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In the Supreme Court of California

Agua Caliente Band of Cahuilla Indians,

Petitioner and Defendant,

vs.

Sacramento County Superior Court,

Respondent.

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Fair Political Practices Commission,

Real Party in Interest and Plaintiff.

AGUA CALIENTE BAND OF CAHUILLA INDIANS' CLOSING BRIEF ON THE MERITS

From an Order of the Court of Appeal
Third Appellate District, No. C043716

From an Order of the
Sacramento County Superior Court, No. 02AS04545
The Honorable Loren E. McMaster

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I
INTRODUCTION

The United States Supreme Court has made it clear that—as a matter of *federal* law—a federally recognized Indian tribe is subject to suit *only* where Congress has authorized the suit or the tribe has waived its immunity. The Supreme Court also has made it clear that this suit immunity flows from the tribes' historic *sovereignty*—now secured and protected from state infringement by the Constitution's delegation to the federal government of plenary power over the nation's tribes. And the Court finally has made it clear that these controlling principles apply no matter who seeks to sue a tribe or the nature of the claim asserted against it.

The FPPC does not dispute the Supreme Court's declarations of controlling federal law. Nor does it dispute the effect of tribal sovereign suit immunity when it applies. The FPPC also admits it has cited *no* case—despite hundreds decided by the federal and state courts—employing an analysis that departs from the requirements the Supreme Court has established for determining when tribal sovereign suit immunity applies.

The FPPC nevertheless argues its lawsuit should be the first exempted from this uniform federal law. According to the FPPC, the tribes' sovereign suit immunity is a creature of mere "common law," trumped by the FPPC's assertion of a federal

constitutional right—allegedly grounded in the Tenth Amendment and Guarantee Clause—to regulate the state's electoral process.

The force and effect of tribal suit immunity cannot be dismissed, however, by giving it a "common law" label. Tribal suit immunity is an inherent aspect of the tribes' historic sovereignty—preserved and secured by the *Constitution* through the Indian Commerce Clause, Treaty Clause and Supremacy Clause. These constitutional provisions place plenary power over Indian affairs *exclusively* in the federal government, including controlling and protecting the tribes' sovereignty from state infringement. *Only* the federal government therefore has the power to abrogate a tribe's sovereign suit immunity.

As for the FPPC's assertion it is advocating a federal constitutional right, there is no dispute here that a state can regulate its own elections and establish the qualifications of its elected officials. These are, indeed, historic sovereign rights reserved to the states. But reserved *state* rights—which are innumerable—are not *federal* "constitutional" rights. And a reserved sovereign *state* right has no greater dignity than a tribe's sovereign right to immunity from suit. No reservoir of state authority, acknowledged by either the Tenth Amendment or the Guarantee Clause, empowers the states to unilaterally ignore the primacy of federal law and strip federally recognized Indian tribes of their sovereign suit immunity.

Again, only the federal government is constitutionally invested with that power.

Nor does this result, as a matter of law or fact, imperil a state's existence as a republican democracy or represent improper congressional interference in state elections. Application of tribal suit immunity precludes a state from doing only one thing—suing a federally recognized tribe in pursuit of its regulatory agenda. A state can sue tribal members in their individual capacities, it can sue candidates, and it can sue lobbyists. It can negotiate with and reach an accord with a tribe that deals with the state's electoral process. A state might even attempt to limit tribal campaign contributions. And if all of these alternatives fail to achieve the state's regulatory objective, it can go to Congress and ask that it abrogate the tribes' suit immunity with respect to such lawsuits. What a state manifestly cannot do, however, is what the FPPC did here—enlist the aid of a state court to sanction a lawsuit against a federally recognized tribe without congressional authorization or tribal consent.

II

TRIBAL SOVEREIGN SUIT IMMUNITY IS PRESERVED AND SECURED BY THE CONSTITUTION AND IS UNEQUIVOCALLY EXPRESSED IN CONTROLLING FEDERAL LAW

The FPPC's arguments sanctioning its lawsuit all hinge on the notion tribal sovereign suit immunity is a matter of mere "common law," which must yield to a supposed constitutional right to regulate state elections. (Real Party's Merits Brief (RPMB) 1-2, 10, 29-31) Deferring for the moment the character of the FPPC's claimed regulatory right, the proposition that the sovereignty of federally recognized Indian tribes—and specifically their sovereign immunity from suit—has no constitutional connection and is grounded solely in common law does not withstand analysis. The FPPC's characterization disregards (a) the historic political relationship of the sovereign tribes and the states and (b) the states' constitutional delegation of exclusive power to the federal government to control the tribes' sovereignty.

A. It Is By Virtue Of The *Constitution* That The Tribes' Historic Sovereign Immunity From Suit Has Been Preserved And Committed Exclusively To The Federal Government And Thus Protected From Infringement By The States

As discussed in the Tribe's opening merits brief, the United States Supreme Court has analyzed the historic political

relationship of the tribes and states numerous times. (OMB 12-21) In *Worcester v. Georgia*, 31 U.S. 515, 542-61 (1832), for example, the Supreme Court recounted that from the time European colonists arrived on the continent, the native tribes were viewed and treated as independent sovereigns. *See also, e.g., United States v. Lara*, __ U.S. __, 124 S.Ct. 1628, 1639 (2004) ("*Lara*") (J. Stevens, concurring) ("The inherent sovereignty of the Indian tribes has a historical basis.... They governed territory on this continent long before Columbus arrived."); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (tribes are "separate sovereigns pre-existing the Constitution").

The Constitution *preserved* this historic political relationship by vesting exclusive power in the federal government to control intercourse with the tribes. *See, e.g., New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983) ("*Mescalero Apache Tribe*") ("tribes retain any aspect of their historical sovereignty not 'inconsistent with the overriding interests of the National Government'" (citation omitted)).

This constitutional grant of authority to the federal government was *secured* through the Indian Commerce Clause, the Treaty Power and the Supremacy Clause and *divested* the states "of virtually all authority over Indian commerce and Indian tribes." *Seminole Tribe v. Florida*, 517 U.S. 44, 62 (1996) (*Seminole I*); *see also Lara*, 124 S.Ct. at 1633 ("the Constitution grants Congress

broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive;'" the court "has traditionally identified the Indian Commerce Clause [citation omitted] and the Treaty Clause [citation omitted] as sources of that power"); *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985) ("*Blackfeet Tribe*") ("the Constitution vests the Federal Government with exclusive authority over relations with Indian tribes"); *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985) ("*Oneida*") ("with the adoption of the Constitution, Indian relations became the exclusive province of federal law"); Felix S. Cohen, *Handbook of Federal Indian Law*, 211 (1982 ed.) (while court opinions refer to the Indian Commerce Clause, the Treaty Clause, and the Supremacy Clause in discussing the source of federal power over Indian affairs, "for most purposes it is sufficient to conclude that there is a single 'power over Indian affairs,' an amalgam of several specific constitutional provisions").

As the Supreme Court therefore explained in *Cotton Petroleum Corporation v. New Mexico*, 490 U.S. 163, 192 (1989), "the Interstate Commerce and Indian Commerce clauses have very different applications." While "the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation [citations omitted], the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs [citations omitted]." *Id.*; *see also* W. Canby, *American*

Indian Law, 2 (3d ed. 1998) ("[T]he independence of the tribes is subject to exceptionally great powers of Congress to regulate and modify the status of the tribes.").[1]

Consistent with the reasoning in these authorities, three points are unmistakably clear:

First, it is by virtue of the *Constitution* that "tribal sovereignty is dependent on and subordinate to, only the Federal Government, not the States." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987) ("*Cabazon Band*"); *see also Lara*, 124 S.Ct. at 1634 ("the Constitution's 'plenary' grants of power" authorize Congress "to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority"); *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978) (tribal sovereignty "exists only at the sufferance of Congress....But until Congress acts, the tribes retain their existing sovereign powers.").

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[1] The FPPC's argument that because no treaty, trade or federal statute is involved, the Constitution has no connection to this case [*e.g.*, RPMB 24, 34, 36, 41], thus misperceives the force and effect of the constitutional delegation imparted by these provisions. Through these three provisions, the federal government was granted plenary control over *every* aspect of tribal affairs and relations. The Tribe discussed this all-encompassing control over *all* facets of the tribes' existence (including far more than "trade") at length in its opening brief. (OMB 37-40)

Second, it is by virtue of the *Constitution* that tribal suit immunity, an inherent attribute of the tribes' sovereignty, likewise, is controlled by the federal government and protected from encroachment by the states. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756 (1998) ("*Kiowa Tribe*") ("tribal immunity is a matter of federal law and is not subject to diminution by the States"); *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 891 (1986) ("*Three Affiliated Tribes*") ("in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States"); *Santa Clara Pueblo*, 436 U.S. at 58 (tribal immunity from suit "is subject to the superior and plenary control of Congress").

Third, because tribal sovereign suit immunity is a matter within the plenary control of the federal government, *federal law* concerning the scope of this immunity is *controlling*.[2] *Kiowa*

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[2] The FPPC citation to *Rohr Aircraft Corp. v. County of San Diego*, 51 Cal.2d 759 (1959), for the proposition that this Court need not follow lower federal court cases on matters of federal law [RPMB 17-18] is inapposite in the face of controlling United States Supreme Court authority. Furthermore, the point the Court made in *Rohr* was that state courts must make an "independent determination" of federal law where "lower federal court precedents *are divided or lacking*." *Id.* at 766 (emphasis added). Here, in contrast, lower federal court precedents are both numerous and uniform in holding tribal sovereign suit immunity bars suit against a tribe absent express authorization by Congress or express consent by the tribe. *See* cases cited, *infra*, at 16-25 and in OMB 18-33.

Tribe, 523 U.S. at 756 ("tribal immunity is a matter of federal law," it "is settled law" and it "controls this case").

While the FPPC observes the drafters of the Constitution did not include an express declaration within the Indian Commerce Clause, Treaty Clause or Supremacy Clause regarding tribal sovereign suit immunity [*see* RPMB 30-31 and slip op. 8], such a declaration was unnecessary and would have served no purpose. The drafters were well aware of the historic recognition of the tribes' sovereignty. *See* cases cited, *supra*, at 4-5. The explicit delegation to the federal government of plenary authority over Indian affairs therefore *necessarily* included control of the tribes' sovereignty which, in turn, *necessarily* included control of their sovereign immunity from suit. *See Three Affiliated Tribes*, 476 U.S. at 890 (tribes' "federally conferred immunity from suit" is "a necessary corollary to Indian sovereignty and self-governance").

The tribes' sovereign suit immunity is therefore imbedded in the very *structure* of the Constitution through the provisions delegating plenary power over the tribes' sovereignty to the federal government and thereby divesting the states of any further power over the tribes in that respect. *See* cases cited, *supra,* at 5-8 and in OMB 13-15.

Nor is this organic constitutional aspect of the tribes' sovereignty, and correlative suit immunity, unique to the tribes.

The same is true with respect to the residual sovereignty of the states. In *Alden v. Maine*, 527 U.S. 706 (1999), for example, the Supreme Court relied exclusively on the Constitution's *structure*, and *not* on any text, to hold that the states are immune from suits brought by state residents in state court. The states' sovereign immunity "neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's *structure*, its history, and [cases] make clear, the States' immunity...is a fundamental aspect of the sovereignty which the States enjoyed before ratification of the Constitution...." *Id.* at 713 (emphasis added).

Nor does this structural grounding of the states' pre-existing sovereign suit immunity lessen its constitutional statute or mean it is a creature of mere "common law." *Id.* at 714. On the contrary, the states' preserved sovereign suit immunity is a matter of "constitutional design." *Id.* In enacting the Eleventh Amendment, therefore, "Congress acted not to change but to restore the original constitutional design." *Id.* Thus, while "the sovereign immunity of the States derives at least in part from the common-law tradition, the structure and history of the constitution make clear that the immunity exists today by constitutional design." *Id.* at 733.

The same is true of the tribes' sovereign suit immunity, which also was preserved and secured through constitutional structure and design. *See* discussion, *supra*, at 5-8.

B. Case Law Addressing The Bounds Of Tribal Sovereign Suit Immunity Reflects Its Constitutional Underpinnings And The Exclusivity And Primacy Of Federal Law

The FPPC derives its "common law" label from the manner in which the scope of tribal suit immunity has been addressed by the Supreme Court. According to the FPPC, the Supreme Court's judicial construction proves tribal suit immunity is untethered to plenary federal power and the Constitution. (RPMB 29-31) This contention does not withstand analysis either.

The FPPC cites no authority, and the Tribe is aware of no authority, establishing that judicial construction of constitutionally secured rights diminishes the status of those rights. Dismissing the Supreme Court and other court opinions as mere "common law" does not, and cannot, alter how the tribes' right of sovereign immunity is anchored in our constitutional structure.

In fact, the FPPC's principal authority for its mere "common law" contention, *Kiowa Tribe*, 523 U.S. at 756-60 [RPMB 29-31], illustrates this point. In *Kiowa Tribe*, the Supreme Court explained that its early decision in *Turner v. United States*, 248 U.S. 354 (1919), sometimes referred to as the progenitor of the "doctrine of tribal immunity," did not turn on sovereign immunity. In *Turner*, Congress had passed a law specifically allowing Turner to sue the Creek Nation in the Court of Claims. The law had been passed simply because the Creek Nation had been dissolved. There

was no congressional discussion as to whether such action would have been necessary in any event to overcome tribal suit immunity. *Kiowa Tribe*, 523 U.S. at 756-57.

The *Kiowa* Court then went on to explain, however, that in subsequent decisions the Court *did* address this question and held "[a]s sovereigns or quasi sovereigns, the Indian Nations enjoyed immunity 'from judicial attack' absent consent to be sued.'" *Id.* at 757 (quoting *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513-14 (1940)). Moreover, it is through *constitutional* delegation to the federal government that this consent can be given by Congress—but *not* by any state. *Id.* at 756-60. Thus, because "Congress ha[d] not abrogated this immunity, nor ha[d] petitioner waived it," tribal sovereign suit immunity "govern[ed]" the case. *Id.* at 760.

Finally, the *Kiowa* Court observed Congress not only *has* exercised its constitutional prerogative to act in this regard, but it is the better suited branch of the federal government to act in this area. *Id.* at 758-60. Accordingly, the Supreme Court reiterated that tribal sovereign immunity from suit *is the law of the land* and *controlling* unless and until abrogated by Congress. *Id.* at 756, 760.

Thus, no part of the Supreme Court's discussion in *Kiowa Tribe* suggests the tribes' sovereign immunity from suit lacks constitutional underpinnings, let alone that it is of "lesser" legal

weight than any other claimed right, constitutionally based or otherwise. On the contrary, *Kiowa* reaffirms the constitutional grounding of tribal suit immunity—through the grant of superior and plenary authority to Congress to control the tribes' sovereignty, including defining the bounds of their sovereign immunity from suit. *Id.* at 759-60; *see also Alden*, 527 U.S. at 733 ("common-law lineage" of states' sovereign suit immunity did not mean it remained a "mere common-law" right). As far as the scope of tribal suit immunity is concerned, the Court's pronouncement is unequivocal, as well. "[A]n Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Id.* at 754; *accord Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991) ("suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation").

Nor does *United States v. Enas*, 255 F.3d 662 (9th Cir. 2001), which the FPPC also cites [RPMB 30], hold that tribal suit immunity lacks any constitutional underpinning. The issue in *Enas* was whether the defendant could be criminally prosecuted by both the tribe and the federal government. Resolution of this issue turned on whether the tribe had prosecuted under its inherent sovereign authority (in which case double jeopardy was no bar) or under a delegation of federal authority. More specifically, the question was whether Congress could statutorily declare that tribal prosecution was pursuant to the tribes' inherent, retained sovereign powers,

overruling a Supreme Court decision to the contrary. The Ninth Circuit held that since the *scope* of the tribes' pre-existing sovereignty was not spelled out by any specific constitutional provision, that question was properly characterized as a matter of federal "common law based on history." Congress therefore was not required to defer to the Supreme Court and was entitled to have the final word on that issue. *Id.* at 674-75 ("within the realm of federal common law—and the federal common law of tribes—Congress is supreme").

This case, in contrast, has nothing to do with the relative power, as between themselves, of the judicial and congressional branches of the federal government. The issue in this case is the binding effect on a *state* of controlling federal law on an issue the *Constitution* commits to the federal government and protects from infringement by the states. *See* cases cited, *supra*, at 5-10.[3]

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[3] Even in the abstract, federal "common law" is rooted in our constitutional structure. *See, e.g., Boyle v. United Technologies Corporation*, 487 U.S. 500, 504 (1988) ("we have held that a few areas, involving uniquely federal interests, *are so committed by the Constitution* and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called 'federal common law'" (emphasis added and citations and internal quotations omitted)). And as to its binding effect on the states, as a matter of *federal supremacy*, no distinction is drawn between federal "common law" and explicit constitutional mandate. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398,

(continued...)

What the "common law" requires in this context, then, is adherence to the controlling Supreme Court precedents that compel the recognition of suit immunity on the record here. Indeed, in *Kiowa Tribe*, the Supreme Court declared the state court had *erred* in "believ[ing] federal law did not mandate tribal immunity." 523 U.S. at 755. Moreover, the lynchpin of the Court's federal supremacy analysis and conclusion was the *constitutional* delegation of plenary power over Indian affairs to the federal government and concomitant withdrawal of that authority from the states. The same analysis and conclusion must pertain here, as well. *See Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (Supreme Court's exposition of federal law is binding on state courts); *In re Tyrell J.*, 8 Cal.4th 68, 79 (1994) (United States Supreme Court decisions binding on federal law).

(...continued)

426 (1964) (federal act of state doctrine prevails over state law; "there are enclaves of federal judge-made law which bind the States"); *see generally* Martha A. Field, *Sources of the Law: The Scope of Federal Common Law*, 99 Harv.L.Rev. 881, 897 (1986) ("it is now established that a federal common law rule, once made, has precisely the same force and effect as any other federal rule").

III

THE UNITED STATES SUPREME COURT'S TRIBAL SOVEREIGN SUIT IMMUNITY DECISIONS ARE CONTROLLING IN THE CONTEXT OF THE FPPC'S LAWSUIT

The FPPC acknowledges that the United States Supreme Court has addressed the issue of tribal suit immunity no less than four times in recent years, but argues that none of these decisions is "controlling" because each involved different underlying facts. (RPMB 24, 33-36) Again, the FPPC misapprehends the import of the Supreme Court's holdings.

A. No Matter Who Sues The Tribe Or What State Interest Is Asserted, Federal Law Establishes That Sovereign Suit Immunity Applies Absent Express Congressional Exception Or A Tribal Waiver

In every case it has confronted, the Supreme Court has articulated a uniform legal standard: A federally recognized Indian tribe is immune from suit absent express waiver of its sovereign immunity by Congress or unless the tribe expressly consents to suit. *E.g.*, *Kiowa Tribe*, 523 U.S. at 754 ("an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity"); *Okla. Tax Comm'n*, 498 U.S. at 509 ("suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation"); *Three Affiliated Tribes,* 476 U.S. at 890-91 ("in the absence of federal

authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States"); *Santa Clara Pueblo*, 436 U.S. at 58-59 ("in the absence here of any unequivocal expression of contrary legislative intent, we conclude the suits against the tribe...are barred by its sovereign immunity from suit).

And in every case, the particular facts have made no difference in the suit immunity analysis or in the outcome dictated by that analysis. The Court thus made no distinction based on who sued the tribe—a private party or a state. *E.g., Kiowa Tribe*, 523 U.S. at 753-54 (private commercial party); *Okla. Tax Comm'n.*, 498 U.S. at 507-07 (state taxing authority); *Santa Clara Pueblo*, 436 U.S. at 52-53 (private individual).

Likewise, the nature of the claim asserted—even if it involved a "compelling" interest—made no difference either. *E.g., Okla. Tax Comm'n.*, 498 U.S. at 511-14 (tribe immune from suit despite state's compelling interest in collecting tax revenues); *Three Affiliated Tribes*, 476 U.S. at 890-91 (tribes entitled to sovereign suit immunity despite "perceived inequity" that they could initiate lawsuits); *Santa Clara Pueblo*, 436 U.S. at 55-59 (tribe immune from suit despite tribal member's compelling interest in full panoply of personal civil rights, including rights otherwise secured to United States citizens under the Bill of Rights).

The dozens and dozens of federal circuit court cases and state court cases construing a tribe's right to invoke its sovereign immunity from suit are in keeping with the reasoning in the Supreme Court opinions. These cases agree that who sues the tribe and the nature of the claim asserted are immaterial to the legal standard governing application of tribal suit immunity. *E.g.*, *Dawavendewa v. Salt River Project Agricultural Improvement & Power Dist.*, 276 F.3d 1150, 1159 (9th Cir. 2002) ("[f]ederally recognized Indian tribes enjoy sovereign immunity from suit [citation], and may not be sued absent an express and unequivocal waiver of immunity by the tribe or abrogation of tribal immunity by Congress"); *see also Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989) ("Indian sovereignty, like that of other sovereigns, is not a discretionary principle subject to the vagaries of the commercial bargaining process or the equities of a given situation"); *State of California v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979) ("*Quechan Tribe*") ("The fact that it is the State which has initiated suit is irrelevant insofar as the Tribe's sovereign immunity is concerned."); *see also* cases cited in OMB at 29-33 and n.11.

The Ninth Circuit underscored the limits on the suit immunity inquiry in *Quechan Tribe*, in which California's Department of Fish and Game sought to enforce its fish and game laws. The state argued in *Quechan Tribe*, as it does in this case, that every other tribal suit immunity case involved different

underlying facts and therefore the circuit court could and should refuse to uphold the tribe's sovereign immunity from suit. 595 F.2d at 1155. While the Ninth Circuit agreed "several distinguishing features" of the case arguably made it "unique," that did not affect the tribe's sovereign immunity from suit. *Id.* As the Court explained:

> Sovereign immunity involves a right which courts have no choice, in the absence of a waiver, but to recognize. It is not a remedy, as suggested by California's argument, the application of which is within the discretion of the court. As the Supreme Court observed in *United States Fidelity & Guaranty Co....*
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> 'Consent alone gives jurisdiction to adjudge against the sovereign. Absent that consent, the attempted exercise of judicial power is void ....' *Id.* (quoting *United States Fidelity & Guaranty Co.*, 309 U.S. at 514).

In sum, the cases are both numerous and unanimous as to the legal analysis applicable when considering tribal sovereign suit immunity—a federally recognized Indian tribe is not subject to suit absent the express authorization of Congress or the explicit consent of the tribe.

B. Whether The Conduct Alleged Occurs On Tribal Lands, Involves Tribal Governance Or Implicates A Compelling State Interest Makes No Difference In The Application Of Tribal Suit Immunity

Despite this unambiguous authority, the FPPC argues that exceptions to tribal suit immunity are not governed by

congressional authorization or tribal consent, but rather by whether the suit involves conduct on tribal lands or conduct directly implicating tribal self-governance. (RPMB 33-40) Of course, neither one of these factors—the location of the conduct or the implication of self-governance—relates to a tribe's *status as a sovereign*. And neither the location of the conduct, nor its relation to self-governance, indicates either an explicit congressional exception to suit immunity or a tribe's express consent to suit.

That is why, in *Kiowa Tribe*, the Supreme Court directly addressed—and rejected—both suggested limitations on tribal suit immunity. "[O]ur cases have sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred." *Id.* at 754 (citing to *Puyallup Tribe, Inc. v. Dept. of Game of Wash.*, 433 U.S. 165, 167 (1977) (tribe immune from suit challenging fishing activities both on and off tribal lands)). "Nor have we yet drawn a distinction between governmental and commercial activities of a tribe." *Id.* at 754-55 (citing to *Okla. Tax Comm'n*, 498 U.S. at 511-14 (tribe immune from suit to collect tax on cigarette sales)).

The FPPC's arguments therefore urge limitations on tribal suit immunity the United States Supreme Court already has heard and *rejected*. "Though respondent asks us to confine immunity from suit to transactions on reservations and to governmental activities, our precedents have not drawn these

distinctions." *Id.* at 755. Not only did the Supreme Court refuse to draw such distinctions, it held any infringement of the Indian tribes' sovereign immunity from suit is a matter to be addressed by Congress, *not* the courts. *Id.* at 759-60. On this issue of *federal* law, the United States Supreme Court's decisions again are *controlling*.[4] *Id.* at 755-56; *see also Cooper*, 358 U.S. at 18; *In re Tyrell J.*, 8 Cal.4th at 79.

The same goes for the FPPC's efforts to make the strength of the state's interest the arbiter in whether tribal suit immunity applies. (RPMB 23-29) This is just another way of saying that the nature of the claim asserted makes a difference. But nothing in the Constitution or the controlling cases interpreting the scope of tribal immunity gives the states the right to control the tribes' sovereign status based on the strength of the state's claim. On this point, too, the law could not be clearer—the tribes'

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[4] The FPPC's assertions about the location of the conduct and its relationship to tribal governance not only are irrelevant to the suit immunity analysis, they do not square with the record. The conduct of the Tribe the FPPC seeks to challenge in this case both took place on tribal lands and implicates governmental activities of the Tribe. The Tribe's decisions to make campaign contributions and to undertake lobbying efforts were all made in the Tribe's offices on tribal lands. (App. 1258, 1260) And deciding whether and how much the Tribe will contribute to any particular candidate or political cause, or how it will make its case to another sovereign (here, the State of California) about a particular political issue, is directly connected with the Tribe's assessments about, and implementation of, its own governmental objectives. (App. 1260-62)

sovereign status is subordinate *only* to the expressed policies of the *federal* government, not to those of the states. *See* cases cited, *supra*, at 8-9.

More fundamentally, the FPPC's effort to import a state interest exception into the suit immunity analysis conflates tribal suit immunity with principles of regulatory preemption. A fundamental difference exists here, as well. While state interests and tribal interests do make a difference in a regulatory preemption analysis, they have no relevance to the application of tribal suit immunity.

As the Tribe discussed in its opening brief, the United States Supreme Court has adopted a form of preemption analysis, which weighs tribal interests and state regulatory interests, to determine whether a tribe and tribal members are subject to a state's regulatory scheme. (OMB 16-18) *E.g.*, *Three Affiliated Tribes*, 476 U.S. at 884 ("we have formulated a comprehensive pre-emption inquiry in the Indian law context which examines not only the congressional plan, but also 'the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law'"); *Mescalero Apache Tribe*, 462 U.S. at 331 ("under certain circumstances a State may validly assert authority over the activities of nonmembers on a reservation and...in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members").

This weighing of relative interests is not, however, imported into the suit immunity analysis. (OMB 18-27) Rather, as the Supreme Court explained in both *Okla. Tax Comm'n* and *Kiowa Tribe*, whether a state can validly regulate tribal conduct in a particular area is an entirely different question than whether a state can sue a tribe to judicially enforce its regulations absent the express consent of Congress or the tribe.

In *Okla. Tax Comm'n*, for example, the Potawatomi Tribe refused to comply with the "minimal burden" of collecting and remitting state sales tax on cigarettes sold to non-Indians and sued the state tax commission to enjoin an assessment. 498 U.S. at 507-08. The state counter-claimed for the amount of the assessment. The tribe moved to dismiss the counter-claim on the ground it had not waived its immunity from suit. The Supreme Court rejected the state's argument that tribal suit immunity unduly burdened the administration of its tax laws and, if retained at all, should be limited to tribal courts and internal affairs of tribal government. *Id.* at 510. The Court also rejected the state's argument that if it could not judicially enforce its tax laws, its power to tax was pointless. *Id.* at 512-14.

Similarly, in *Kiowa Tribe*, the tribe was sued on a promissory note executed in connection with an off-reservation business venture. 523 U.S. at 753-54. The state courts refused to recognize the tribe's immunity from suit and thus refused to dismiss

the lawsuit. The Supreme Court reversed, and in doing so explained that the balancing-of-interests preemption analysis used to determine whether a tribe is subject to a state's regulatory scheme does not apply to the issue of a tribe's sovereign immunity from suit. *Id.* at 755. The Court explicitly distinguished between a state's power to *regulate* and a state's power to *judicially enforce* its regulatory scheme:

> We have recognized that a State may have the authority to tax or regulate tribal activities occurring within the State but outside Indian country. [Citations omitted.] To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit. In Potawatomi, for example, we affirmed that while Oklahoma may tax cigarette sales by a Tribe's store to non-members, the Tribe enjoys immunity from a suit to collect unpaid state taxes. [Citations omitted.] *There is a difference between the right to demand compliance with state laws and the means available to enforce them.* [Citations omitted.] *Id.* at 755 (emphasis added).

Fort Belknap Indian Community v. Mazurek, 43 F.3d 428 (9th Cir. 1994), cited by the FPPC [RPMB 28], is not to the contrary (nor could it be in light of the controlling United States Supreme Court decisions on tribal suit immunity).[5] In *Fort Belknap*,

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[5] The same goes for the other cases cited by the FPPC. *Minn. State Ethical Practices Bd. v. Red Lake DFL Committee*, 303 N.W.2d 54 (Minn. 1981), which the FPPC cited in the court of appeal, was a regulatory action against a group of individual tribe members, *not* against the tribe. Accordingly, tribal suit immunity was neither raised, nor an issue, in that case. The issue was whether state

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the *tribe* sued for declaratory relief as to whether *individual tribal members* could be criminally prosecuted under state liquor laws. Accordingly, tribal suit immunity was *not* at issue in any respect. The Supreme Court already had ruled the states could *regulate* liquor sales and consumption on tribal land. *Id.* at 432-34 (citing *Rice v. Rehner*, 463 U.S. 713, 722-29 (1983)). The Ninth Circuit concluded the balance remained tipped in the state's favor as to criminal prosecutions of *individual* tribe members and ruled the tribe's power to prosecute under tribal laws was not exclusive in this area. *Id.* at 434-36. Individual tribe members, of course, are not sovereigns and do not have tribal suit immunity for individual conduct. *E.g., Santa Clara Pueblo*, 436 U.S. at 59 (tribal suit immunity does not bar lawsuits against tribe members sued in individual capacity); *Puyallup Tribe,* 433 U.S. at 171-72 (same).

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statutes applied to the group, requiring it to register as a political committee or fund. On balancing the state's purposes, the effect of the conduct and the burdens on the individuals, the Minnesota court concluded the state could regulate the conduct. *Id.* at 55-56. In *Shakopee Mdewakanton Sioux (Dakota) Community v. Minn. Campaign Finance and Pub. Disclosure Bd.*, 586 N.W.2d 406 (Minn. App. 1998), the *tribe* sued the Minnesota state board, so again, tribal suit immunity was not an issue. The issue was the regulatory authority of the board—*not* whether the board could sue the tribe absent its consent or the consent of Congress. In contrast, in *Diver v. Peterson*, 524 N.W.2d 288, 290-91 (Minn. App. 1994), the tribe's attorney was sued under Minnesota law for defamation. Because he was acting in his capacity as an official of the *tribe*, tribal suit immunity *was* invoked and *barred the suit* since neither Congress nor the tribe had consented to the suit.

In the end therefore this appeal is about one very narrow issue—a state's power to involuntarily hail a federally recognized Indian tribe into court to judicially enforce a state regulatory scheme. The states do *not* have this power by virtue of the Constitution and under controlling federal law.

IV

THE CONSTITUTION AND CONTROLLING UNITED STATES SUPREME COURT AUTHORITY REQUIRE BOTH THE STATES AND THE INDIAN TRIBES TO RESPECT THE OTHER'S SOVEREIGN SUIT IMMUNITY

The FPPC's "common law" argument, and its arguments that tribal suit immunity must ebb and flow depending on a state's asserted "interests" in suing a tribe, also fail to acknowledge the analytical bedrock of tribal suit immunity. Suit immunity concerns the courts' jurisdiction over a *sovereign*, and sovereignty does not turn on who the plaintiff is or what claim is asserted. That is also why, in the absence of explicit consent to suit, a state cannot sue a federally recognized Indian tribe. Nor can an Indian tribe, in turn, sue a state. Both are domestic dependent sovereigns, and *neither* can sue the other without an explicit waiver of its sovereign immunity from suit.

A. Controlling Federal Law Establishes That Sovereign Suit Immunity Bars Both States And Tribes From Suing One Another

The *Seminole Tribe* cases provide an excellent illustration. In *Seminole I*, 517 U.S. at 44, the tribe attempted to sue Florida to force it to comply with the Indian Gaming Regulatory Act (IGRA). The Act required states to negotiate in good faith to reach a gaming compact and authorized tribes to sue in federal court to enforce the Act. Florida refused to negotiate, and when the tribe sued it, claimed Congress had no authority to waive the state's sovereign immunity from suit. *Id.* at 51-52.

The United States Supreme Court agreed with Florida and held Congress had no authority to abrogate the states' historic sovereign immunity from suit, recognized by the Eleventh Amendment. *Id.* at 58-72. As the Court explained, that amendment stands "'not so much for what it says, but for the presupposition...which it confirms.'" *Id.* at 54 (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991)). That proposition is two-fold: First, each state "is a sovereign entity in our federal system." And, second, it is an inherent attribute of sovereignty not to be amenable to suit absent consent. *Id.* (citing *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) ("The amendment is rooted in a recognition that the States, although a union, maintain certain

attributes of sovereignty, including sovereign immunity.")); *see also Alden,* 527 U.S. at 712-730.

Given this understanding of the states' historic sovereignty, the Supreme Court concluded the Indian Commerce Clause, while divesting the states of "virtually all authority over Indian commerce and Indian tribes" [*Seminole I*, 517 U.S. at 62], did not empower the federal government to also divest the states of their sovereign immunity from suit. "Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *Id.* at 72. Accordingly, the Court held the tribe's suit against Florida was barred by the state's sovereign immunity from suit. *Id.* at 76.

In *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237 (11th Cir. 1999) (*Seminole II*), Florida turned around and attempted to sue the tribe for engaging in gaming in the absence of a compact (which the state had refused to negotiate, giving rise to *Seminole I*). Just as Florida had done in *Seminole I*, the tribe asserted its sovereign immunity from suit, prompting the Eleventh Circuit to observe the case "demonstrate[ed] the continuing vitality of the venerable maxim that turnabout is fair play." *Id.* at 1239.

The Eleventh Circuit rejected each of the state's arguments that the tribe's sovereign suit immunity had been waived.

There was no express congressional waiver in IGRA abrogating the Indian tribes' suit immunity with respect to the claim made by Florida. *Id.* at 1241-42 ("Congress may abrogate a sovereign's immunity only by using statutory language that makes its intention unmistakably clear...."). Nor did the tribe waive its immunity from suit by engaging in gaming. *Id.* at 1243-44 ("The Supreme Court has made it plain that waivers of tribal sovereign immunity cannot be implied on the basis of a tribe's actions, but must be unequivocally expressed."). Nor did the fact the state was seeking declaratory relief affect the tribe's sovereign immunity from suit. *Id.* at 1244-45 ("In *Santa Clara Pueblo* [citation omitted] the court unequivocally upheld a tribe's immunity from a suit that sought only declaratory and prospective injunctive relief."). Accordingly, the tribe's sovereign suit immunity remained intact, and the state's suit against the tribe was barred. *Id.*

As these two cases demonstrate, *neither* the State of Florida *nor* the Seminole Tribe had the power to abrogate the other's sovereign immunity from suit. *Id.* at 1239. This did not depend on who was bringing the suit or the nature of the claim being asserted. The bar depended *solely* on the historic *sovereignty* of the states and the tribes and the immunity from suit inherent in that sovereign status. *See* cases cited, *supra*, at 8-11, 13-14; *see also Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1056 (9th Cir. 2004) ("Immunity from suit has been recognized by the courts of this country as integral to the sovereignty and self-governance of

Indian tribes."); *Quechan Tribe*, 595 F.2d at 1155 ("The sovereign immunity of Indian tribes is similar to the sovereign immunity of the United States; neither can be sued without the consent of Congress.")

B. The Constitution Does Not Give The States A Preeminent Position Over The Tribes With Respect To Sovereign Suit Immunity

Blatchford, 501 U.S. at 775, provides additional insight on this sovereignty analysis. In that case, native tribes attempted to sue Alaska in order to challenge a revenue sharing program. *Id.* at 777-78. Alaska raised its sovereign immunity from suit, and the United States Supreme Court agreed the suit was barred. *Id.* at 779-88.

The Supreme Court first rejected the tribes' argument that sovereign suit immunity bars only suits by individuals, not by other sovereigns such as Indian tribes. *Id.* at 780-81 (argument was inconsistent with Court's prior sovereign immunity decision and "conception of sovereignty that it embrace[d]"). The Court next rejected the tribes' argument that, by ratifying the Constitution, the states had waived their sovereign immunity as against Indian tribes. *Id.* at 781-82. However, as the Court explained, in adopting the Constitution the states waived their sovereign immunity *only* as to sister states and the federal government. The states did not waive their sovereign immunity as to "foreign" sovereigns. *Id.* Finally,

the Court rejected the tribe's argument they were "more like States than foreign sovereigns." *Id.* at 782.

While the Supreme Court agreed tribes are like states in the sense they are both "domestic" sovereigns, that did not resolve the suit immunity question. *Id.* Rather, the critical distinction between tribes and states is that the states were present at the constitutional convention—"[w]hat makes the States' surrender of immunity from suit by sister states plausible is the mutuality of that concession" through ratification of the Constitution. *Id.* "There is no such mutuality with either foreign sovereigns or Indian tribes." *Id.*

As the Court explained, "*[w]e have repeatedly held that Indian tribes enjoy immunity against suits by States*" because "it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties." *Id.* (emphasis added). "[I]f the convention could not surrender *the tribes'* immunity for the benefit of the *States*," so too concluded the Court, the convention could not "surrender[] the States' immunity for the benefit of the tribes." *Id.* (emphasis in original). Accordingly, Alaska's sovereign immunity from suit remained unimpaired as against the tribes. *See also Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 268 (1997) ("Since the plan of the Convention did not surrender the Indian tribes' immunity for the benefit of the States,

we reasoned that the States likewise did not surrender their immunity for the benefit of the tribes.").

Blatchford thus reaffirms *states cannot sue Indian tribes* absent the tribes' or Congress' consent. It also confirms this bar to suit has *nothing* to do with the underlying facts of a particular case, but rather, is rooted in the tribes' *historic sovereignty*.

This is why the FPPC's assertion that the states could not have "ceded" to the federal government their "right" to sue Indian tribes to protect their republican form of government [RPMB 23] is an analytical misfire. As the *Seminole Tribe* cases and *Blatchford* make clear, the states *never* had the "right" to unilaterally sue the tribal nations without their consent. Like the states, the tribes were recognized sovereigns and, like the states, the tribes could invoke sovereign immunity from suit. *See Blatchford*, 501 U.S. at 782; *see also Alden*, 527 U.S. at 715 ("Although the American people had rejected other aspects of English political theory, the doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified).[6]

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[6] *And see Governor and Company of Connecticut, and Mohegan Indians* 126 (London 1769) (opinion of Comm'ns Horsmanden, August 1, 1743) ("The Indians, though living amongst the king's subjects in those countries, are a separate and distinct people from them, they are treated as such, they have a polity of their own, they

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What the states did cede to the federal government at the constitutional convention was the right to control the tribes' very existence. In other words, the states gave up the right to conquer and assimilate the tribes—thus committing to the exclusive control of the federal government the tribes' *sovereignty*, including necessarily the scope of their sovereign immunity from suit. *See* discussion and cases cited, *supra*, at 5-11.

V

NEITHER THE TENTH AMENDMENT NOR THE GUARANTEE CLAUSE EMPOWERS THE STATES TO ABROGATE TRIBAL SOVEREIGN SUIT IMMUNITY

The FPPC's argument also depends—in fact, principally depends—on its claim that it is advancing a federal constitutional right that "trumps" the Indian tribes' supposed common law right of sovereign immunity from suit. (RPMB 10-22) The FPPC, however, has no trump card to play.

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[make] peace and war without any controul from the English."), cited in Robert N. Clinton, *State Power Over Indian Reservations: A Critical Comment on Burger Court Doctrine*, 26 S. Dakota L.Rev. 434 (1981)).

A. The States Have No Reserved Power Under The Tenth Amendment To Abrogate Tribal Suit Immunity

The FPPC does not seriously argue the Tenth Amendment is a source of any affirmative constitutional right that can be weighed against the tribes' sovereign immunity from suit. (*See* RPMB 11-22) Nor could it reasonably advance such an argument.

As the United States Supreme Court has explained numerous times, the Tenth Amendment is solely and completely an expression of political demarcation—reserving to the states pre-existing sovereign rights not ceded to the federal government. "If a power is delegated to Congress in the [C]onstitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the [C]onstitution has not conferred on Congress....It is in this sense that the Tenth Amendment 'states but a truism that all is retained which has not been surrendered.'" *New York v. United States*, 505 U.S. 144, 156 (1992) (quoting *United States v. Darby*, 312 U.S. 100, 124 (1941)).

Thus, the Tenth Amendment does not employ principles of alchemy—that is, the amendment does not transform pre-existing *state* sovereign rights into federal "constitutional" rights. Rather, the amendment *preserves* the states' sovereign powers "to the extent that the Constitution has not divested them of their original powers

and transferred those powers to the Federal Government." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 549 (1985).

It is no surprise, therefore, that the Tenth Amendment has *never* been held to be a source of constitutional power in the states to sue federally recognized Indian tribes. On the contrary, the courts, including the United States Supreme Court, have held time and time again that the states *ceded* all power to the federal government to control intercourse with the tribes, including the power to control the tribes' sovereignty and their correlative sovereign immunity from suit. *See, e.g., Kiowa Tribe*, 523 U.S. at 755 ("tribal immunity is a matter of *federal law* and is not subject to diminution by the States" (emphasis added)); *Three Affiliated Tribes*, 476 U.S. at 891 ("in the absence of *federal authorization*, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States" (emphasis added)).

By its plain terms then, the Tenth Amendment *necessarily disclaims* any power in the states to alter the bounds of tribal sovereign immunity from suit. *See New York*, 505 U.S. at 156; *see also City of Roseville v. Norton*, 219 F.Supp. 2d 130, 153-54 (D.D.C. 2002), *aff'd*, 348 F.3d 1020 (D.C. Cir. 2003) (Congress' plenary, constitutional power to handle Indian affairs forecloses any such power reserved by the Tenth Amendment); *Carcieri v. Norton*, 290 F.Supp. 2d 167 (D.R.I. 2003), *aff'd*, 398

F.3d 22, 34 (1st Cir. 2005) (since "Congress' authority to regulate Indian affairs is clearly within enumerated powers of the federal government," there is no such power in the states reserved by the Tenth Amendment).[7]

The FPPC therefore cannot—and does not—point to the Tenth Amendment, alone, as the source of any supposed constitutional right that purportedly trumps a federally recognized Indian tribe's sovereign suit immunity.

B. The Guarantee Clause Does Not Empower The States To Abrogate Tribal Sovereign Immunity From Suit

Ultimately, the FPPC grounds its claim of superiority over the tribes' sovereign suit immunity on the Guarantee Clause, arguing states have the right to control and regulate their own elections. Since it is acting to protect the electoral process, the

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[7] The FPPC's assertion these cases are irrelevant because they did not involve suit immunity [RPMB 44 and slip op. 21-22] fails to account for the fundamental legal propositions underlying the disposition in these cases—(a) the federal government's exclusive and plenary power over of Indian tribes, including control of the tribes' sovereign immunity from suit, *is* grounded in the Constitution, and (b) because of that exclusive and plenary federal power, there is *no* power over Indian affairs reserved to the states under the Tenth Amendment. In other words, the same fundamental *sovereignty* considerations and allocation of constitutional authority over Indian affairs that cut short the challenges in *Carcieri* and *City of Roseville*, also require recognition of Agua Caliente's sovereign immunity from suit here. *See* discussion and cases cited, *supra*, at 7-11.

FPPC asserts it has constitutional superiority over the Tribe. (RPMB 11-22) The FPPC's Guarantee Clause argument is just another iteration of a "reserved powers" argument. Such an argument does not, and cannot, transform the sovereign *state* right it is asserting into a federal constitutional right. Nor is a Guarantee Clause claim even justiciable under controlling Supreme Court authority. In fact, the Guarantee Clause claim advanced by the FPPC here is not even the kind of claim some legal commentators have suggested might be entertained if the Supreme Court ever retreats from its current non-justiciability holdings.

1. *State* Rights Reserved By The Guarantee Clause Are Not *Federal* "Constitutional" Rights

The FPPC acknowledges the Guarantee Clause was born out of concern the sovereign states were at risk from anarchists and monarchists and its stated purpose was to commit the federal government to assisting the states in defending against such attacks. (RPMB 10-11) *See* William M. Wiecek, *The Guarantee Clause of the U.S. Constitution* 11, 42-43, 59-60 (Cornell Univ. Press 1972).

It nevertheless urges the Guarantee Clause has a second role, noting that during the constitutional ratification process, this Clause, along with the Tenth Amendment, was invoked as assurance the federal government's powers were strictly circumscribed and the states retained the lion's share of their sovereign powers—including the power to regulate and control their varying republican

governments. (RPMB 11-13) *See* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism For a Third Century*, 88 Colum. L.Rev. 1, 29-35 (1988). In other words, in addition to imposing an affirmative duty on the federal government to quell revolts that threatened the states' governments, the Guarantee Clause also was characterized as a further affirmation of the states' residual sovereign status and reservation of sovereign powers, especially in the area of self-governance. *Id.*

As an acknowledgement of the states' pre-existing sovereign powers respecting self-government, the Guarantee Clause is no different analytically than the Tenth Amendment. Retained *state* rights do not become federal "constitutional" rights by virtue of such reservation provisions. *See* discussion and cases cited, *supra*, at 34-36. Accordingly, for the same reasons the Tenth Amendment does not transform reserved state rights into federal constitutional rights, neither does any reserved powers aspect of the Guarantee Clause effect such a transformation.

Nor, for that same reason, does the Guarantee Clause operate to constrict the Supremacy Clause. Whatever *states' rights* were reserved under the Guarantee Clause (and the Tenth Amendment) must yield to federal supremacy in those areas where the federal government was ceded full authority, as it was with respect to control over Indian affairs, including controlling the tribes' sovereignty. And while federal supremacy may be narrowly

construed under our constitutional structure, where it does operate, there is no debate about its effect. *See, e.g., Donaldson v. National Marine, Inc.*, __ Cal.4th ___, 25 Cal.Rptr.3d 584 (2005) (where issue is a matter of federal law, federal law controls even if contrary to state's policy).

In fact, the cases the FPPC cites [RPMB 12-14, 21-22] underscore these points. For example, in *McConnell v. Fed. Elec. Comm.*, 540 U.S. 93, 186 (2003), the Supreme Court largely upheld challenged provisions of the Bipartisan Campaign Reform Act of 2002. Several plaintiffs argued provisions of the Act exceeded Congress' authority to make rules governing federal elections and impaired "the authority of the states to regulate their own elections." While this authority would squarely come within the sovereign self-governance rights "reserved" under the Guarantee Clause, the Court drew only upon the Tenth Amendment to supply the requisite legal analysis. *See also Sugarman v. Dougall*, 413 U.S. 634, 647 (1973) ("Just as the 'Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections' [citations omitted] '[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen.'" (citations omitted)); *State of Oregon v. Mitchell*, 400 U.S. 112, 124-27 (1970) (same; "the Constitution was also intended to *preserve* to the States the power that even the

Colonies had to establish and maintain their own separate and independent governments" (emphasis added)).[8]

Similarly, in *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991), the Court upheld the state's right to fix a mandatory retirement age for state judges. The Court explained, "the authority of the people of the States to determine the qualifications of their most important government officials...lies at the 'heart of representative government.'" With respect to the source of this authority, not only did the Court make no distinction between the Guarantee Clause and Tenth Amendment, but it identified *both* as *reserving* this authority to the states. This "is a power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States 'guarantee[s] to every State in this Union a Republican Form of Government'" (citations omitted)). *See also State of Oregon v. Mitchell*, 400 U.S. 112, 134-35 (1970) (result both upheld the federal government's constitutional power to control federal elections and "save[d] for the States the power to control state and local elections which the Constitution originally *reserved* to them"—

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[8] The FPPC cites *McConnell* and several other campaign law cases [*e.g., Nixon v. Shrink Missouri Government Pac*, 528 U.S. 377 (2000); *Buckley v. Valeo*, 424 U.S. 1 (1976)] primarily for the proposition that large campaign contributions carry the potential for political corruption and this threat justifies state regulation in this area. But this proposition is not in dispute—rather, the issue as framed by the FPPC's argument here is the source and character of the states' authority in this area.

and not identifying *either* the Guarantee Clause or the Tenth Amendment (emphasis added)).

These cases also reflect that the Supreme Court has never embraced an expansive reading of the Guarantee Clause. Instead, the Court's limited references to the provision are consistent with the views expressed during the constitutional debates that the clause is concerned with states maintaining a republican *form* of government, that is, a government acting through representatives of and accountable to the electorate. *The Federalist*, No. 43, at 291-292 (James Madison) (Jacob E. Cook, ed. 1961) ("the authority extends no further than to a guaranty of a republican form of government, which presupposes a preexisting form of government of a form which is to be guaranteed. As long therefore as the existing republican forms are continued by the States, they are guaranteed by the Federal Constitution."). As the Court has continued to hold, the clause means only that states "retain the ability to set their legislative agenda" and state officials "remain accountable to the local electorate."[9] *E.g., New York*, 505 U.S. at 185.

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[9] The complaints leveled by the FPPC about the timing and form of reports [*see* discussion, *infra*, at 54-60], is nowhere close to the recognized constitutional function of the Guarantee Clause addressing the fundamental *structure* of state governments. While the reports may be useful administrative tools (with considerable overlap in information from other sources [*see* discussion, *infra*, at 53-58]), they do not swing the balance between republicanism and a monarchy. Nor do they deprive the voters of their ability to set legislative agendas or hold their elected representatives accountable.

Try as it might, the FPPC cannot use the Guarantee Clause to elevate its state law regulatory claim against the Tribe to that of an affirmative federal constitutional right. The states' ability to regulate their own elections is a sovereign *state* right, reserved under the Tenth Amendment, and perhaps secondarily, under the Guarantee Clause. That sovereign *state* right is no weightier on the scales of justice than the tribe's sovereign right to suit immunity reserved exclusively to the federal government and protected from diminution by the states by the Constitution.

2. Guarantee Clause Claims *Are Nonjusticiable* Under Controlling United States Supreme Court Precedent

Not only does the Guarantee Clause itself provide no constitutional ballast for the FPPC's state claims, but controlling United States Supreme Court authority holds claims based on the Guarantee Clause are non-justiciable. *See New York*, 505 U.S. at 184-85 (noting current view is that "Guarantee clause implicates only nonjusticiable political questions"); *Highland Farms Dairy v. Agnew,* 300 U.S. 608, 612 (1937) (enforcement of Guarantee Clause "is for Congress, not the courts"); *Mountain Timber Co. v. Wash.,* 243 U.S. 219, 234 (1917) ("As has been decided repeatedly, the question whether [the Guarantee Clause] has been violated is not a judicial but a political question, committed to Congress and not to the courts"); *California v. United States,* 104 F.3d 1086, 1091 (9th Cir. 1997) (state's claim that federal immigration policy deprived it of republican form of government by forcing it to spend money on

illegal aliens presented nonjusticiable political question); *Williams v. City of San Carlos*, 233 Cal.App.2d 290, 295 (1965) ("[u]nder long established principles of constitutional interpretation, the enforcement of this guarantee is committed to the Congress of the United States and not to the judiciary").

The FPPC asserts this view may not hold sway in the future, pointing to the Supreme Court's discussion of the Guarantee Clause in *New York*, 505 U.S. at 184-85, and legal commentary suggesting the Guarantee Clause could provide the basis for a claim that the federal government has exceeded its enumerated powers and trenched too far into a state's residual sovereignty. (RPMB 15-19) *E.g.*, Laurence H. Tribe, *American Constitutional Law* § 5-12, at 910-12 (3d ed. 2000); D. Merritt, 88 Colum. L.Rev. at 75-78.

There is no dispute, however, about the import or effect of the law construing the Guarantee Clause as currently declared by the United States Supreme Court. And it is, of course, that construction that controls here. *See Gates v. Discovery Communications, Inc.*, 34 Cal.4th 679, 692 (2004) ("On matters of federal constitutional law, of course, we are bound by the decisions of the United States Supreme Court."); *In re Tyrell J.*, 8 Cal.4th at 79 (same).

Moreover, the Guarantee Clause argument advanced by the FPPC bears no semblance to the claim made in *New York* or the

Guarantee Clause claims posited by some legal commentators. In *New York*, the State of New York challenged provisions of the Low-Level Radioactive Waste Policy Amendments Act on the ground the legislation compelled states to act in accordance with Congress' directives in handing radioactive waste, rather than providing an economic incentive to do so, which the states could refuse. The Supreme Court invalidated one of the three challenged provisions of the Act under the Tenth Amendment, holding Congress could not effectively "'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" 505 U.S. at 161 (quoting *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981)).

The Court then turned to New York's Guarantee Clause argument in connection with the two remaining provisions. *Id.* 183-86. The Court expressed "trepidation" in considering this argument, pointing out the clause has been "an infrequent basis for litigation" and in most cases, the Court had held such claims involved non-justiciable political questions. *Id.* at 184-85. But even assuming "the guarantee clause provides a basis upon which a State...may sue to enjoin the enforcement of a federal statute," the Court ruled no provision of the challenged Act could "be said to deny any State a republican form of government." *Id.* at 185-86.

In the wake of *New York*, some legal commentators have suggested the Guarantee Clause might provide a basis to

challenge "a federal statute that requires a state agency to respond to the federal government." D. Merritt, 88 Colum. L.Rev. at 64, 75-76 (courts could "use the guarantee clause to protect state governments from undue federal interference" which might "require the courts to invalidate some federal legislation"); *see also* L. Tribe, *American Constitutional Law* §5-12, at 911 (Supreme Court's rejection of Guarantee Clause argument in *New York* "does not undercut the potential importance of that clause in future states' rights challenges to congressional legislation").

Here, the FPPC is not challenging any federal legislation that allegedly reaches "too far" into California's sovereign domain. The FPPC is complaining about the sovereignty of the Indian tribes. Tribal sovereignty, however, was a pre-existing feature of the political landscape at the time the Constitution was enacted and which, by virtue of the Constitution, is now "dependent on and subordinate to, only the Federal Government, not the States." *Cabazon Band*, 480 U.S. at 207; *see* discussion and cases cited, *supra*, at 5-16. No authority suggests the Guarantee Clause provides a basis for reordering this constitutional paradigm or for empowering the states, as well as the federal government, to dictate the parameters of tribal sovereignty and abrogate unilaterally the tribes' sovereign immunity from suit.

For these same reasons, there is no merit to the FPPC's assertion that recognizing the tribes' sovereign suit immunity allows

Congress to impermissibly interfere with the states' sovereign self-governance rights in violation of the Guarantee Clause. (RPMB 20-22) Again, this argument disregards that the tribes' sovereignty *pre-dates* the Constitution, and that at the constitutional convention, the states gave up the right to conquer and assimilate the tribes by committing the tribes' sovereignty exclusively to the federal government. *See* discussion and cases cited, *supra*, at 5-16, 27-34. Preserving and securing existing tribal sovereign rights, including through recognition of tribal sovereign suit immunity, does not "inject" *Congress* into the states' reserved sovereign domain. On the contrary, it merely respects the historic political relationship between these two domestic sovereigns which, as between themselves, was *not* compromised or altered by the Constitution. *See* discussion and cases cited, *supra*, at 5-15, 26-33.

At various points in its brief, the FPPC also seems to be complaining that Congress has failed to exercise its constitutional power to "modify or eliminate tribal rights." (RPMB 22) *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) ("Congress possesses plenary power over Indian Affairs, including the power to modify or eliminate tribal rights"); *Santa Clara Pueblo*, 436 U.S. at 58 ("this aspect of tribal sovereignty [immunity from suit], like all others, is subject to the superior and plenary control of Congress"). But that purported failing is an issue the FPPC must take up with Congress, not the courts. Even if states could challenge and invalidate specific congressional enactments

under the Guarantee Clause, no court (or commentator) has suggested states could invoke the clause to compel Congress to act, much less, act in a specific manner. Indeed, adoption of such a legal principle would entangle the courts in political controversies—the exact result the controlling federal law provides must be avoided.

VI

THE STATE'S PURPORTED NEED TO REGULATE THE ELECTORAL PROCESS BY MEANS OF A LAWSUIT CARRIES NO WEIGHT IN THE SUIT IMMUNITY ANALYSIS

The FPPC insists that if this Court does not allow it to pursue its lawsuit, the State will be unable to protect its citizens against the allegedly potentially corrupting influence of tribal campaign contributions and lobbying activities. (RPMB 25-29) This argument carries no weight in the tribal suit immunity analysis. It also ignores that recognition of immunity here will not leave California either without recourse to accomplish its regulatory objectives or powerless to protect the integrity of its electoral process.

The Supreme Court's directive that states can and must obtain express authorization from Congress before they can sue federally recognized Indian tribes cannot be eliminated by a state's

unsupported cries of futility. Other states have made the same argument—that their regulatory schemes will be meaningless and they will have no recourse—if they are unable to sue the targeted Indian tribe. Each time, the courts have rejected it. In *Okla. Tax Comm'n*, for example, the state argued if it could not sue the Potawatomi Tribe to enforce a tax assessment, its regulatory power to tax the tribe's sales of cigarettes (which the Supreme Court had upheld in prior decisions) was meaningless. 498 U.S. at 514. The Court was not persuaded. "There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives." *Id.*

The Supreme Court identified at least three options available to the state: recourse against individual tribe members, who are not sovereigns and do not have suit immunity; seizure of unstamped cigarette cartons on non-tribal lands; and assessment of the wholesalers. And if none of these alternatives proved satisfactory, the state could "seek appropriate legislation [to sue the tribe] from Congress." *Id.*

Similarly, in *Seminole II*, Florida argued if it could not sue the tribe, it would be left with no means to prevent the tribe from "violating IGRA [the Indian Gaming Regulatory Act] with impunity." 181 F.3d at 1243-44. The Eleventh Circuit first expressed doubt a plaintiff's claimed lack of remedy has any bearing

on a tribe's sovereign immunity from suit, since suit immunity exists by virtue of the tribe's *sovereign status* and has nothing to do with the nature of the claim asserted against the tribe. *See also Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990) ("sovereign immunity may leave a party with no forum for its claims."). Furthermore, the state had alternatives. It could request that the United States prosecute the tribe or individual tribal members for violating applicable state and federal gambling laws. It could also ask the National Indian Gaming Commission to fine the tribe or even to close its gaming facilities. *Seminole II*, 181 F.3d at 1244. Or, the state could petition Congress to abrogate the tribes' sovereign immunity to allow states to sue under the Act. *Id.* at 1243-44.

In fact, in *Quechan Tribe*, California advanced an argument similar to the one it makes here. In that case, the state claimed it would never be able to obtain a judicial decree upholding its fish and game laws governing non-tribal hunting and fishing on tribal lands if it could not sue the tribe for declaratory relief. 595 F.2d at 1156. But as the Ninth Circuit explained, this wasn't so, since the state's regulatory authority would be at issue in any prosecution of an individual for alleged violation of the laws. *Id.* Tribal sovereign immunity only precluded the state from suing the *tribe*. *Id.*

Here, as well, suit immunity exists by virtue of the Tribe's sovereign status and does not depend on whether alternatives are available to the State. But here, as well, recognizing the Tribe's suit immunity does not leave California without means of achieving its regulatory objectives or place California's republican form of government in jeopardy. To begin with, the State is only barred from suing the *Tribe*. The recipients of campaign contributions from the Tribe and lobbyists hired by the Tribe are subject to suit should they fail to file reports required of them, disclosing the same information the FPPC contends the Tribe should have reported.

In addition, California can negotiate with the Tribe on a sovereign to sovereign basis and reach an agreement that reasonably accommodates the interests of both parties. (OMB 9-10, 51) In fact, this is one of the alternatives to suit the United States Supreme Court specifically recognized and endorsed in *Okla. Tax Comm'n.* 498 U.S. at 514 (state tax agency could enter into an agreement with the tribe to achieve collection objectives).

The FPPC's assertion that it has no such negotiating authority is belied by the fact it negotiated with the Tribe for six months. (Repl. 9-10) The commission turned its back on the process only at the last minute—after it had expressed optimism an agreement would be reached and after the tribe had prepared a detailed agreement to resolve the pending litigation and govern the Tribe's activities in the disputed areas in the future (including a

waiver of the tribe's sovereign immunity from suit for purposes of enforcing the agreement). (Repl. 10)

Further, if the FPPC needs specific statutory authority to negotiate directly with the tribes—a proposition which the commission never claimed before and for which it cites no authority—that can be remedied by appropriate state legislation. Many California statutes authorize state agencies to enter into agreements with tribes. *E.g.*, Health & Saf. Code §13863(b) (fire protection districts "may enter into mutual aid agreements with any...federally-recognized Indian tribe that maintains a full-time fire department"), §102910 (Department of Vital Statistics "is hereby encouraged to contract with a federally recognized tribe" regarding vital statistics of Indian children); Welfare & Inst. Code §10553.1(a)-(b)(1) (Department of Welfare and Institutions "may enter into an agreement...with any California Indian tribe [regarding]...child welfare services or assistance payments under the AFDC-FC program"); Streets & High. Code §94(a) (Caltrans "may make and enter into...contracts with federally-recognized Indian tribes" regarding various transportation-related activities).

The State could even consider enacting limitations or prohibitions on campaign contributions by tribes, allowing only individual contributions by individual tribe members who do not have tribal sovereign immunity from suit. *See generally McConnell*, 540 U.S. at 115-16 (discussing federal statutory prohibitions against

campaign contributions directly by corporations and unions); *Puyallup Tribe*, 433 U.S. at 171-72 (tribal suit immunity does not bar lawsuits against tribal members acting individually).

Finally, if these options prove ineffective, California can seek express authorization from Congress to sue the tribes—another one of the options the United States Supreme Court specifically identified in *Okla. Tax Comm'n*. 498 U.S. at 514 (if states "find that none of these alternatives produce the [tax] revenues to which they are entitled, they may of course seek appropriate legislation from Congress").

Even apart from all the other options available, Congress *does* take seriously proposals to abrogate tribal suit immunity. As the Tribe discussed in its opening brief, Congress has taken and will take action where, in its considered judgment, abrogation of tribal suit immunity is warranted. (OMB 63-66)

VII

ADHERENCE TO THE CONTROLLING FEDERAL LAW AND RESPECT FOR THE INDIAN TRIBES' SOVEREIGN SUIT IMMUNITY DOES NOT "DISPLACE" OR "ELIMINATE" CALIFORNIA'S CONTROL OF ITS ELECTORAL PROCESS

Throughout its brief, the FPPC makes it sound as though the Tribe's delay in reporting some contributions has, and will, fatally compromise the integrity of state elections. (RPMP 5-6, 8, 25-27) The FPPC clearly wants the spectre of these consequences to drive this Court to create an exception to tribal suit immunity. For reasons already discussed, the FPPC's state-interest assertions are legally irrelevant to the suit immunity analysis and the result here. Yet, because these assertions are so prominent in the FPPC's analysis, the Tribe is constrained to point out that the FPPC, on the facts of this case, goes too far with its rhetoric.

Here, the integrity of the State's electoral process most assuredly will survive the Tribe's invocation of its sovereign suit immunity. Most of the campaign contribution information that would be reported by the Tribe as a "major donor," is required to be reported even more quickly by recipient committees, and is more readily available to the public from that source in advance of elections on the Secretary of State's web site than it would be from timely-filed major donor reports.

The FPPC alleges in the first cause of action of its second amended complaint that the Tribe failed to timely file the two semi-annual major donor statements due for 1998: For the first half of 1998, reporting $1,218,413 in contributions made by the Tribe, by the due date of July 31, 1998 (which the Tribe allegedly did not file until October 2000); and for the second half of 1998, reporting $6,291,764 in contributions by the Tribe, by the due date of January 31, 1999 (which the Tribe allegedly did not file until March 1999, and did not fully amend until November 2000). (App. 5-6)

The FPPC argues the Tribe's failure to file these reports "while the elections were still ongoing, thereby depriv[ed] voters of information necessary to make informed decisions." (RPMB 6) The FPPC dismissed the value of the Tribe's late filing, describing that as providing information "of historic [sic] interest only." (*Id.*) But the fact of the matter is these major donor reports are, for the most part, of "historical interest only" *even if timely filed* for two reasons:

First, the statutory filing schedule requires major donors to file only two semi-annual reports for an election year such as 1998. The report for the first half of the year, covering the period January through June (which would include contributions made during that period for the June primary election), is not required to be filed until July 31—well *after* the June primary. The major donor's report for the second half of the year, covering the

period July through December (which would include contributions made during that period for the November general election) is not due until January 31 of the following year—well *after* the general election. Gov. Code §84200(b), §82013(c). Thus, because the statutory due dates for these major donor reports are not until *after* the elections that occur within each reporting period, these reports are for the most part "of historical interest only" even if timely filed.

Second, and more importantly to the informational interests of the voters, recipient committees, for both candidates and ballot measures, are required to file not only the same semi-annual reports that major donors file, but in an election year must also file additional pre-election reports shortly before the primary and general elections reporting all contributions received up to the respective cutoff dates for those reports. Gov. Code §84200.5, §84200.7. Recipient committees that meet the threshold of $50,000 in activity must also file their reports electronically. *Id.* §84605. The Secretary of State makes those reports available online virtually immediately.[10] In addition, the Secretary of State provides search capability by donor so anyone can determine to which committees a particular donor has made contributions.[11] None of this information

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[10] www.ss.ca.gov

[11] Secretary of State's "User's Guide to Getting the Most out of the Cal-Access Advanced Reports / Searchable Date Base" available online at www.ss.ca.gov, >Campaign and Lobbying Information

(continued...)

is available from a major donor report until a major donor timely files a semi-annual report, well after the election.

The FPPC alleges in the second cause of action that the Tribe failed to report a $125,000 contribution in March 2002 to the committee supporting Proposition 51. (AA 6-7) The Tribe disputes this allegation as a matter of fact. But even taking this allegation at face value, it demonstrates the efficacy of relying on recipient committee reports to disclose contributions—the complaint alleges this contribution was disclosed on the report filed by the recipient committee for the period in which it was received and, this is apparently how the FPPC learned of it. (AA 7)

The FPPC's complaint alleges in the third cause of action that the Tribe failed to timely file "late contribution" reports which are required for contributions of $1,000 or more made during the 17 days prior to an election—that is, after the closing date for a recipient committee's last pre-election report. (AA 8-15) Again, however, the donor's report is not the only source of that information. Recipients are also required to file late contribution reports. They must do so within 24 hours of the time the contribution is received [Gov. Code §84203, §82036], and do so electronically if the committee has met the $50,000 threshold for

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(...continued)

(main heading), >Advanced Reports, >User Guide, at page 4: "General Query – To Whom Has An Entity Given?

electronic filing [*id.* §84604, §84605(e)]. Thus, most late contributions are also available online almost immediately from the Secretary of State's web site.

Finally, in its fourth cause of action, the FPPC alleges the Tribe did not include the listing of legislative bill numbers in its quarterly lobbying expenditure reports. (AA 16-18) This information, too, is available from an alternative source: the quarterly reports required to be filed by lobbyist firms. Gov. Code §86114. Both lobbyist employers and lobbying firms must include bill numbers in connection with any legislative lobbying. *Id.* §86116; 2 C.F.R. §18613(c), §18616(j). (No other information about the subject of the bill, any position taken, or any other aspect of the lobbying interest in that bill is required, so for most members of the public, merely reporting the bill number, alone, is not informative. *Id.*) Lobbying firms also are required to file their reports electronically if they meet the threshold level of $5,000 in activity. *Id.* §84605(d). The Secretary of State also makes these electronically filed reports available online.

The FPPC also argues that without major donor semi-annual reports "it is not possible to determine the extent of the Tribe's contributions....[n]or can the FPPC accurately audit the contribution recipients' compliance." (RPMB 26) But the FPPC does not "audit" committees for compliance; the Franchise Tax

Board has that responsibility. Gov. Code §§9000-07.[12] The Board certainly can accurately audit a recipient committee's bank records and determine if all receipts have been accounted for in its reports. That involves no more than standard financial auditing practices and techniques. And while late reports from major donors perhaps hinder the ease with which the FPPC can make comparisons between a recipient committee's reports of contributions received and a donor's reports of contributions made, the audit of recipient committee reports still will disclose any missing information.

While the foregoing discussion is legally irrelevant to the application of tribal sovereign suit immunity, it does illustrate that recognition of suit immunity here will not fatally imperil California's electoral process or the FPPC's regulatory function. Voters will still be fully informed, in a timely manner, about major donations. The manner of disclosure may not be administratively the most convenient to the FPPC for enforcement purposes, but that inconvenience provides no basis to strip the Tribe of its right to sovereign suit immunity, constitutionally secured from infringement by the states. *See Okla. Tax Comm'n*, 498 U.S. at 514.

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[12] There is an exception for committees supporting or opposing candidates for Controller or for the Board of Equalization, which are audited by the FPPC. *Id.* §90007.

VIII
CONCLUSION

Unanimous and controlling federal case law leaves no room for doubt on the issue presented in the Tribe's petition. Federally recognized Indian tribes are immune from lawsuits unless Congress explicitly has authorized the suit or the tribe unequivocally has consented to be sued. Neither federal authorization nor tribal consent is present here. The Tribe's motion to quash, accordingly, should have been granted.

DATED: April 1, 2005.

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CERTIFICATION OF COMPLIANCE WITH CAL.R.CT. 14(c)(1)

Pursuant to California Rule of Court 14(c)(1), the foregoing Agua Caliente Band of Cahuilla Indians' Closing Brief on the Merits is double-spaced and was printed in proportionately spaced 14-point CG Times typeface. It is 62 pages long (inclusive of footnotes, but exclusive of tables and this Certificate) and contains 13,394 words. In preparing this certificate, I relied on the word count generated by MS Office Word 2003.

Executed on April 1, 2005, at Oakland, California.

Kathy M. Banke

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. I am employed in the office of a member of the bar of this court at whose direction the service was made. My business address is Reed Smith LLP, 1999 Harrison Street, Suite 2400, Oakland, CA 94612-3572. On April 1, 2005, I served the following document(s) by the method indicated below:

AGUA CALIENTE BAND OF CAHUILLA INDIANS' CLOSING BRIEF ON THE MERITS

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Oakland, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Declaration.

☐ by placing the document(s) listed above in a sealed envelope(s) and by causing personal delivery of the envelope(s) to the person(s) at the address(es) set forth below. A signed proof of service by the process server or delivery service will be filed shortly.

☐ by placing the document(s) listed above in a sealed envelope(s) and consigning it to an express mail service for guaranteed delivery on the next business day following the date of consignment to the address(es) set forth below. A copy of the consignment slip is attached to this proof of service.

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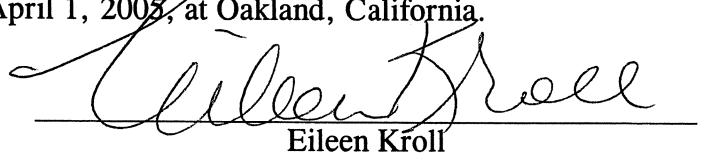
No. C043716

I declare under penalty of perjury under the laws of the United States that the above is true and correct. Executed on April 1, 2005, at Oakland, California.



Eileen Kroll