino compact. Neither the Oregon Legislature nor the Oregon voters have ever specifically authorized the Governor to approve casinos, or to create new gaming policy. Thus, the Compact represents an *ultra vires* act by the Governor, and is thus void *ab initio*.

It is axiomatic that, where an executive official acts without legislative authority or upon a valid order of the judiciary, that official acts *ultra vires*. The Oregon Supreme Court explained this concept at length in *Li v. State*, 338 Or 376, 110 P3d 91 (2005):

a governmental official must, within the scope of that official’s otherwise lawfully delegated authority, take care to consider the meaning of the state and federal constitutions when executing



official duties. ... [There is] no hint that the duty to be mindful of the state and federal constitutions somehow grants to a governmental official powers not otherwise devolved by law on that official to take actions and fashion remedies that, under any other circumstances, would constitute *ultra vires* acts. ... [T]he ***county erroneously transmogrified a governmental official's ongoing obligation to support the constitution into an implied grant of authority***, respecting any laws that the official must administer, to prescribe remedies for any perceived constitutional shortcomings in such laws without regard to the scope of the official's statutory authority to act.

*Li v. State*, 338 Or at 396 (county official had no authority to provide marriage licenses in violation of state marriage statute, and the licenses were void *ab initio*) (emphasis added). In such an event, when faced with a perceived duty and a corresponding constitutional impediment, the Oregon Supreme Court suggested that rather than seizing unauthorized powers, a more constitutionally proper way to act would be to have the Legislature amend the law, or for the official to “***decline to perform a statutory duty and leave it to a party aggrieved by that action to seek a contested case decision or judicial intervention***[.]” *Li*, 338 Or at 397 (emphasis added). Neither convenience nor expediency are shortcuts for constitutional process.

In fact, these compacts entered into by only a state's governor are often simply considered invalid. *Pueblo of Santa Ana, v. Kelly*, 104 F3d at 1557, 1559 (because the New Mexico governor lacked legislative authority to bind the state to a gaming compact, the compact was never “validly entered into”

and thus violated federal law). *See also Kickapoo Tribe of Indians v. Babbitt*, 827 F Supp 37, 46 (D DC 1993) (“[B]ecause only the Governor—a person without authority—signed the compact, *the State did not enter into the compact*. Thus, *the compact ... is invalid*”) (emphasis added). Likewise in Oregon, where a public official acts *ultra vires*, the resulting legal acts are void *ab initio*. *See Li v. State*, 338 Or at 397. Thus the Compact in this case is invalid and void *ab initio* under Oregon law.

## II. SECOND ASSIGNMENT OF ERROR

The trial court erred in finding that Article XV, Section 4(12) was voided by purported IGRA preemption of state casino regulations under a validly signed compact. IGRA may preempt the enforcement of state anti-gambling laws on the Tribes after a compact is in place, but it does not preempt state laws governing the process by which casino compacts are negotiated and signed, or state policy on gaming enshrined in state constitutions.

### A. PRESERVATION OF ERROR

The State and Tribes “jointly move for summary judgment in their favor[.]” *Defendants’ and Intervenor Defendants’ Joint Motion* at 1, ER-23.

Article XV, Section 4(12) “is preempted by federal law with respect to tribal gaming.”

*Defendants’ and Intervenor Defendants’ Joint Reply* at 11, ER-28.

“[D]oes federal supremacy require the Governor to negotiate and sign compacts under IGRA, even without state law authorizing him to do so? ... ‘No.’”

*Relators’ Reply and Response Memorandum* at 6, ER-27.

“Defendants’ and Intervenor-Defendants’ Joint Motion for Summary Judgment is GRANTED, and Relators’ Motion for Summary Judgment is DENIED.”

*Opinion and Order* at 1, ER-36.

“Article XV section 4(12)’s prohibition on casinos ... is preempted by IGRA[.]”

*Opinion and Order* at 19, ER-54.

## B. STANDARD OF REVIEW

This assignment of error shares the same standard of review as Relators’ First Assignment of Error.

## C. ARGUMENT: IGRA DOES NOT PREEMPT STATE LAW ON SIGNING COMPACTS.

“When addressing questions of express or implied preemption, we begin our analysis with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *Altria Group, Inc. v. Good*, 555 US 70, 129 SCt 538, 543 (2008), *quoted in Emerald Steel Fabricators, Inc. v. BOLI*, 348 Or 159, 173, 230 P3d 518 (2010) (internal quotation marks and citation

omitted). “Under the implied preemption test, the court asks whether there is an ‘actual conflict’ between state and federal law, which can occur in either of two circumstances: One, when it is physically impossible to comply with both state and federal law, or, two, when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Willis v. Winters*, 235 Or App 615, 621, 234 P3d 141 (2010) (citations and internal quotation marks omitted). Under this preemption test, complying **both** with IGRA **and** Article XV, Section 4(12) is neither (1) physically impossible, nor (2) against the intent of Congress when it passed IGRA, thus IGRA does not preempt Article XV, Section 4(12). Additionally, if IGRA mandated the Governor’s participation in a federal negotiation process, it would violate the Tenth Amendment. There is just no preemption here.

The first prong of the preemption evaluation—physical impossibility—is not met here. It is not physically impossible to comply with both a state law prohibition on a governor’s authority to execute IGRA compacts and IGRA itself. IGRA only requires negotiation in good faith from a “State.” It neither establishes who in state government must negotiate or sign a compact, nor does it demand any particular official to negotiate or sign a casino compact. In fact, preemption of the type envisioned by the trial court and Defendants here was specifically rejected in New York:

IGRA does not preempt state law governing which state actors are competent to negotiate and agree to gaming compacts. IGRA imposes on “the State” an obligation to negotiate in good faith (25 USC § 2710 (d)(3)(a)), but ***identifies no particular state actor who shall negotiate the compacts; that question is left up to state law*** (see *Pueblo of Santa Ana v. Kelly*, 104 F3d 1546, 1557 (10th Cir.1997)).

*Saratoga County Chamber of Commerce, Inc. v. Pataki*, 798 NE2d at 1060 (emphasis added). The *Saratoga County* court continued by discussing the fact, noted above, that IGRA does not grant governors the authority to sign compacts of their own accord. *Id.* (“[a]s the Supreme Court noted, the duty to negotiate imposed by IGRA ‘is not of the sort likely to be performed by an individual state executive officer or even a group of officers’”) (citations omitted). A state can meet its requirement to negotiate in “good faith” simply by informing the Tribes that a particular officer cannot negotiate a compact. There is no physical impossibility requiring preemption.

The second prong for preemption—Congress’ intent—likewise does not favor preemption. When one looks at the statute, IGRA’s deference to state law and gambling policy is obvious. As the United States Supreme Court stated, “[t]he shorthand test is whether the [Indian gambling] at issue violates the State’s public policy.” *California v. Cabazon Band of Mission Indians*, 480 US 202, 209 (1987). This deference found its way into the statutory language of IGRA itself: “Indian tribes have the exclusive right to regulate gaming

activity on Indian Lands if the gaming activity is . . . within a State which does not, *as a mater of criminal law and public policy*, prohibit such gaming activity.” Indian Gaming Regulatory Act, 25 USC § 2701(5) (emphasis added). Indeed, IGRA provides that, *until a valid* compact is in place, “for purposes of Federal law, *all State laws pertaining to the licensing, regulation, or prohibition of gambling* . . . shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.” 18 USC § 1166(a) (emphasis added).<sup>17</sup> A Tribes’ right to have gaming is not secured

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<sup>17</sup> Relators expect Defendants to argue again that because Oregon allows certain types of “Class III” games (banked card games, slot machines and other similar games of chance) , Oregon must allow casinos. But it is premature to consider whether IGRA requires that any Indian Tribes in Oregon be allowed to construct and operate casinos. IGRA creates a process, not a mandate, and that process should play out as intended. IGRA does not directly authorize “class III” gambling by Tribes, but instead allows for the formation of compacts. It is only then that “class III” gambling can occur:

IGRA legalizes *only gaming conducted pursuant to a compact validly entered into by both the state and the tribe*. In section 11(d)(1), IGRA declares that “[c]lass III gaming activities” are “lawful ... only if such activities are ... conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State ... that is in effect.” 25 USC § 2710(d)(1). *To be “entered into” by the state and the tribe means to be “entered into” validly in accordance with state (and tribal) law*. (See *Pueblo of Santa Ana v. Kelly* 104 F3d 1546, 1555 (10th Cir1997) (concluding “the ‘entered into’ language imposes an independent requirement and the compact must be validly entered into by a state before it can go into effect, via Secretarial approval, under IGRA).

*Hotel Employees and Restaurant Employees Intern. Union v. Davis*, 981 P2d

before a compact is signed, and if signing a compact is against state policy, then IGRA requires the parties to respect that choice. In fact, even where a governor is not permitted to negotiate or sign a casino compact, a Tribe is permitted to obtain a compact directly from the Secretary of the Interior.

Therefore, IGRA is seen most properly as favoring neither States nor Tribes, but balancing their competing interests:

IGRA involved two countervailing sovereign interests—states and Indian tribes—and it granted authority to each. *See Coyote Valley II*, 331 F3d at 1096 (“IGRA ... 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.”); *Seminole Tribe*, 517 US at 58 (“[T]he Act grants the States a power that they would not otherwise have....”). Although states have not traditionally had the power to regulate Indian tribes, states have traditionally had the power to regulate the scope of gambling within their territorial borders. As the Supreme Court has explained, “Congress should make its intention clear and manifest if it intends to pre-empt the historic powers of the States.... This plain statement rule is ... an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.” *Gregory v. Ashcroft*, 501 US 452, 461 (1991).

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990, 1009 (Cal. 1999) (emphasis added) (citations omitted); *Seminole Tribe of Fla. v. Florida*, 517 US 44, 47 (1996) (noting that IGRA “provides that an Indian tribe may conduct certain gaming activities only in conformance with a **valid** compact between the tribe and the State”) (emphasis added). But of course, this begs the question, which is and remains: was the casino compact “validly entered into”? *See, e.g., Pueblo of Santa Ana v. Kelly*, 104 F3d 1546 (10th Cir 1997) (New Mexico Governor lacked the authority to bind the state to a compact, so the compacts did not comply with IGRA and were void). Therefore, the trial court’s entire discussion about the types of gaming allowed by IGRA, gambling in Oregon, and Indian gaming in general remains a *non sequitur*.

*Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F3d 1019, 1062 n9 (9th Cir 2010) (Bybee, J., dissenting).

Under IGRA, therefore, it is state law and state public policy that determine whether an Indian tribe may operate a casino within a state. IGRA does not require a state to violate its constitution to site tribal casinos. Congress expressly stressed that state law determines whether an Indian tribe may operate a casino in 25 USC § 2701(5), when it made the finding that, “Indian tribes have the exclusive right to regulate gaming activity on Indian Lands if the gaming activity is . . . within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.” Therefore, no reading of federal law would authorize the Governor to negotiate or enter into a casino compact with the Tribes under IGRA absent—indeed, in violation of—specific state policy, and a compact executed solely on the basis of IGRA is fatally flawed.<sup>18</sup>

Finally, notions of federal supremacy do not carry so far as to create an affirmative duty upon state executive officers to execute federal statutes. “The Federal Government may not compel the States to enact or administer a federal regulatory program.” *New York v. United States*, 505 US 144, 188 (1992), *quoted in Dalton v. Pataki*, 835 NE2d 1180, 1189 (NY 2005). The Tenth

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<sup>18</sup> See Note 3, *supra*.



Amendment likewise prohibits the commandeering of state officials to administer and enforce a federal regulatory program. *Printz v. United States*, 521 U.S. 898, 935 (1997) (Brady Act provision requiring local law enforcement to perform background checks was unconstitutional). Under the Tenth Amendment, federal supremacy alone cannot require state officials' participation in an affirmative, federal statutory program.

In fact, the correct process for the negotiation and approval of casino compacts in the face of a constitutional prohibition on casinos was played out in California in *Hotel Employees*, 981 P2d 990. In 1984, California voters placed a casino ban in their state constitution, prohibiting "casinos of the type currently operating in Nevada and New Jersey." Cal. Const., Art. IV, § 19(e). The California Supreme Court held that under the casino ban, the California governor could not lawfully enter into an IGRA compact, and invalidated the signed agreement. *Hotel Employees*, 981 P2d 1008 ("a compact may not go into effect unless it is validly entered into under state law, which the model compact in Proposition 5 could not be, because its approval would violate section 19(e) [the casino ban]"). Following this decision, California voters approved an exemption from this state constitutional ban on Indian casinos, and specifically authorized the California governor to enter into IGRA compacts. Cal. Const., Art. IV, § 19(f). Only then could the IGRA compact be

lawfully signed and become enforceable, thereby allowing a tribal casino.

The situation is all but identical here. State law controls the analysis of who can negotiate and sign an IGRA casino compact, and IGRA only preempts gambling laws *after* a valid compact is in place. Therefore, there can be no preemption of Article XV, Section 4(12)'s clear ban on casinos that would permit Oregon's governor to sign a casino compact in the first instance. Either Article XV, Section 4(12) must be amended before Oregon's Governor can sign his name on a casino compact, or the Tribes must obtain their casino from the Secretary of the Interior. The Tribes' convenience is not sufficient grounds for an abrogation of Oregon's organic charter. The trial court erred in finding that IGRA preempted Article XV, Section 4(12), and its decision should be reversed.

## CONCLUSION

Oregon's Governor cannot ignore the Constitution that serves as the very basis for his authority and legitimacy. The Oregon Constitution expressly forbids casinos as a violation of state gambling policy, and nothing in Oregon law can be read to grant him the authority to allow casinos, with or without IGRA. The Governor's actions in signing the Compact were unconstitutional and *ultra vires*, and as such, the Compact is void *ab initio*. The trial court erred

in granting summary judgment to Defendants, and that decision should be reversed. Conversely, the trial court erred in failing to grant summary judgment to Relators, and should be instructed to do so on remand.

RESPECTFULLY SUBMITTED this 1st day of February, 2011.

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