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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.

Fair Political Practices Commission,

Real Party in Interest and Plaintiff.

AGUA CALIENTE BAND OF CAHUILLA INDIANS' OPENING 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
QUESTIONS PRESENTED

1. "May a state court exercise jurisdiction over a federally recognized American Indian tribe where Congress has not expressly authorized the filing of the lawsuit and the tribe has not unequivocally waived its constitutionally based sovereign immunity from suit?" (3-13-04 Pet. Rev. 3)

Answer: No.

2. "Does the Tenth Amendment or the Guarantee Clause of the United States Constitution provide state courts with the discretion to reject a uniform line of United States Supreme Court and lower federal court authority recognizing the constitutional underpinnings of tribal sovereignty and of tribal suit immunity?" (*Id.*)

Answer: No.

II
INTRODUCTION

For over a hundred years, the courts have asked two questions, and only two questions, to determine whether a federally recognized Indian tribe is subject to suit in any court: Has Congress

unequivocally abrogated the tribe's constitutionally grounded sovereign immunity to permit suit? Or, has the tribe itself expressly consented to be sued and thus waived its sovereign suit immunity? If the answer to both questions is "no," the tribe's sovereignty must be recognized, it cannot be sued, and a motion to quash service of summons must be granted.

This straightforward analysis is rooted in the historic sovereignty of the Indian tribal nations, secured by the United States Constitution. With the enactment of our Constitution, *all* power to regulate tribal activity was given to the federal government, in part to safeguard the tribes' sovereignty from impingement by the states. By virtue of this constitutional framework, only Congress is empowered to limit the Indian tribes' sovereign immunity from suit. And that is so no matter what the context or what the perceived import of the federal or state interest asserted in the lawsuit.

Here, there is no dispute that Congress has *not* abrogated the Indian tribes' sovereignty to allow the suit pursued by the Fair Political Practices Commission ("FPPC"). Nor has the Agua Caliente Band of Cahuilla Indians ("Agua Caliente" or "Tribe") consented to be sued in this case. The Court of Appeal panel majority nevertheless concluded that Agua Caliente could be sued by the FPPC *without* Congressional authorization *or* the Tribe's consent.

In support of its holding, the panel majority first reduced tribal suit immunity to a mere "common law" right. It next concluded that the FPPC, in seeking to judicially enforce California's Political Reform Act ("PRA"), is asserting rights grounded in the Tenth Amendment and Guarantee Clause of the Constitution. Thus, according to the majority, the FPPC has "constitutionally" based rights that "trump" Agua Caliente's "common law" right to immunity from suit.

The panel majority's first premise—that tribal suit immunity is simply a creature of federal "common law"—is unprecedented. No other court has ever held that the Indian tribes' sovereign rights, including their immunity from suit, lack the dignity of constitutionally secured rights. On the contrary, the decisions of the United States Supreme Court and lower federal courts make clear that tribal sovereign immunity from suit (a) is grounded in the federal Constitution, (b) is not subservient to other federally secured rights, and (c) is paramount to any state interest regardless of its source.

The panel majority's second premise is equally unprecedented. No other court has ever held that the Tenth Amendment and Guarantee Clause, either alone or collectively, empower the states to act, where Congress has not, to subject a tribe to suit. The panel majority's Tenth Amendment analysis likewise fails to acknowledge the extraordinary sweep of plenary power over

Indian affairs delegated to the federal government by other provisions of the Constitution, including the Indian Commerce Clause and Treaty Clause. That delegation, in turn, overrides any state interest by virtue of the Supremacy Clause. The majority's analysis also disregards that the Tenth Amendment simply confirms that the states retain whatever powers have not been ceded to the federal government in the Constitution. But since all power over Indian affairs has been ceded to the federal government in the Constitution, the Tenth Amendment, by definition, *disclaims* any reservation of such power to the states.

A proper construction of the Guarantee Clause does not change this result in any respect. The panel majority's analysis disregards that this clause is not implicated at all unless the federal government, by statutory enactment, has interfered with a reserved power of a state. Even then, cases dealing with the clause hold its enforcement is a political issue for Congress, not a judicial issue for the courts. Here, there is *no* affirmative federal enactment involved that impinges any power reserved to the state. Thus, there is no basis to invoke the Guarantee Clause.

The panel majority no doubt felt a strong compulsion to help the FPPC enforce California's campaign reporting laws. But that compulsion does not, and cannot, provide a basis to usurp the power, reserved solely to the federal government, to determine what suits may be brought against federally recognized Indian tribes.

Controlling precedent and proper construction of the constitutional principles involved compel that Agua Caliente's sovereign suit immunity must be recognized in the circumstances of this case. This Court accordingly should reverse the panel majority's decision, with directions to grant the Tribe's motion to quash.

III

FACTS AND PROCEDURAL HISTORY

A. The FPPC Takes Issue With Agua Caliente's Voluntary Reporting Of Campaign Contributions And Files A Lawsuit To Compel The Tribe To Comply With PRA Reporting Requirements

Agua Caliente is a federally recognized Indian Tribe with tribal lands in southeastern California. (Pet. 7 ¶2; App. 3:10-11, 47:2-13, 1260:9-13, 1336:26)[1] The Tribe has made a number of contributions to political campaigns both for candidates and ballot measures, which it has voluntarily reported to the Secretary of State. (App. 30:13-14; Repl. 35[2]; *see also* App. 1260-61) The Tribe posts

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[1] "Pet." citations are to Agua Caliente's "Petition for Writ of Mandate, Prohibition or Other Appropriate Writ," and "App." citations are to the Appendix in support of the Tribe's writ petition, both filed in the Court of Appeal on April 7, 2003.

[2] "Repl." citations are to the Tribe's "Replication Responding to Return re Petition for Writ of Mandate" filed in the Court of Appeal on September 10, 2003.

this information on its website,[3] making it even more available to the public, as well. (App. 30:13-14 and n.1; Repl. 35) Similarly, the Tribe voluntarily files reports with the Secretary of State disclosing its lobbying activities, and additionally posts copies of these reports on its website. (App. 30:13-14 and n.1; Repl. 35; *see also* App. 1261-62)

The Tribe's campaign contributions are reported as required by law by the candidates and committees to which they are made. (App. 30:9-13; Repl. 36) Lobbyists for the Tribe likewise file the reports required by law. (Repl. 40) These reports, too, are available to the public, including through the Secretary of State's website.[4] (Repl. 36) In fact, these reports can be searched by contributor, and all contributions from a given contributor can be aggregated and totaled.

Nevertheless, in 2002, the FPPC filed a civil suit against the Tribe, alleging violations of the PRA's reporting requirements. (App. 1-19) The FPPC's complaint contends the Tribe is a "person" subject to the reporting requirements of the PRA, and seeks monetary penalties for the alleged violations and

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[3] www.aguacaliente.org

[4] http://cal-access.ss.ca.gov/Campaign/ and http://dbsearch.ss.ca.gov/

injunctive relief requiring amendment of allegedly deficient reports. (*Id.*; *see also* Ret. 4-5)[5]

B. Invoking Its Sovereign Immunity From Suit, Agua Caliente Moves To Quash Service; The Trial Court Denies Relief On The Ground No Federal Law Is Paramount To The FPPC's Interests

Invoking its sovereign immunity from suit, Agua Caliente filed a motion to quash service of summons and the complaint. (App. 21-23)[6] The Tribe pointed to the absence of any federal legislation authorizing the FPPC's lawsuit and the lack of any waiver by the Tribe of its suit immunity. (App. 33-37, 44) Therefore, uniform federal and state authority compelled that its motion to quash be granted. (App. 33-38, 44)

In ruling on the Tribe's motion, the trial court recognized there was no congressional authorization for the FPPC's

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[5] "Ret." citations are to the FPPC's "Real Party's Return To Petition for Writ of Mandate" filed in the Court of Appeal on August 19, 2003.

[6] As it has in all proceedings in this case, the Tribe now appears specially to object to the trial court's attempt to exercise jurisdiction. By making this appearance, the Tribe does not intend to limit its objections to the attempted assertion of personal jurisdiction or to waive any other jurisdictional, procedural or substantive defenses available to it.

lawsuit, nor any waiver by the Tribe. (App. 1346:24-26, 1347:6-8) The trial court determined, however, that California's interest in regulating its elections was paramount to United States Supreme Court holdings applying tribal suit immunity. (App. 1346:11-1350:17) As the trial court put it, "no principal of federal law" "overrides" a state's "sovereign interest reserved by the Tenth Amendment" in "overseeing its political processes." (App. 1351:14-18)

C. After The Court Of Appeal Summarily Denies Agua Caliente's Writ Petition Seeking To Enforce Its Immunity From Suit, This Court Grants Review And Remands

The Tribe filed this original proceeding in the Third District Court of Appeal seeking a writ directing the trial court to vacate its order and grant the Tribe's motion to quash. (Pet. 6-11) When the Court of Appeal summarily denied that petition, the Tribe sought review by this Court. (5-5-03 Pet. Rev.) The Tribe's petition highlighted that another judge of the same superior court had just issued an order upholding tribal suit immunity and quashing service in a similar case brought by the FPPC against the Santa Rosa Community of the Santa Rosa Rancheria (No. 02AS04544). (5-5-03 Pet. Rev. 5) This Court granted review and remanded to the Court of Appeal with directions to hear the Tribe's writ petition on the merits.

The FPPC filed a return and supporting memorandum of points and authorities. In keeping with the trial court's ruling, the FPPC claimed the Tribe's sovereign immunity from suit was abrogated here not by Congress or any tribal waiver, but by California's "sovereign right and power, secured by the Guarantee Clause and Tenth Amendment, to control and protect its own electoral processes." (Ret. 1) For the first time, the FPPC also asserted it had no means, other than by a lawsuit against the Tribe, to obtain the contribution information covered by the PRA. (Ret. 5 ¶20, 37-39)

In response to the FPPC's new assertion, Agua Caliente filed a replication demonstrating that suit was not the only avenue open to the FPPC. (Repl. 8-11, 33-42) For example, states can engage in government-to-government negotiations with Indian tribes to reach a mutually agreeable compact or agreement. (Repl. 8-11, 40-41; *see also* App. 1255-58) In fact, up to the moment the FPPC filed its return, the Tribe and the FPPC were engaged in such negotiations. Tribal representatives had met several times with the Chief of Enforcement for the FPPC, Steven Russo, and these negotiations had led to correspondence outlining the terms of such a government-to-government agreement. (Repl. 8-11)

In June 2003, Mr. Russo expressed satisfaction "with how far we have come toward reaching a settlement" and optimism an agreement would be reached. (Repl. 9-10) By the end of June,

the Tribe delivered a fully drafted agreement that would not only resolve the pending dispute but also govern the Tribe's activities with respect to areas regulated by the PRA in the future, including a waiver of the Tribe's suit immunity for the purpose of enforcing that agreement. (Repl. 10) Six weeks later, the FPPC sent the Tribe a counter-proposal, open for one week. (*Id.*) On the eighth day, and with no notice to the Tribe, the FPPC filed its return, claiming it had no option except to sue. (*Id.*)

D. On Remand, The Court Of Appeal, In A Two-To-One Decision, Holds That Tribal Suit Immunity Is Merely A "Common Law" Right And That The FPPC Can Sue Agua Caliente Without Congressional Authorization Or Tribal Waiver

On March 3, 2004, in a 2 to 1 decision, the Court of Appeal affirmed the trial court's order denying Agua Caliente's motion to quash. *Agua Caliente Band of Cahuilla Indians v. Superior Court of Sacramento County*, 116 Cal. App. 4th 545 (2004) ("*Agua Caliente Band*"). Like the trial court, the panel majority recognized there was no express congressional authorization for the FPPC's lawsuit and no express waiver of suit immunity by the Tribe. *Id.* at 551-61.

Instead of upholding suit immunity in these circumstances, the majority departed from the controlling law

through an unprecedented analysis of one hundred years of case authority. According to the panel majority, a proper interpretation of the prevailing case law established that the Tribe's sovereign lawsuit immunity was merely a federal "common law" right, not grounded in the Constitution and subject to judicial construction. *Id.* at 551-54. Further, California's interest in judicially enforcing the PRA was grounded in the Tenth Amendment and Guarantee Clause of the Constitution, and therefore "trumped" the Tribe's "common law" immunity from suit. *Id.* at 554-60.

Taking a closer look at the same body of authority, however, the dissenting judge came to the opposite conclusion. As he put it, the case law reflected that tribal sovereignty "is anchored in the United States Constitution" and thus "has a constitutional basis." *Id.* at 561-65. Accordingly, the dissenting judge perceived a potential conflict between "the Tribe's constitutionally derived right of sovereign immunity from suit and California's constitutionally derived right to regulate its electoral process." *Id.* at 563-64. However, on balance, the Tribe's suit immunity had to be respected. Allowing suit would "eviscerate the Tribe's constitutionally derived right of tribal sovereign immunity from suit." *Id.* at 564. In contrast, precluding suit would deprive the State of only one tool to enforce its regulatory authority. The State has a number of other means to obtain the desired information, including alternative sources that already exist, reaching a negotiated

agreement with the Tribe, or petitioning Congress to exercise its plenary power to permit such suit against the Indian tribes. *Id.*

Agua Caliente petitioned for review of the Court of Appeal's decision, which this Court granted on June 23, 2004.

IV
ARGUMENT

A. For More Than A Century, The United States Supreme Court, Lower Federal Courts And California's State Courts Have Held Tribal Suit Immunity Is An Inherent Attribute Of The Indian Nations' Sovereignty, Subject To Abrogation *Only* By Congress *Or* Waiver By A Tribe

1. Beginning With Its Earliest Tribal Decisions, The United States Supreme Court Has Recognized The Tribes' Sovereign Status

In *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), and *Worcester v. Georgia*, 31 U.S. 515 (1832), the United States Supreme Court recognized that native Indian tribes possess a unique form of sovereignty. In *Cherokee Nation*, Chief Justice Marshall described the tribes as "domestic dependent nations" whose sovereignty is subject to the complete dominion of the United States and distinct from that of foreign nations and each of the states. 30

U.S. at 17-18. In *Worcester*, the Chief Justice traced the basis of this inherent tribal sovereignty to and through the historical relations and treaties between the Indian tribes and Great Britain during colonial times, and subsequently between the tribes and the United States. 31 U.S. at 542-61.

Chief Justice Marshall explained that from the arrival of the colonists, the tribes were regarded as independent sovereign nations. *Id.* at 545-49; *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (tribes are "separate sovereigns pre-existing the Constitution"). Thus, upon the union of the states, the tribes were regarded and established as separate and distinct political communities under the exclusive protection and dominion of the United States, possessing rights to territory and governance with which no state could interfere. *Worcester*, 31 U.S. at 549-59; *see also 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'").

Consistent with this historic political arrangement, the United States Constitution, through the Indian Commerce Clause and Treaty Power, vested exclusive power in the federal government to regulate *all* intercourse with the tribes. *Worcester*, 31 U.S. at 559. This constitutional power superseded any state laws on the subject. In fact, these constitutional provisions made federal

authority more explicit and conferred more power on Congress than had been given by the Articles of Confederation, which had made federal control of Indian affairs subject to a proviso "that the legislative power of any state within its own limits not be infringed or violated." *Id.*; *see also Cotton Petrol. Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) ("the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs"); *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) ("with the adoption of the Constitution, Indian relations became the exclusive province of federal law").

In *Seminole Tribe v. Florida*, the Supreme Court put the matter directly: "If anything, the Indian Commerce clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate commerce but have been *divested of virtually all authority over Indian commerce and Indian tribes*." 517 U.S. 44, 62 (1996) (emphasis added); *see also United States v. Lara*, __ U.S. __, 124 S. Ct. 1628, 1633 (2004) ("*Lara*") ("the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive'").

Accordingly, "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").

Over the years, congressional policy with regard to Indian affairs has evolved and, so too, has the United States Supreme Court's treatment of tribal sovereignty. *See Lara*, 124 S. Ct. at 1634-35 ("Congress has in fact authorized at different times very different Indian policies;" congressional policy "initially favored 'Indian removal,' then 'assimilation' and the breakup of tribal lands, then protection of the tribal land base . . . and it now seeks greater tribal autonomy"); *Organized Village of Kake v. Egan*, 369 U.S. 60, 71-75 (1962) ("*Village of Kake*") (federal policy moved from isolating tribes to assimilation).

In particular, during the latter part of the nineteenth century, Congress "began to consider the Indians less as foreign nations and more as part of our country." *Village of Kake*, 369 U.S. at 72. To this end, Congress ceased the practice of making treaties with the tribes and has since authorized certain states to provide various governmental services and to exercise limited criminal and civil jurisdiction over individual tribal members within

tribal boundaries. *Id.* at 72-74; *see Lara*, 124 S. Ct. at 1635; *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 885 (1986) ("*Three Affiliated Tribes*") (as originally enacted in 1953, Pub. L. 280 (authorizing some lawsuits against tribal members) reflected "congressional plan of gradual but steady assimilation").

The Supreme Court, in turn, shifted from the *Cherokee Nation* and *Worcester* analysis of absolute aboriginal sovereignty, to examining what authority the states have over tribes and individual tribe members, if any, in light of congressional enactments. *See Three Affiliated Tribes,* 476 U.S. at 884; *Mescalero Apache Tribe*, 462 U.S. at 331 (since *Worcester*, "we have held that Indian tribes have been implicitly divested of their sovereignty in certain respects by virtue of their dependent status").

With respect to the question of state authority to regulate tribes, individual tribal member conduct, and especially the conduct of non-Indians on reservations, the United States Supreme Court developed a form of preemption analysis to determine whether a state's regulatory scheme infringes on Congress' plenary power over Indian affairs and the tribes' self-governance rights. *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").[7]

However, this shift to a form of preemption analysis with respect to the application of state laws to tribes and tribal members by no means has excised tribal sovereignty from the law. On the contrary, the Supreme Court continues to emphasize the unique historical sovereignty of the Indian tribes and, on that basis, to sharply limit the scope of state regulatory control over tribes and tribal member conduct. *Three Affiliated Tribes*, 476 U.S. at 884 ("considerations of tribal sovereignty, and the federal interests in promoting Indian self-governance and autonomy, if not of themselves sufficient to 'pre-empt' state regulation, nevertheless

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[7] *E.g., Cabazon Band*, 480 U.S. at 216-22 (state bingo regulations not applicable to tribe; state's interest in preventing infiltration of organized crime "does not justify state regulation of the tribal bingo enterprises in light of the compelling federal and tribal interest supporting them"); *Mescalero Apache Tribe*, 462 U.S. at 337-44 (state hunting regulations not applicable to tribe; state control would "completely 'disturb and disarrange'" tribe's wildlife management program undertaken with approval of federal authorities); *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 482-83 (1976) (state sales tax collection requirements on cigarettes sold to non-Indians applicable to tribal members; collection of tax imposed "minimal burden" on members).

form an important backdrop against which the applicable treaties and federal statutes must be read"); *Blackfeet Tribe*, 471 U.S. at 766 ("'the canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians'"); *Mescalero Apache Tribe*, 462 U.S. at 332 ("we have continued to stress that 'Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory'").[8]

2. The United States Supreme Court Repeatedly Has Held Suit Immunity Is An Inherent Attribute Of The Tribes' Sovereignty

With respect to the precise aspect of tribal sovereignty at issue here—immunity from suit—the United States Supreme Court consistently has recognized that suit immunity is an inherent attribute of tribal sovereignty. *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991); *Three*

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[8] In fact, the Supreme Court noted in *Bryan v. Itasca County*, 426 U.S. 373, 387-88 (1976), that "[t]oday's congressional policy toward reservation Indians may *less clearly* . . . favor their assimilation." (Emphasis added.) And in *Three Affiliated Tribes*, the Court observed that 1968 amendments to Pub. L. 280 requiring tribal consent to further extensions of state authority, reflect renewed concern about, and a reaffirmation of, tribal sovereignty. 476 U.S. at 892; *see also Lara*, 124 S. Ct. at 1634 (while Congress at one time favored "assimilation," "it now seeks greater tribal autonomy within the framework of a 'government-to-government relationship'").

Affiliated Tribes, 476 U.S. at 890 (tribes' "federally conferred immunity from suit" is "a necessary corollary to Indian sovereignty and self-governance"); *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."); *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989) (tribal suit immunity has long been recognized as "co-extensive" with immunity of other sovereign powers "as a means of protecting tribal political autonomy and recognizing . . . tribal sovereignty which substantially predates our Constitution").

Of course, immunity from suit, like all aspects of tribal sovereignty, is subject to federal control and may be abrogated by Congress. *Santa Clara Pueblo*, 436 U.S. at 58 ("this aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress"); *see also 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").

And Congress has exercised its authority to abrogate the tribes' sovereign immunity from suit in some limited circumstances. *See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998) ("*Kiowa Tribe*"); *Bryan*, 426 U.S. at 389 (discussing scope of Pub. L. 280, which authorizes some lawsuits against individual

tribal members). Such action, however, "'cannot be implied but must be unequivocally expressed.'" *Santa Clara Pueblo*, 436 U.S. at 58-59 ("a proper respect for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent").

But absent such explicit congressional abrogation, tribal suit immunity remains intact, free from state interference. *Kiowa Tribe*, 523 U.S. at 755 ("tribal immunity is a matter of federal law and is not subject to diminution by the States"); *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"); *Santa Clara Pueblo*, 436 U.S. at 58 (tribal immunity is "subject to the superior and plenary control of Congress," and "'without congressional authorization,' the 'Indian Nations are exempt from suit'").

Further, if Congress has not acted, only an express tribal waiver can lift the suit immunity bar. *Kiowa Tribe*, 523 U.S. at 755 ("As a matter of federal law, 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 510 (suits against tribes are "barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation"); *Puyallup Tribe, Inc. v. Dept. of Game*, 433 U.S. 165, 172 (1977) ("Absent an effective

waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe.").

3. The Supreme Court Repeatedly Has Held There Are Only Two Exceptions To The Bar Of Tribal Suit Immunity—Unequivocal Abrogation Of The Tribes' Immunity By Congress Or Express Consent To Suit By The Tribe

Consistent with the foregoing principles, the United States Supreme Court has *never* employed a preemption-type analysis, involving the balancing of tribal sovereign interests and state regulatory interests, when considering the application of tribal lawsuit immunity. On the contrary, the high Court repeatedly has explained that suit immunity is a fundamental attribute of tribal sovereignty that ceases to exist in *only* two circumstances—unequivocal congressional abrogation or express tribal consent.

In fact, in recent years, the United States Supreme Court specifically has addressed tribal suit immunity no less than four times. In each case, the Court was asked—but refused—to abandon the established two-part test, and was asked—but refused—to make additional exceptions.

The earliest of these watershed immunity decisions is *Santa Clara Pueblo*, 436 U.S. 49. In *Santa Clara Pueblo*, a tribal

member filed a civil lawsuit against her tribe and tribal officers for declaratory and injunctive relief, alleging violations of the Indian Civil Rights Act [25 U.S.C. §§ 1301 *et seq.*]. This federal statute endows tribal members and others who may be subject to a tribe's criminal or civil jurisdiction, with a panoply of individual rights against the tribe, similar to those afforded against states and the federal government by the Constitution. These rights include virtually the entire Bill of Rights (*e.g.*, speech, press, religion, assembly, public trial, confrontation, prohibitions against double jeopardy, unreasonable searches and seizures, self-incrimination, excessive fines, cruel and unusual punishment, bills of attainder, and ex post facto law), as well as due process and equal protection. *Id.* § 1302. For the enforcement of these civil rights, the statute provides only one explicit remedy, federal habeas corpus. *Id.* § 1303.

And yet, despite the sweeping and fundamental nature of these individual rights, when called on to determine whether the same federal statute provided a basis for their enforcement in federal court other than by habeas corpus, the Supreme Court's answer was "no." *Santa Clara Pueblo*, 436 U.S. at 58-72. The Court explained that since the Act provides only for federal habeas corpus relief, this could "hardly be read as a general waiver of the tribe's sovereign immunity." *Id.* at 59. Accordingly, there was no "unequivocal" abrogation of the Indian tribes' suit immunity by Congress. Nor had the tribe itself consented to suit.

Thus, in *Santa Clara Pueblo*, the Supreme Court held an entire cavalcade of fundamental, individual civil rights was insufficient to create an exception to tribal suit immunity for their enforcement. *Id.* at 58-59. The state rights asserted by the FPPC here have no greater dignity, and under *Santa Clara Pueblo*, do not, and cannot, abrogate Agua Caliente's immunity from suit.

In *Three Affiliated Tribes*, 476 U.S. 877, the Supreme Court invalidated a state law requiring tribes to agree to suit in any case as a condition of their use of the state courts. The tribe in *Three Affiliated Tribes* had invoked the jurisdiction of the state courts to sue for negligence and breach of contract. The action was dismissed on the ground the tribe had not consented to be sued for all purposes as the law required. The Supreme Court held the state law not only was unauthorized, but in fact was preempted. *Id.* at 884-93. As the Court explained, the state law served "to defeat the Tribe's federally conferred immunity from suit." But that is a power reserved solely to Congress. And, "in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States." *Id.* at 890-91.

The Supreme Court recognized "the perceived inequity" in tribes being able to sue in state court, while they are not subject to suit without explicit congressional authorization or their consent. However, this "simply must be accepted in view of the overriding federal and tribal interests in these circumstances, much in the same

way that the perceived inequity of permitting the United States or North Dakota to sue in some cases where they could not be sued as defendants because of their sovereign immunity." *Id.* at 893.

The Court's next decision, *Okla. Tax Comm'n*, 498 U.S. 505, followed in the wake of its decisions holding that states could require individual tribe members to shoulder the "minimal burden" of collecting and remitting state sales tax on sales of cigarettes to non-Indians on reservation lands (*e.g., Moe*, 425 U.S. at 483). The Potawatomi Tribe refused to comply with this "minimal burden" and sued the state tax commission to enjoin an assessment. The state counter-claimed for the amount of the assessment. The tribe moved to dismiss the counterclaim on the ground it had not waived its immunity from suit.

The Supreme Court first rejected the state's argument that by filing suit, the tribe had waived its sovereign immunity and consented to affirmative claims for relief by the state. *Okla. Tax Comm'n*, 498 U.S. at 509 ("a tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it merely because those actions were pleaded in a counterclaim to an action filed by the tribe").

The Court next rejected the state's invitation to narrow, or abandon entirely, the doctrine of tribal sovereign immunity. The state argued suit immunity impermissibly burdened the

administration of its tax laws and, if retained at all, should be limited to tribal courts and internal affairs of tribal government. The Supreme Court was unmoved. Regardless of the state's significant interest in collecting tax revenues, tribal suit immunity foreclosed recourse to the courts. *Id.* at 510.

Nor did the Court vacillate in the face of the state's argument that this left it with the power to tax but no power to judicially enforce that power. "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.* at 514. The state might have recourse against individual tribe members, who are not sovereigns and do not have suit immunity. It could seize unstamped cigarette cartons off tribal lands or assess wholesalers. And if none of these alternatives proved satisfactory, the state could "seek appropriate legislation from Congress." *Id.*

Thus, in *Okla. Tax Comm'n*, the Supreme Court reaffirmed that, absent unequivocal authorization by Congress or express waiver by the tribe, tribal suit immunity forecloses suit *regardless* of the importance of the state right asserted. Tax revenue is the life-blood of the sovereign states, yet even that compelling interest must yield to the tribes' sovereign immunity from suit.

The Supreme Court reaffirmed these fundamental principles in *Kiowa Tribe*, 523 U.S. at 751. In that case, the tribe

was sued on a promissory note executed in connection with an off-reservation business venture. The state courts refused to recognize the tribe's immunity from suit and thus refused to dismiss the lawsuit. The Supreme Court reversed, emphasizing it has drawn no distinctions with respect to a tribe's suit immunity based on where the conduct at issue occurred or whether it is governmental or commercial in nature. *Id.* at 754.[9]

The Court further observed that its decisions applying a preemption analysis to determine whether a tribe is subject to a state's regulatory scheme *do not address tribal immunity from suit*. Rather, the Court explicitly distinguished between a state's power to *regulate* tribal conduct 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.] *There*

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[9] Despite the Supreme Court's explicit ruling in *Kiowa Tribe* that tribal suit immunity is *not* limited to cases impinging on tribal self governance, this was the ground the trial court here relied on in attempting to distinguish this case from all other authority. (App. 1346-47, 1350-51)

> *is a difference between the right to demand compliance with state laws and the means available to enforce them.* [Citations.] *Id.* at 755 (emphasis added).

Simply put, the Supreme Court repeatedly has refused to make any inroad into the tribes' immunity from suit—despite entreaties that suit immunity be limited, and even abandoned. While the Court observed in *Kiowa Tribe* that "our interdependent and mobile society" might call into question the "wisdom" of the tribes' continued immunity from suit—that, said the high Court, is a matter expressly committed, and better committed, to Congress. 523 U.S. at 758-59 ("Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests."). Pursuant to its plenary power, Congress "'has occasionally authorized limited classes of suits against Indian tribes.'" *Id.* But where Congress has not done so, the tribes' immunity from suit remains intact. *Id.*; *see also C & L Enterprises v. Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001) (*Kiowa* "reaffirmed the doctrine of tribal immunity").[10]

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[10] As noted, in contrast to tribes, individual tribe members are not sovereigns and thus do not share tribal suit immunity. *Santa Clara Pueblo*, 436 U.S. at 59. This does not mean tribal members are always subject to suit. Such lawsuits may not be authorized by the statutory scheme in question or may be entirely preempted by federal law. *E.g., Santa Clara Pueblo*, 436 U.S. at 59-72 (tribal officer not subject to civil suit under Indian Civil Rights Act); *Great W. Casinos, Inc. v. Morongo Band of Mission Indians*, 74 Cal. App. 4th 1407, 1421 (1999) (tribal suit immunity extends to tribal

(continued...)

4. Lower Federal Courts And California Courts Have Followed This United States Supreme Court Precedent And Repeatedly Upheld Tribal Suit Immunity Where There Is No Congressional Abrogation And No Tribal Waiver

Following this controlling precedent, the lower federal courts have respected the Indian tribes' sovereignty and upheld their immunity from suit in every context, and with respect to the myriad interests, that can be litigated in the courts. *E.g.*, *Dawavendewa v. Salt River Project Agricultural Improvement & Power Dist.*, 276 F.3d 1150, 1159 (9th Cir. 2002) (tribe immune from employment discrimination suit under Title VII; "[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"); *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989) (tribe immune from breach of contract action; "[a]bsent congressional or tribal consent to suit, state and federal courts have no jurisdiction over Indian tribes"); *State of California v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979) ("*Quechan Tribe*") (tribe immune from suit to enforce state fish and game laws;

(...continued)

officials "when they act in their official capacity and within the scope of their authority").

while court "sympathized" with state's "need to resolve the extent of its regulatory power," "[s]overeign immunity involves a right which courts have no choice, in the absence of a waiver, but to recognize").[11]

The intermediate federal courts also have readily understood the Supreme Court's articulated distinction between a state's sovereign power to regulate, on the one hand, and tribal sovereign immunity from judicial enforcement of such power, on the other. Thus, in *Quechan Tribe*, the Ninth Circuit barred California from suing to enforce the state's fish and game laws on the tribe's reservation. The appellate court acknowledged the state's regulatory

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[11] *Accord Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 356-58 (2d Cir. 2000) (tribe immune from copyright infringement action; it is "for Congress, not the judiciary, to adjust the boundaries of tribal immunity"); *E.F.W. v. St. Stephen's Indian High School*, 264 F.3d 1297 (10th Cir. 2001) (tribe immune from civil rights action challenging removal of Indian child from mother; fact tribe "agreed to act in accordance with state law to some degree and in essence to adopt state law is simply not an express waiver of their tribal sovereignty"); *Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 1166 (10th Cir. 1992) (tribe immune from interpleader action); *Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282 (11th Cir. 2001) (tribe immune from suit under federal Rehabilitation Act); *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1241-45 (11th Cir. 1999) (in absence of tribal-state compact, tribe immune from suit to enforce federal Indian Gaming Regulatory Act); *Florida Paraplegic Assoc. v. Miccosukee Tribe of Indians,* 166 F.3d 1126 (11th Cir. 1999) (tribe immune from suit under federal Americans with Disabilities Act).

interest, but pointed out that that interest played no role in the resolution of the suit immunity issue:

> While the several distinguishing features of this case may make it unique, considered either individually or together, they cannot justify a refusal, by this court, to recognize the Tribe's claim of sovereign immunity. The fact that it is the State which has initiated suit is irrelevant insofar as the Tribe's sovereign immunity is concerned. [Citation.] Although we may sympathize with California's need to resolve the extent of its regulatory power, the "desirability for complete settlement of all issues . . . must . . . yield to the principle of immunity." [Citation.] *Id.* at 1155.

Similarly, in *Dawavendewa* the Ninth Circuit held a Title VII lawsuit challenging Indian hiring preferences could not be brought against the Navajo Nation. 276 F.3d at 1159-61. While the court fully understood the policies behind the federal statute, those policies played no role in its disposition of the suit immunity issue. Thus, even though a substantive violation of Title VII was present, whether the tribe could be sued turned solely on express congressional authorization or tribal waiver:

> Having determined that the Nation is thrice over a necessary party to the instant litigation, we next consider whether it can feasibly be joined as a party. We hold it cannot. Federally 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. [Citation.]

> In this case, the Nation has not waived its tribal sovereign immunity and Congress has not clearly abrogated tribal sovereign immunity in Title VII cases. *Id.* at 1159.

Until the panel majority's decision here, the California courts, including this Court, uniformly had recognized the force and effect of this federal precedent on a matter of federal law. *Boisclair v. Superior Court*, 51 Cal. 3d 1140, 1157 (1990) ("Indian tribes enjoy broad sovereign immunity from lawsuits"); *DOT v. Naegele Outdoor Adver. Co.*, 38 Cal. 3d 509, 519 (1985) ("Indian tribes are immune from suit in the absence of an effective waiver or consent."); *Ackerman v. Edwards*, 121 Cal. App. 4th 946, 951-52 (2004) ("absent congresional authorization, the tribes are exempt from suit"); *Warburton/Buttner v. Superior Court*, 103 Cal. App. 4th 1170, 1181 (2002) ("It must be recognized that 'sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities a given situation.'"); *Redding Rancheria v. Superior Court*, 88 Cal. App. 4th 384, 387 (2001) ("An aboriginal American tribe is a sovereign nation . . . subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."); *Great W. Casinos,* 74 Cal. App. 4th at 1419-20 (same); *Middletown Rancheria v. WCAB*, 60 Cal. App. 4th 1340, 1346-47 (1998) (Workers' Compensation Appeals Board lacks jurisdiction over Tribe); *Long v. Chemehuevi Indian Reservation*, 115 Cal. App. 3d 853, 856-58 (1981) (finding tribe immune from

lawsuit after reviewing federal law and finding no congressional waiver of immunity).

In *Redding Rancheria*, 88 Cal. App. 4th 384, for example, a different panel of the Third District Court of Appeal considered whether a tort action could be brought against the tribe for injuries sustained by a female bartender working for the tribe's casino at an off-reservation party. In reversing an order denying a motion to quash, the appellate curt surveyed the relevant Supreme Court authorities, including *Kiowa Tribe* and *Okla. Tax Comm'n*.

Based on this review, the *Redding Rancheria* Court made the observation that is pivotal to the result here: "a state's power to regulate a tribe's conduct is not the same as a state's power to sue a tribe." 88 Cal. App. 4th at 387. Further, notwithstanding the scope of the state's power to regulate, the appellate court likewise agreed that, as a matter of controlling federal law, a tribe is subject to suit only where Congress has authorized it or the tribe has waived its immunity. *Id.* Nor did the court give any weight to the fact the alleged conduct had not occurred on the reservation: "To say substantive state laws apply to off-reservation conduct . . . is not to say that a tribe no longer enjoys immunity from suit. [Citation.]" *Id.* at 388. Moreover, any change in that result, said the court, had to come from Congress. *Id.* at 390.

The extensive and controlling authority leads to only one conclusion here—that Agua Caliente's sovereign immunity from suit remains in effect and must be respected because it has not been abrogated by Congress, nor has the Tribe consented to the FPPC's suit. In short, "[s]overeign immunity involves a right which courts have no choice, in the absence of a waiver but to recognize." *Quechan Tribe*, 595 F.2d at 1155.

B. The Court Of Appeal Majority Erred In Disregarding Existing Precedent And Creating A New "Exception" To Tribal Suit Immunity

The Court of Appeal majority disregarded all of the foregoing authorities on the theory tribal suit immunity is solely a matter of federal "common law," which is subordinate to federal constitutional rights secured to the states and invoked by the FPPC. The panel majority's rejection of the controlling law fails to withstand scrutiny based on any of the reasons the majority offered.

1. Tribal Suit Immunity Is Firmly Anchored In The Federal Constitution

The panel majority predicated its subordinate "common law" conclusion on the lack of specific reference to tribal suit immunity in the Constitution and express references in the case law to the United States Supreme Court's development of the doctrine of

tribal sovereign immunity. *Agua Caliente Band*, 116 Cal. App. 4th at 551-54 (tribal immunity doctrine is "not found in the federal constitution"); *e.g., Kiowa Tribe*, 523 U.S. at 756-60 ("Although the Court has taken the lead in drawing the bounds of tribal immunity, Congress, subject to constitutional limitations, can alter its limits through explicit legislation.")

The majority's insistence on specific constitutional immunity language, however, is incompatible with the Supreme Court's discussion of the significance of the adoption of the constitutional provisions vesting the federal government with plenary authority over Indian affairs. Indeed, heeding this authority, the dissenting justice had little difficulty exposing the fallacy in the majority's "common law" premise: "The majority fails to recognize that while the doctrine of tribal sovereign immunity began as a judicially created doctrine, it is anchored in the United States Constitution. Therefore, the doctrine has a constitutional basis." *Agua Caliente Band*, 116 Cal. App. 4th at 561-63.

As the dissenting justice explained:

> The Indian Commerce Clause delegates to Congress the plenary power to legislate in the field of Indian affairs. Specifically, the clause states that Congress shall have the power "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes." (U.S. Const., art. I, § 8, cl. 3.) The United States Supreme Court has routinely interpreted this clause to mean that Indian

> relations are the exclusive province of federal law (*Oneida* . . . ["With the adoption of the Constitution, Indian relations became the exclusive province of federal law"]; *Cotton Petroleum* . . . ["the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs"]; *Montana v. Blackfeet Tribe* . . . ["The Constitution vests the Federal government with exclusive authority over relations with Indian tribes"].)
>
> Through its constitutionally delegated power to regulate Indian affairs, Congress has recognized and adopted the doctrine of tribal sovereign immunity through both action and nonaction. As *Kiowa* again explains, "Congress has acted against the background of our [suit immunity] decisions. It has restricted tribal immunity from suit in limited circumstances. [Citations.] And in other statutes it has declared an intention not to alter it." [Citation.] As stated plainly in *Oklahoma Tax* . . . ". . . Congress has consistently reiterated its approval of the immunity doctrine." (498 U.S. at p. 510.) "Like foreign sovereign immunity, tribal immunity is a matter of federal law." (*Kiowa, supra*, 523 U.S. at p. 759.)" *Id.*

This construction of the controlling authority dealing with the Indian Commerce Clause, alone, is enough to demonstrate the fundamental infirmity of the majority's "common law" analysis.

In addition, however, the Treaty Clause (Art. II, § 2, cl. 2) also has long been recognized as another source of the plenary federal authority over the nation's tribes. *Lara*, 124 S. Ct. at 1633 ("This Court has traditionally identified the Indian Commerce

Clause [citation] and the Treaty Clause [citation] as sources of [Congress' plenary and exclusive] power"); *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 172 n.7 (1973) ("The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making.").

Thus, as this Court observed in *Boisclair*:

> The basis for [the] assertion of exclusive federal authority over Indian affairs is rooted in three provisions of the United States Constitution: the Indian commerce clause (art. I, § 8, cl.3), which gives Congress the exclusive power to control Indian commerce; the treaty clause (art. II, § 2, cl. 2); and the supremacy clause (art. IV, cl. 2), which, together with extensive congressional legislation on Indian affairs, has broadly preempted state law. 51 Cal. 3d at 1148.

Accord 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.")

The historical context in which the Indian Commerce and Treaty Clauses were crafted substantiates the constitutional

underpinnings of tribal suit immunity. As discussed above, from the time European colonists set foot on the continent, the Indian tribes were viewed and treated as sovereign nations. When the states adopted the Articles of Confederation there was some pressure to allow state control over the tribes. Accordingly, the Articles' delegation of power over Indian affairs to the federal government was subject to the proviso the states' legislative power within their own borders could not be infringed. *See* discussion and cases cited, *supra*, at 13-14.

When the Constitution was adopted, the states' residual authority was extinguished through the Indian Commerce and Treaty Clauses, in part to insure uniform treatment of the tribal nations and secure their sovereignty against any diminution by the states. *See* discussion and cases cited, *supra*, at 13-15. Thus, while the words "tribal sovereignty" and "tribal suit immunity" may not appear expressly in the constitutional language, the tribes' recognized sovereignty nevertheless underlies the purpose and scope of these two constitutional provisions. *Id.*

Indeed, under its plenary and exclusive power over Indian affairs, Congress legislates on subjects as diverse and removed from literal commercial "commerce" as the foster and adoptive placement of Indian children in state courts,[12] gaming

[12] Indian Child Welfare Act, 25 U.S.C. §§ 1901 *et seq.*

activities,[13] imposition of federal criminal penalties on Indians as Indians,[14] conferral of full state criminal jurisdiction and a limited degree of state civil jurisdiction over reservation Indians on enumerated states such as California,[15] representation of Indians by the United States Attorney,[16] the allocation of the burden of proof in certain trials regarding property claimed by Indians,[17] education of Indian students at government schools,[18] probate of the estates of deceased Indians by intestacy and by will,[19] the rights of individuals as against tribal governments,[20] financing for Indian tribes and individuals,[21] Indian health care,[22] Indian colleges,[23] old age assistance for Indians,[24] prevention of alcohol and substance abuse

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[13] Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq*.

[14] 18 U.S.C. § 1153.

[15] 18 U.S.C. § 1162 and 28 U.S.C. § 1360.

[16] 25 U.S.C. § 175.

[17] 25 U.S.C. § 194.

[18] 25 U.S.C. §§ 271 *et seq*. and 25 U.S.C. § 450a(c).

[19] 25 U.S.C. §§ 371-380.

[20] Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303.

[21] Indian Finance Act, 25 U.S.C. §§ 1451 *et seq*.

[22] Indian health Care Improvement Act and related statutes, 25 U.S.C. §§ 1601 *et seq*.

[23] 25 U.S.C. §§ 1801 *et seq*.

[24] 25 U.S.C. §§ 2301 *et seq*.

by Indians,[25] grants for tribally-controlled schools,[26] support of tribal law enforcement,[27] preservation of native languages,[28] protection and repatriation of native human remains and associated goods,[29] Indian forest resource management,[30] Indian child protection and family violence prevention,[31] Indian higher education funding,[32] support for tribal justice systems,[33] safety of Indian dams,[34] clean-up of open dumps on reservations,[35] and housing assistance for Indian families.[36]

There can be no doubt, then, that by virtue of and in accordance with its constitutional mandate, the federal government

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[25] 25 U.S.C. §§ 2401 *et seq.*

[26] 25 U.S.C. §§ 2501 *et seq.*

[27] 25 U.S.C. §§ 2801 *et seq.*

[28] 25 U.S.C. §§ 2901 *et seq.*

[29] 25 U.S.C. §§ 3001 *et seq.*

[30] 25 U.S.C. §§ 3101 *et seq.*

[31] 25 U.S.C. §§ 3201 *et seq.*

[32] 25 U.S.C. §§ 3301 *et seq.*

[33] 25 U.S.C. §§ 3601 *et seq.*

[34] 25 U.S.C. §§ 3801 *et seq.*

[35] 25 U.S.C. §§ 3901 *et seq.*

[36] 25 U.S.C. §§ 4101 *et seq.*

retains exclusive and plenary power over the entire field of Indian affairs. This includes controlling the tribes' sovereignty and their immunity from suit.[37] *E.g., Lara*, 124 S. Ct. at 1634-35 (discussing Congress' power to change "the metes and bounds of tribal sovereignty"); *Santa Clara Pueblo*, 436 U.S. at 58 (tribal immunity from suit "is subject to the superior and plenary control of Congress"). And as the Supreme Court explained in *Kiowa Tribe*, Congress has exercised its constitutional power both through affirmative legislative acts *and* by approving the federal courts' recognition of the tribes' sovereign immunity from suit. 523 U.S. at 758-59.

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[37] With respect to the grant of sovereignty, for example, recognizing a particular group as a federally recognized Indian tribe is a function of the executive branch. *United States v. John*, 437 U.S. 634, 652-53 (1978); *Miami Nation of Indians v. United States Dept. of the Interior,* 255 F.3d 342, 345 (9th Cir. 2001). Congress, in turn, has mandated that the executive branch publish an official list of all such federally recognized tribes in the *Federal Register*. 25 U.S.C. § 479a-1. The introduction to the most recent such list states: "The listed entities are acknowledged to have the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States . . . ." 67 Fed. Reg. 46,328 (July 12, 2002). One of the most important of these "immunities," of course, is sovereign immunity from unconsented suit. This publication in the *Federal Register* by the Assistant Secretary of the Interior, in response to congressional command, reflects the shared recognition of all three branches of the federal government that tribal sovereign immunity is, indeed, anchored in the federal plenary power over Indian affairs, arising from the Indian Commerce Clause, the Treaty Clause, and the Supremacy Clause of the Constitution.

In short, the fact tribal sovereign immunity has been recognized and explained in the federal "common law" does not mean it is divorced from the Constitution and of "lesser" dignity than any other constitutionally based right secured to individual citizens or the states. Simply because the attributes of tribal immunity have been recognized and addressed in the federal case law does not mean that the immunity's constitutional underpinnings cease to exist, any more than it would when courts construe other constitutionally based rights such as the right to privacy, which also is not expressly mentioned in the Constitution. Tribal "sovereignty" is "a term with constitutional implications" [*United States v. Enas*, 255 F.3d 662, 673 (9th Cir. 2001)] regardless of whether its attributes are explicitly delineated by Congress, or addressed by the federal courts in interpreting the scope of the exclusive, plenary power over Indian affairs delegated to the federal government by the Constitution.

2. Neither The Tenth Amendment Nor The Guarantee Clause Empowers A State To Abrogate Tribal Sovereign Immunity From Suit

The Court of Appeal majority looked to the Tenth Amendment and Guarantee Clause as sources of a state constitutional right that supposedly overrides tribal immunity from suit. *Agua Caliente Band*, 116 Cal. App. 4th at 554-59. The majority's conclusion that these constitutional provisions provide a

state with power to abrogate tribal suit immunity also is indefensible in light of existing precedent.

a. The States Have No Reserved Power Under The Tenth Amendment With Respect To The Regulation Of Indian Tribes

The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." U.S. Const., Amend. X. By its terms, the amendment does not grant the states any substantive rights. Rather, the amendment reserves rights to the states not foreclosed by the Constitution or ceded to the federal government. *See Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

Conversely, "[i]f a power *is* delegated to Congress in the Constitution, the Tenth Amendment expressly *disclaims* any reservation of that power to the States . . . ." *New York v. United States,* 505 U.S. 144, 157 (1992) (emphasis added).

All power over Indian affairs, of course, *is* delegated to the federal government. Given this federal exclusivity, the Tenth Amendment has no role to play as a source to overcome tribal suit immunity: "The states unquestionably do retain a significant measure of sovereign authority. They do so, however, only to the

extent that the Constitution has not divested them of their original powers and transferred them to the federal Government." *Garcia v. San Antonio MTA*, 469 U.S. 528, 549 (1985).

Accordingly, the Tenth Amendment expressly *disclaims* any reservation of power over the tribes to the states. The amendment therefore does not, and cannot, serve as the repository of any authority to the states to abrogate a tribe's immunity from suit. *Carcieri v. Norton*, 290 F. Supp. 2d 167, 189 (D.R.I. 2003) (Tenth Amendment does not reserve authority over tribes to the states).

As the district court for the District of Columbia thus succinctly—and recently—observed:

> [T]he Supreme Court has recognized Congress' plenary power "to deal with the special problems of Indians . . ." *Morton*, 417 U.S. at 551, 94 S. Ct. 2474. This power "stems from the Constitution itself." *Id.* at 552 []. Indeed, the Supreme Court has held that neither the fact that an Indian tribe has been assimilated, nor the fact that there has been a lapse in federal recognition of a tribe, was sufficient to destroy the federal power to handle Indian affairs. *United States v. John*, 437 U.S. 634, 652 []. Accordingly, the Tenth Amendment does not reserve authority over Indian affairs to the States, and plaintiffs' Tenth Amendment claim is without merit and must be dismissed. *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).

The panel majority dismissed *Carcieri* and *City of Roseville* as not supporting either that tribal suit immunity is rooted in the Constitution, or that the Tenth Amendment is immaterial to the suit immunity analysis. *Agua Caliente*, 116 Cal. App. 4th at 559-60. The majority observed that neither case involved application of tribal suit immunity and both relied on *Morton v. Mancari*, 417 U.S. 535 (1974), which the majority also found to be factually distinguishable as not applying tribal immunity either. *Id.* But this misses the legal forest for the factual trees.

The fact that these cases involved different issues does not detract from the fundamental legal propositions that underlay their disposition which control the outcome here—(a) that 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 *Morton*, *Carcieri* and *City of Roseville*, also require recognition of Agua Caliente's sovereign immunity from suit here—as the Supreme Court repeatedly has held in its decisions dealing squarely with tribal suit immunity.

In fact, the argument the plaintiffs advanced in *City of Roseville* is remarkably similar to the FPPC's argument here. The two municipal plaintiffs in *City of Roseville* challenged federal action "restoring" lands to a federally recognized tribe, which would allow the tribe to construct and operate a casino. 219 F. Supp. 2d at 134. The cities argued the federal action interfered with the state's sovereign land use power reserved under the Tenth Amendment. But as the district court explained, this argument failed in light of the exclusive and plenary power over Indian affairs granted to the federal government in the Constitution. Because the states had ceded all power in this area, the Tenth Amendment afforded no basis for challenging the federal action on the ground it infringed on a reserved right of the state. *Id.* at 153-54.

Given the lack of reservation of any authority over Indian affairs to the states, let alone authority to revoke the tribes' sovereign status, it is apparent why the panel majority here failed to cite a single case where the Tenth Amendment was relied on to overcome tribal lawsuit immunity. *No such case exists*. No matter what the context in which a state's interest arises and no matter what the perceived strength of its regulatory authority, tribal suit immunity is undiminished and is controlled exclusively by federal law. *See* discussion and cases cited, *supra*, at 18-33.

Furthermore, the majority's characterization of a power reserved under the Tenth Amendment as "constitutionally based,"

does not change the import of the amendment. The Tenth Amendment does not "constitutionalize" the litany of powers the states did not cede to the federal government. *See New York*, 505 U.S. at 156-57 ("the Tenth Amendment 'states but a truism that all is retained which has not been surrendered'"; the amendment protects the retained sovereignty of the states); *Gregory*, 501 U.S. at 458 (powers that remain in the states "are numerous and indefinite"). Rather, the Tenth Amendment acts as a limitation on the federal government, prohibiting it from encroaching on the powers the states retained. *See New York*, 505 U.S. at 156 (the Tenth Amendment "restrains the power of Congress"); *Gregory*, 501 U.S. at 457-58 (powers delegated to federal government "are few and defined").

In sum, the Tenth Amendment is not a source of any affirmative constitutional right that "trumps" the Indian tribes' constitutionally grounded sovereign immunity from suit. And the fact that the states may have the reserved power to enact their own campaign disclosure rules does not mean they can on their own, and without express congressional approval, sue federally recognized tribes to enforce such regulatory oversight. *See Kiowa Tribe*, 523 U.S. at 755; *Okla. Tax Comm'n*, 498 U.S. at 514.

b. The Guarantee Of A Republican Form Of Government Does Not Provide Any Basis For State Abrogation Of Tribal Suit Immunity

(1) The Clause Obligates The Federal Government To Protect The Republican Form Of Government, Grants No Authority To The States, And Under United States Supreme Court Precedent Does Not Give Rise To Justiciable Controversies

Article IV § 4 of the Constitution provides in pertinent part: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion." U.S. Const., Art. IV, § 4. By its terms, the "Guarantee Clause" (the first proviso) is not a grant of authority to the states. Rather, it imposes an obligation on the federal government to guarantee the republican form of government. The provision was included in the Constitution specifically to assure the states the federal government would defend against unrepublican elements such as slave revolts or monarchist revolutions. William M. Wiecek, *The Guarantee Clause of the U.S. Constitution* 11, 42-43, 59-60 (Cornell Univ. Press 1972).

Given these limitations, it comes as no surprise that the United States Supreme Court has never suggested that a state regulatory agency can invoke the Guarantee Clause as a grant of constitutional authority to initiate a lawsuit in pursuit of maintaining the republican form of government, let alone invoke the clause to abrogate the sovereignty of a federally recognized Indian tribe.

Instead, cases implicating the Guarantee Clause typically are dismissed as raising political issues for Congress and the Executive Branch, not judicial issues for the courts. *See New York*, 505 U.S. at 184-85 (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) ("Under 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 United States Supreme Court's pronouncements, alone, should have cut short the panel majority's effort to divine affirmative authority for the FPPC's lawsuit in the Guarantee Clause. *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).[38]

To justify its contrary view of the clause, the panel majority opined that recognition of tribal suit immunity would deprive the people of the State of California of the right to determine the qualifications of their most important governmental officials, thus impairing the state's republican form of government. *Agua Caliente Band*, 116 Cal. App. 4th at 556-57. But this is another proposition that finds no support in any authority or the record.

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[38] While the Tribe recognizes the credentials of Harvard Law School's Professor Laurence Tribe, the majority's reliance on his observations about the Guarantee Clause in a law journal article to expand controlling Supreme Court authority to provide such an affirmative right [*Agua Caliente Band*, 116 Cal. App. 4th at 555], goes too far. *See Cooper*, 358 U.S. at 18; *In re Tyrell J.*, 8 Cal. 4th at 79.

(2) No Authority Supports The Court Of Appeal's Expansive Construction Of The Clause, Let Alone Its Conclusion That The Clause Empowers A State To Disregard Tribal Suit Immunity

As early as 1891, the United States Supreme Court held that the distinguishing feature of a republican form of government is the right of the people to choose their own officials and to pass their own laws through those chosen officials. *Duncan v. McCall*, 139 U.S. 449, 461 (1891). Recognition of the Tribe's immunity from suit does not eliminate the right of California voters to choose their own officials or to pass their own laws. Recognition of tribal suit immunity here does not even thwart the FPPC from accomplishing its primary mission, to collect political contribution and lobbying information (which is far removed from the federal protection against insurrections and monarchies and the preservation the right to choose state officials secured by the Guarantee Clause). It merely eliminates one of several options available to the FPPC for obtaining this information.[39]

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[39] The Tribe hastens to add that the contribution and lobbying information *is* publicly available in this case. (*See* discussion and citations, *supra*, at 5-7.) The FPPC's complaint is that this information is not available in the exact manner specified by its regulations. (*Id.*)

Alternatively, the FPPC can return to the negotiating table and, on a government-to-government basis, reach a mutually acceptable agreement. (Repl. 8-11, 40-41) *Okla. Tax Comm'n*, 498 U.S. at 514 (reminding state it could enter into such an agreement with respect to the collection of state tax revenues). A tribal-state compact on the subject of gaming regulation already is in place, and the Tribe routinely reaches such accords with other governments at the federal, state, county and municipal levels. (App. 1203-58) The FPPC also can—and does—collect the campaign contribution and lobbying engagement information it seeks from the Tribe, from the candidates, the recipient committees and the lobbyists. (App. 30; Repl. 36, 40) Cal. Govt. Code §§ 84200 and 84202.7 (committees must file annual campaign statements), 84200.5 (additional requirements for filing pre-election statements), 84211 (governing content of campaign statements).

In addition, California is free to ask Congress to abrogate the tribes' suit immunity with respect to state political reporting and campaign finance laws. *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"); *Florida*, 181 F.3d at 1243-

44 (upholding tribal suit immunity and pointing out state could petition Congress to secure right to sue tribes).[40]

While the FPPC may complain these options are less convenient than filing a lawsuit, such inconvenience is not synonymous with deprivation. The recognition of tribal suit immunity does not, of itself, deprive the people of the State of California of the benefit of the FPPC's regulations, let alone the ability to choose their elected officials.

Moreover, the controlling law dictates that the FPPC must avail itself of these options in preference to the abrogation of the Tribe's sovereign immunity from suit. *Kiowa Tribe*, 523 U.S. at 758-59; *Okla. Tax Comm'n*, 498 U.S. at 514.[41]

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[40] By no means, then, does recognition of the Tribe's suit immunity leave the FPPC with no recourse but to "call out its 'well regulated militia'"—as the panel majority suggested. *Agua Caliente Band*, 116 Cal. App. 4th at 557. The majority's citation to *Miranda v. Arizona*, 384 U.S. 436 (1966) (necessity to inform arrestee of rights), *Wilson v. Arkansas*, 514 U.S. 927 (1995) ("knock and announce" rule), and *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusion rule), to support its conclusion that the FPPC has "no choice" but to resort to the state courts is likewise unavailing. Indeed, these cases have nothing to do tribal sovereignty, immunity from suit, the Tenth Amendment or the Guarantee Clause.

[41] In the courts below, the FPPC placed significant reliance on *Minnesota State Ethical Practices Board v. Red Lake DFL Committee,* 303 N.W.2d 54 (Minn. 1981), in which Minnesota sought to enforce its state campaign laws. However, the defendant in *Red Lake* was a committee of individual tribal members, not the

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Even if the panel majority's "deprivation" premise was accepted, and it should not be, none of the cases cited by the majority comes close to holding that the Guarantee Clause creates a reservoir of state authority "superior to" the Indian tribes' sovereign status and immunity from suit or Congress' plenary authority over Indian affairs. None of the cases point to the Guarantee Clause as a source of any affirmative right that can be asserted in a lawsuit against another sovereign.

In two of the cases, states used the clause defensively against enforcement of federal laws allegedly infringing the guarantee of a republican form of government. *New York,* 505 U.S. at 183;[42] *Gregory,* 501 U.S. at 463.[43] In the other cases, the

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tribe, and the committee made no claim of sovereign immunity. Accordingly, the case has no bearing on the case at hand. Nor did the panel majority rely on it. In fact, the Minnesota courts have since made clear that *Red Lake* is inapposite when a tribe is involved. *E.g., Diver v. Peterson*, 524 N.W.2d 288, 291 (Minn. Ct. App. 1994) (tribal official sued in his official capacity, *i.e.* as representative of the tribe, was entitled to suit immunity; "tribal sovereign immunity applies to tribal officials acting in their official capacity, even where one element of a claim occurred outside the reservation").

[42] In *New York*, the state challenged provisions of the Low-Level Radioactive Waste Policy Act. The salient question was whether Congress was empowered to compel states to provide for the disposal of their low-level radioactive waste, or as the Court more simply put it, whether Congress could "use the States as implements of [federal] regulation." *Id.* at 161. The Court's answer entailed considerable discussion of the respective sovereignty of the federal government and the states, which necessarily included discussion of

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Supreme Court relied on the clause as a reason *not* to grant the relief sought in the case. *Duncan*, 139 U.S. at 461; *Luther v. Borden*, 48 U.S. 1, 42 (1849) (which of two rival governments was legitimate government of Rhode Island was question for Congress); *see New York*, 505 U.S. at 184-85 (noting *Duncan* pre-dates cases articulating general rule of nonjusticiability).[44]

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the Tenth Amendment and the Guarantee Clause. *Id.* at 155-69, 183-86. And as for the latter, even assuming the clause could provide a basis to challenge the statute, the Court concluded the Act did not pose any risk of "altering the form" of the state's government. *Id.* at 185-86.

[43] In *Gregory*, several state court judges challenged the state's mandatory retirement law as violating the federal Age Discrimination in Employment Act (ADEA) and Equal Protection Clause. Since the ADEA's requirements implicated the qualifications the state had established for its own officers, the Supreme Court undertook an exacting examination of whether Congress clearly intended to exercise its power under the Commerce Clause to abridge this aspect of the state's sovereignty when it enacted the statute. The Court again discussed the Tenth Amendment and the Guarantee Clause in the context of describing the breadth of the state's sovereignty and the "federalist structure of joint sovereigns." *Id.* at 458. The Court did not hold that either provision invests the states with affirmative federal constitutional authority, let alone authority to abridge the sovereignty of the tribal nations.

[44] *Buckley v. Valeo*, 424 U.S. 1 (1976), also cited by the panel majority for the point that contribution disclosure laws protect the integrity of the electoral process and republican form of government, does not remotely call into question the Supreme Court's decisions addressing tribal sovereignty and correlative immunity from suit. In *Buckley*, the Court considered the constitutionality of numerous provisions of the Federal Election

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The most that can said with respect to the Guarantee Clause is that it may provide some basis to defend against an affirmative federal enactment that allegedly goes "too far" in intruding into a state's sovereign domain. But that hypothetical scenario has nothing to do with this case. When it comes to tribal affairs, the states ceded all authority to the federal government. In this area, they have no sovereign authority that can be impinged. Nor is there any intrusive, affirmative federal legislation at issue here. This case involves the tribes' historic sovereign immunity from suit, unabridged by Congress and secured from infringement by the states through the Indian Commerce, Treaty and Supremacy Clauses of the Constitution.

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Campaign Act of 1971. It invalidated some provisions as violating First Amendment free speech rights, and upheld other provisions. *Id.* at 59-60, 85, 109, 143. That some of the provisions had to give way to individual rights secured by the constitution provides no basis for the leap that the sovereignty of the Indian nations must give way to a state's claimed constitutional interests. The Supreme Court rejected such a claim in more compelling circumstances in *Santa Clara Pueblo*. 436 U.S. at 58-72.

c. Even If The Tenth Amendment Or Guarantee Clause Granted Affirmative Rights To The States, Which They Do Not, Such State Rights Are Not Superior To Tribal Sovereign Rights

Even if the Guarantee Clause or the Tenth Amendment were sources of some affirmative constitutional authority in the states, which they are not, this still would not change the tribal suit immunity analysis. As the controlling United States Supreme Court authorities make clear, tribal suit immunity does not turn on the source or character of the claim asserted.

Despite the states' "compelling interest" in collecting tax revenue [*Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 527 (1981)], the Supreme Court has categorically rejected the argument this is sufficient to abrogate tribal suit immunity. *Okla. Tax Comm'n*, 498 U.S. at 514. Likewise, despite the fundamental character of the panoply of individual civil rights secured to tribal members by the Indian Civil Rights Act—nearly identical to the individual civil rights, due process and equal protection rights secured by the First and Fourteenth Amendments—the Supreme Court has held that tribal suit immunity bars any action other than the federal habeas remedy Congress has expressly provided. *Santa Clara Pueblo*, 436 U.S. at 55-59.

This is because tribal suit immunity concerns the courts' jurisdiction over a sovereign, and sovereignty does not turn on who the plaintiff is or what claim is asserted. Indian tribal sovereignty exists by virtue of the tribes' historic independence as sovereign nations, secured by the Constitution against infringement by the states and now committed solely and exclusively to the federal government. *See* discussion and cases cited, *supra*, at 12-15. Accordingly, unless Congress has abrogated the tribes' sovereignty to permit suit, their sovereignty remains intact and precludes suit absent their express consent. *See* discussion and cases cited, *supra*, at 18-27.

It thus makes no difference that California is, itself, a sovereign and claims to assert sovereign rights reserved and protected through the Tenth Amendment and Guarantee Clause. One sovereign's decision to sue another does not strip the latter of its sovereignty and immunity from suit.

In fact, the United States Supreme Court addressed this exact issue in the context of states and Indian tribes in *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779-82 (1991). In *Blatchford*, native tribes filed suit against Alaska challenging a revenue sharing program. The Supreme Court first rejected the argument that sovereign suit immunity bars only suits by individuals, not by other sovereigns. *Id.* at 780-81. The Court next rejected the argument that, by adopting the Constitution, the states

had waived their sovereign immunity as against Indian tribes. As the Court explained, by adopting the Constitution, the states waived their sovereign immunity only as to sister states and the federal government. *Id.* Finally, the Court rejected the argument that "Indian tribes are more like States than foreign sovereigns." *Id.*

While the Court agreed tribes are like states in the sense that they are "domestic" sovereigns, that—the Court observed—was not dispositive of the suit immunity question. Rather, the critical distinction was the states' presence at the constitutional convention—"[w]hat makes the States' surrender of immunity from suit by sister states plausible is the mutuality of that concession." *Id.* at 782.

However, "[t]here 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.* "[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, the Court held Alaska's sovereign immunity foreclosed suit by the tribe. *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.").

The Supreme Court's reciprocal sovereign immunity analysis in *Blatchford* makes clear that the states cannot look to the provisions of the Constitution, including the Tenth Amendment and Guarantee Clause, as securing for them a preeminent position over the tribal nations and a "surrender" of the tribes' sovereign immunity from suit. In other words, because the tribal nations did *not* cede their sovereign immunity from suit to the states at the constitutional convention, the states cannot turn around and point to specific provisions adopted at that convention as exactly this cession of sovereign suit immunity. On the contrary, the Constitution secured the tribes' sovereignty from diminution by the states through the explicit delegation of exclusive and plenary power over all Indian affairs to Congress. *See* discussion and cases cited, *supra*, at 12-16. Thus, Congress, and only Congress, can "surrender" the tribes' sovereign immunity to allow suits against the tribes by the states.

The *Seminole Tribe* cases further illustrate the point. In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (*Seminole I*), the tribe attempted to sue Florida to force it to negotiate as required by the Indian Gaming Regulatory Act (IGRA). The United States Supreme Court held the Indian Commerce clause, pursuant to which Congress enacted IGRA, did not empower Congress to

abrogate the states' sovereign immunity from suit guaranteed by the Eleventh Amendment. *Id.* at 58-72. "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. Therefore, the tribe's suit was barred by Florida's sovereign immunity from suit.

In *Florida v. Seminole Tribe of Florida*, 181 F.3d at 1237 (*Seminole II*), the state sued the tribe for engaging in gaming in the absence of a compact (which the state had refused to negotiate, giving rise to *Seminole I*). Since Congress had not abrogated the tribes' sovereignty to allow the suit in question, the Eleventh Circuit affirmed the dismissal of the case on the basis of the tribe's suit immunity. *Id.* at 1241-45. As the Eleventh Circuit observed, in this battle of sovereigns, *neither* had the power to abrogate the other's sovereign immunity from suit. *Id.* at 1239.

In sum, the FPPC's invocation of a constitutionally based state right, whether predicated on the Tenth Amendment or the Guarantee Clause, does not, and cannot, overcome Agua Caliente's sovereign immunity from suit. The tribal nations and the states are both domestic sovereigns, and *neither* can force suit on the other regardless of the sovereign right asserted. Rather, Indian tribes and the states can sue one another *only* if the defendant sovereign expressly consents to the suit *or* Congress has

unequivocally and permissibly abrogated the sovereign's immunity from suit. If neither of these two requirements is met—and neither has been met here—the sovereign—whether a Tribe or a state—cannot be sued by the other.

C. State Created "Exceptions" To Tribal Suit Immunity Would Undermine The Delegation Of Plenary Power Over Indian Affairs To Congress And Lead To Confusion And Uncertainty In An Area Of Federal Law That Has Been Settled For More Than A Century

The panel majority went to some length to try to justify its departure from the known legal world of tribal suit immunity on the ground this is an unique case. *Agua Caliente Band*, 116 Cal. App. 4th at 558-59. This is no justification to depart from the demands of the Constitution and controlling United States Supreme Court precedent. Moreover, this justification does not withstand analysis either.

To begin with, California is not the only state that has enacted campaign contribution disclosure and reporting laws. If this Court were to affirm the panel majority's decision, federally recognized tribes in every other state with a similar statutory scheme would face the prospect of being sued. Thus, this case involves a national issue, not a parochial, one-of-kind state issue—precisely the

kind of issue Congress is charged with, and should be, deciding. *See Kiowa Tribe*, 523 U.S. at 758-59.

Furthermore, the panel majority's analysis, regardless of the facts of this case, opens the door to innumerable abrogation arguments. As discussed, neither the Tenth Amendment nor the Guarantee Clause bestows any express authority on the states. Rather, the Tenth Amendment preserves states' rights not otherwise ceded to the federal government, and the Guarantee Clause charges the federal government with protecting the states' republican form of government. *See* discussion and cases cited, *supra*, at 42-55.

It takes little imagination to envision the panoply of suit immunity abrogation arguments states could advance under the rubric of a "constitutionally based" Tenth Amendment right. *See Gregory*, 501 U.S. at 458 (states have innumerable reserved rights arising from their own sovereign status). Nor would requiring invocation of the Guarantee Clause, as well, be a particularly helpful limitation. States would undoubtedly advance a host of regulatory interests as being within the realm of "'preserv[ing] the basic conception of the political community'" [*Gregory*, 501 U.S. at 462, *quoting Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)]. Plus, they would being doing so against a backdrop of one of the most undeveloped areas of federal law given the United States Supreme Court's longstanding rule that Guarantee Clause claims are nonjusticiable. Chaos is the word that comes readily to mind.

The United States Supreme Court's determination that abrogation of tribal suit immunity is a matter for Congress thus applies with as much force in this case as it does in any other. The Constitution delegates exclusive and plenary power over Indian affairs to Congress in part to insure uniformity in the treatment of the tribes throughout the country, and that is particularly true when it comes to the scope of their suit immunity. Thus, as the Supreme Court has ruled, abrogation of tribal immunity from suit not only *is* committed—it is best committed—to Congress.

And this is a charge Congress has taken seriously. As discussed above, Congress has on occasion abrogated the tribes' sovereignty and allowed some lawsuits against them. *See* discussion and cases cited, *supra*, at 19-20. In fact, since the Supreme Court's decision in *Kiowa Tribe*, Congress has considered seven separate pieces of legislation addressing tribal suit immunity, two of which have been enacted and do abrogate tribal suit immunity in connection with certain contracts and the resolution of a water dispute.

In 1998, for example, Senator Slade Gorton introduced S. 1691, entitled the "American Indian Equal Justice Act." The bill recited that, "the Supreme Court has affirmed that Congress has clear and undoubted constitutional authority to define, limit, or waive the immunity of Indian tribes" and "it is necessary to address the issue." American Indian Equal Justice Act, S. 1691, 105th

Cong. (1998). Among other things, the legislation would have abrogated tribal sovereignty to allow states to pursue tax collection actions. *Id.* Hearings were held and the bill was reported out of committee, but never came to a vote in the Senate.

The same year, Senator Ben Nighthorse Campbell introduced S. 2097, entitled the "Indian Tribal Conflict Resolution and Tort Claims Risk Management Act of 1998." This bill would have required states and tribes, when entering into agreements on various subjects, including state taxation, to mutually waive their sovereign immunities from suit. Indian Tribal Conflict Resolution and Tort Claims Risk Management Act of 1998, S. 2097, 105th Cong. (1998). Hearings were held, but the bill did not pass out of committee.

In 1999, Senator Campbell introduced Senate Bill 613 to clarify 25 U.S.C. § 81, requiring that all contracts with Indian tribes for "services for . . . Indians relative to their lands" be approved by the Secretary of the Interior. Without such approval, the contracts were "null and void." Senate Bill 613 defined exactly which contracts required approval. It also required that such contracts specify the remedies for breach and include a waiver by the tribe of its sovereign immunity from suit. 25 U.S.C. § 81; *see also* House Report 106-501 on S. 613, P.L. 106-179, 106th Congress, 2d Session, February 29, 2000, reprinted in 2000 U.S.C.C.&A.N., vol. 3 at 69. This bill was enacted as the Indian

Tribal Economic Development and Contracts Encouragement Act of 2000, replacing entirely the previous version of § 81. 25 U.S.C. § 81.

Two years later, in 2002, Representative J. D. Hayworth introduced House Resolution 5443, entitled the "Arizona Water Settlements Act." Intended to resolve water rights claims of the Gila River Indian Community, the bill also would have abrogated the tribe's suit immunity as to any disputes over the interpretation or enforcement of the settlement. Arizona Water Settlements Act, H.R. 5443, 107th Cong. (2002). The bill did not pass out of committee.

The following year, in 2003, Senator John McCain introduced Senate Bill 222, entitled the "Zuni Indian Water Rights Settlement Act of 2003." This legislation was enacted and resolves the water rights claims of the Zuni Pueblo. It also expressly abrogates the tribe's suit immunity as to any disputes over the interpretation or enforcement of the settlement. Zuni Indian Water Rights Settlement Act of 2003, S. 222, 108th Cong. (2003); *see also* Senate Report 108-18 on S. 222, 108th Congress, 1st Session, March 10, 2003, reprinted in 2003 U.S.C.C.&A.N., vol. 3, at 983, 991-92 (discussing Congress' view of the settlement statute as a contract and intent to provide effective contract remedies).

Senator Campbell, in turn, introduced Senate Bill 521, entitled the "Indian Land Leasing Act of 2003." This bill would allow tribes that have previously received federal approval for a tribal land leasing structure, to lease their land for up to 99 years without further federal approval. The original version of the bill would have allowed a lessee to bring a civil action against the lessor tribe to enforce the lease. This provision has been deleted, and the bill currently provides another remedy. Indian Land Leasing Act of 2003, S. 521, 108th Cong. (2003). The bill is still pending.

The point of these recent examples is, again, that Congress routinely considers proposals to abrogate the tribes' suit immunity. Hearings are held, bills are debated and amended, and full consideration is given to the need for the relief sought and the problems such relief might engender. Congress then takes action where, in its considered judgment and in accordance with its constitutional mandate, abrogation of tribal suit immunity is warranted.

V
CONCLUSION

The directive this Court should give the FPPC is that it must inquire of Congress, not the state courts, to abrogate Agua Caliente's sovereign immunity from suit. As the United States Supreme Court has held, this disposition is compelled by and

preserves the fundamental delegation of power made in the Constitution and the supremacy of federal law on federal issues that lies at the heart of our federal governmental structure.

The Court of Appeal majority's unprecedented departure from the straightforward tribal suit immunity analysis established by more than a century of United States Supreme Court precedent should be reversed, with directions to issue a writ of mandate directing that the Agua Caliente's motion to quash be granted.

DATED: September 21, 2004.

LAW OFFICES OF ART BUNCE

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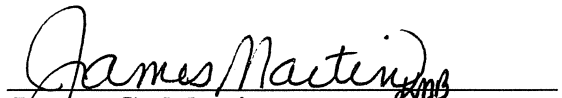
By 

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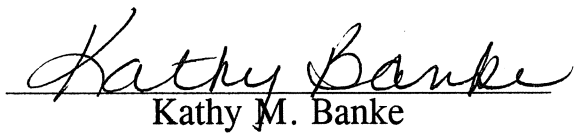
CERTIFICATION OF COMPLIANCE WITH CAL. R. CT. 14(c)(1)

Pursuant to California Rule of Court 14(c)(1), the foregoing Opening Brief on the Merits of Agua Caliente Band of Cahuilla Indians is double-spaced and was printed in proportionately spaced 14-point CG Times typeface. It is 67 pages long (inclusive of footnotes, but exclusive of tables and this Certificate) and contains 15,041 words. In preparing this certificate, I relied on the word count generated by MS Word 97.

Executed on September 21, 2004, 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 September 21, 2004, I served the following document(s) by the method indicated below:

AGUA CALIENTE BAND OF CAHUILLA INDIANS' OPENING 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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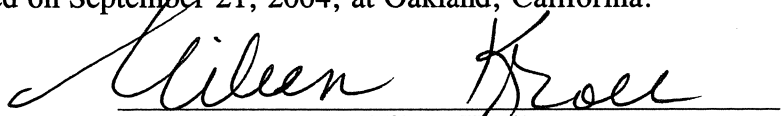
I declare under penalty of perjury under the laws of the United States that the above is true and correct. Executed on September 21, 2004, at Oakland, California.



Eileen Kroll