IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

AGUA CALIENTE BAND OF CAHUILLA INDIANS,

Petitioner,

v.

SUPERIOR COURT OF SACRAMENTO COUNTY,

Respondent;

FAIR POLITICAL PRACTICES COMMISSION,

Real Party in Interest.

_____/

No. S123832

Third Appellate District Court Case No. C043716

Sacramento County Superior Court Case No. 02AS04545

REAL PARTY IN INTEREST'S OPPOSITION 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, Case No. 02AS04545
The Honorable Loren E. McMaster

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INTRODUCTION

This case involves the State of California's affirmative exercise of powers, secured under the Guarantee Clause and reserved by the Tenth Amendment to the United States Constitution, to protect the integrity of its elections and legislative processes through enforcement of the Political Reform Act (Gov't Code §§ 81000-91014) ("PRA"). The PRA, enacted by voter initiative in 1974, charges the California Fair Political Practices Commission ("FPPC") with its administration and enforcement. The California Constitution, Article III, § 3.5 and the terms of the PRA require the FPPC to enforce the statute equally against all, including Indian tribes, the largest contributors to California elected officials, candidates and initiative proposals. Accordingly, the FPPC brought this action against the petitioner Agua Caliente Band of Cahuilla Indians ("Agua Caliente" or "Tribe").

The Tribe asserted that the federal common law doctrine of tribal sovereign immunity from suit renders the State powerless to enforce the statute against the Tribe. The superior court and court of appeal disagreed.

No precedent--state or federal--has extended the common law doctrine of tribal sovereign immunity from suit to abrogate state exercise of powers reserved under the Tenth Amendment, including specifically the right to protect its republican form of government guaranteed by Article IV, § 4. Further, such an extension would be inconsistent with the Constitution's delegation of limited powers to the federal government and reservation of other powers to the states. The United States Supreme Court has applied the court-created immunity doctrine to effectuate powers that the States delegated to Congress by Article I, § 8 cl. 3. Article IV § 4 and the Tenth Amendment limit those Article I powers. The common law doctrine protects tribal self-governance and economic self-sufficiency *separate* from state governments. This action is about state government

protecting the integrity of state elections for the benefit of all of its citizens *including* the Tribe and its members.

This Court is fully empowered to examine the principles underlying the common law doctrine and to determine whether they apply to the circumstances before the Court. The Court of Appeal correctly determined that they do not.

A related case, *FPPC v. Santa Rosa Indian Community of the Santa Rosa Rancheria,* Sacramento Superior Court case no. 02AS04544, Third Appellate District no. 3 Civil C044555, was decided October 27, 2004. The Court of Appeal reversed the superior court's order granting the Santa Rosa Tachi tribe's motion to quash.

The order of the Sacramento Superior Court denying the Tribe's motion to quash should be affirmed for all of the reasons expressed in the opinion of the Court of Appeal and in this Opposition Brief on the Merits and the case should be remanded to the superior court for trial on the merits.

QUESTIONS PRESENTED

The Questions Presented, as framed by the Tribe, make the common assumption that United States Supreme Court or lower federal courts have already addressed the issues before this Court. No party or court in this or the related case has found any such authority.

The Petitioner's first question asks, in effect, whether state exercises of Article IV, § 4 powers reserved by the Tenth Amendment require Congressional authorization? Answer: No--Congress has no power to interfere with the exercise of such powers, except as set forth in the Civil Rights Amendments to the United States Constitution.

The Petitioner's second question asks in effect whether any United States Supreme Court or lower federal court sovereign immunity decision

has considered a state's exercise of Guarantee Clause powers reserved by the Tenth Amendment. Answer: No--this is a case of first impression.

Turning these questions to their flipside, does Congress have the power, by action or inaction, to allow Indian tribes to undermine the integrity of state government elections and legislative processes? Alternatively, do Indian tribes have inherent authority, by virtue of their special status as domestic dependent nations, to so interfere with state elections and legislative processes? Answer: No--this would violate the Article IV § 4 guarantee and interfere with powers reserved to the States by the Tenth Amendment, which limit Congress' Article I powers.

FACTS AND PROCEDURAL HISTORY

I. CALIFORNIANS ACT TO PROTECT THEIR GOVERNMENT FROM THE CORRUPTING INFLUENCE OF LARGE CAMPAIGN CONTRIBUTIONS

In the wake of the Watergate scandal, the People of the State of California enacted the Political Reform Act by initiative in 1974. The PRA seeks to ensure that State and local government "serve the needs and respond to the wishes of all citizens equally, without regard to their wealth." Gov't Code § 81001(a); *see also, Albertson's, Inc. v. Young*, 107 Cal. App. 4th 106, 133 (2003) (Sims, J. concurring) (adoption of the PRA through the initiative process reflected concern that California has "increasingly become subject to the domination and control of monied special interests, leaving the average citizen without an effective voice in government").

The PRA finds, among other things, that lobbyists and organizations making large contributions to campaigns "gain disproportionate influence over governmental decisions" (§ 81001(c)), that "existing laws for disclosure of campaign receipts and expenditures have proved to be

inadequate" (§ 81001(d)), and that "previous laws regulating political practices have suffered from inadequate enforcement" (§ 81001(h)). Purposes of the PRA include (1) fully informing voters and inhibiting improper practices (§ 81002(a)) and (2) providing adequate enforcement mechanisms to public officials and private citizens so that the PRA will be "vigorously enforced" (§ 81002(f)).

Californians have voted on numerous occasions to strengthen the PRA by establishing contribution limits. Proposition 34, adopted by the voters in the November 2000 general election, established those limits after other initiatives succumbed to judicial challenges. Gov't Code §§ 85300 et seq. Proposition 34 also increased the administrative penalties for violating the PRA. Gov't Code § 83116(c).

Additional indicia of Californians' determination to protect the integrity of their state government from the corrupting influence of money include the PRA's provision for "vigorous enforcement" (§ 81002(f)), the requirement that the PRA be liberally construed in favor of its purposes (§ 81003), and the restrictions on the Legislature's power to amend the PRA (§ 81012(a)). Any amendment to the statute must "further its purposes" and must be passed in each house of the Legislature by a two-thirds vote of the membership. Gov't Code § 81012(a). Alternatively, the PRA may only be amended or repealed by a statute that "becomes effective only when approved by the electors." Gov't Code § 81012(b).

II. AS A MATTER OF FACT, THE TRIBE'S CONDUCT IMPAIRS THE STATE'S SOVEREIGN POWERS TO PROTECT THE INTEGRITY OF ITS ELECTIONS AND LEGISLATIVE PROCESSES

The Tribe, according to its own records, made contributions of more than one million dollars to California political candidates and committees from January 1, 1998 to June 30, 1998 and in the 1998 calendar year the

Tribe made contributions of more than $7,500,000 to statewide ballot initiatives. (Ex. 1 to Petition, Second Amended Complaint, p.3, ¶ 11)(App. Vol. 1, p.0003). The Tribe contributed to more than 140 candidates for elective state office. (*Id.* at p.3, ¶ 11)(App. Vol. 1, p.0003). From July 1, 1998 to December 31, 1998 the Tribe made contributions totaling at least $6 million. (*Id.* at p.6, ¶ 21)(App. Vol. 1, p.0006). The Tribe made similar contributions in 2001. (*Id.* at pp.3-4, ¶ 12)(App. Vol. 1, pp.0003-0004) and 2002. (*Id.* at p.4, ¶ 13)(App. Vol. 1, p.0004).

More recently, in connection with the Proposition 51 ballot initiative, the Tribe failed to disclose a contribution of $125,000 to the Yes on Proposition 51 Committee, using the Planning and Conservation League as an intermediary. If it had passed, Proposition 51 would have committed the expenditure of $15 million in public funds per fiscal year, for 8 years, for a rail line from Los Angeles to Palm Springs, including a train terminal at the Tribe's Coachella Valley casino. (*Id.* at pp.6-7, ¶¶ 26-29)(App. Vol. 1, pp.0006-0007).

In 1998 the Tribe was one of the top 5 contributors to Yes on Proposition 5, Californians for Indian Self-Reliance, contributing more than $2,300,000 to the most expensive initiative campaign to that point in California history. (*Id.* at p.8-9, ¶ 37)(App. Vol. 1, pp.0008-0009). The Tribe entirely failed to disclose or only made untimely reports of several last-minute in-kind contributions to Yes on Proposition 5 totaling some $1 million. (*Id.* at pp.8-13, ¶¶ 37-61)(App. Vol. 1, pp.0008-0013).

The complaint details additional undisclosed or late disclosures of contributions in the November 1998 general election, the March 2001 special election, the November 2001 general election, and the March 5, 2002 primary election. (*Id.* at pp.13-15, ¶¶ 62-84)(App. Vol. 1, pp.0013-0015).

Contrary to the Tribe's rosy view of its voluntary reporting (OBM pp.5-6, 50), the complaint alleges the Tribe failed to file required reports while the elections were still ongoing, thereby depriving voters of information necessary to make informed decisions. It did not file its report for the period January 1, 1998 to June 30, 1998 until October 2000, more than two years after the due date. (*Id.* at p.5, ¶ 19)(App. Vol. 1, p.0005). The Tribe filed an untimely report for the period July 1, 1998 through December 31, 1998 in March 1999 but only filed an amended final statement in November 2000, nearly two years after the due date. (*Id.* at p.6, ¶ 22)(App. Vol. 1, p.0006). Such late reports would be of historic interest only.

The Tribe's quarterly lobbyist employer reports, required by the PRA, failed to identify for any quarter of 2001 the bills that were the subject of the Tribe's lobbying efforts. (*Id.* at pp.16-18 ¶¶ 85-98)(App. Vol. 1, pp.0016-0018).

III. THE FPPC BROUGHT THIS ACTION TO ENFORCE THE PRA AND PROTECT STATE POWERS IN AN ARENA LACKING ANY TRADITION OF TRIBAL SOVEREIGNTY

The FPPC brought this action in 2002. (App. Vol. 1, pp.1-19). The quality of the Tribe's "voluntary" compliance outlined in the complaint well demonstrated the need for vigorous enforcement of the PRA.

The FPPC showed California in fact has a significant interest in protecting the integrity of its elections and legislative processes from the corrupting influence of campaign contributions and lobbying activities by special interests. (Dec. of Karen Getman, Immediate Past Chairman of the FPPC, ¶¶ 4-12)(App. Vol. 3, pp.0519-0522); Dec. of Bill Jones, Immediate Past Secretary of State, ¶ 3)(App. Vol. 3, pp.0502-0503); Dec. of Bob Stern, former FPPC General Counsel and President of the Center for

Governmental Studies, ¶ 6-7)(App. Vol. 2, pp.0414); Dec. of James K. Knox, ¶¶ 15-16)(App. Vol. 3, p.0714)).

The Declaration of past FPPC Chairman Karen Getman showed that *California ProLife Council, Inc. v. Karen Getman et al.*, No. CIV S-00-1698 FCD GGH[1] made this finding. (Getman Dec., Ex. D)(App. Vol. 3, p.0659).

The FPPC also showed there is no tradition of tribal sovereignty with respect to enforcement of state laws analogous to the PRA. (Dec. of George Dunst, Legal Counsel for the Wisconsin State Elections Board, ¶¶ 4-5)(App. Vol. 2, pp.0491-0500); Dec. of Jeffrey Garfield, General Counsel Executive Director and General Counsel of the Connecticut Elections Enforcement Commission, ¶ 5)(App. Vol. 2, 0335-0336); Dec. of Alan Plofsky, Executive Director and General Counsel of the Connecticut State Ethics Commission, ¶¶ 5, 7)(App. Vol. 2, pp.0395); Dec. of Jeanne Olson, Executive Director of the Minnesota Campaign Finance and Public Disclosure Board, ¶¶ 4, 9-14)(App. Vol. 2, pp.0358, 0359-0360)). At least one state court has declined to enjoin enforcement of its campaign contribution statute against a tribal committee (although without elaboration of the issues raised here). *Minnesota State Ethical Practices Board v. Red Lake DFL Committee,* 303 N.W. 2d 54 (Minn. 1981).[2]

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[1] This decision has since been affirmed in pertinent part in *California Pro-Life Council, Inc. v. Getman,* 328 F.3d 1088 (9th Cir. 2003).

[2] The Tribe argues that Minnesota courts have made it clear that *Red Lake* is "inapposite when a tribe is involved." (OBM pp. 52-53 n.41). In fact, the courts applied *Red Lake* to affirm an order refusing to enjoin enforcement of a Campaign Finance and Public Disclosure Board advisory opinion requiring a *tribe* to make disclosures concerning funds supplied to its PAC for donation to a political party. *Shakopee Mdewakanton Sioux (Dakota) Community v. Minnesota Campaign Finance & Public Disclosure Bd.*, 586 N.W.2d 406 (Minn. App. Nov 24, 1998).

IV. THE SUPERIOR COURT DENIES THE TRIBE'S MOTION TO QUASH AND THE COURT OF APPEAL AFFIRMS

The Sacramento County Superior Court denied the Tribe's motion to quash. (App. Vol. 5, pp.134-135).

Among other things, the FPPC argued that alternatives to judicial enforcement were unavailable as a matter of fact and law.[3] The FPPC's argument concerning the inadequacy of alternatives appeared under the heading " 'Courtesy' Compliance Is Not a Viable Alternative to Enforcement" (App. Vol. I, p.0093), which referred to attached evidence discussed in more detail below. (*See* Argument IV. B, infra). As will be shown below, alternatives to enforcement are also beyond the Commission's jurisdiction, as a matter of *law.* California Constitution Article III, section 3.5 gives the FPPC no option except to comply with the statutory mandate that it enforce the PRA according to its terms for the benefit of all of its citizens. (App. Vol. I, p.0074). While administrative agencies such as the FPPC have implied authority to settle lawsuits (Ret. p.38)[4], the parties were unable to reach a settlement agreement, as the Opening Brief on the Merits implicitly recognizes (OBM at pp.9-10). Nothing in the record supported the Tribe's assertion that the FPPC (or any other State agent) has authority to negotiate a "government-to-government agreement" with the Tribe as an alternative to enforcing the PRA according to its terms. (*Cf.* OBM at p.9). The FPPC asserted that such an agreement would violate the PRA and the California Constitution. (*See* Cal. Const. Art. III, § 3.5; Gov't Code §§ 81002(a), (f)).

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[3] The Tribe asserts that the FPPC "for the first time" in its Return argued that alternatives to judicial enforcement are unavailable to it. (OBM p.9).

[4] *See Stermer v. Board of Dental Examiners,* 95 Cal. App. 4th 128, 133 (2002). It is inappropriate to discuss the content of those negotiations. Evid. Code §§ 1152, 1154. (*Cf.* OBM pp.9-10).

The Court of Appeal summarily denied the petition. This Court granted review and remanded to the Court of Appeal with directions to hear the Tribe's petition on the merits.

The FPPC filed its Return, agreeing that the issues raised in the Tribe's petition should be resolved so that the FPPC and all Californians will know that the FPPC may enforce the PRA against the largest contributors to California political campaigns. (Ret. p.2).

With controversy swirling around the role of tribal contributions in the historic recall election of the State's Governor, the parties and amici submitted their briefs and made their oral arguments to the Court of Appeal. The Court affirmed respondent's order in a published decision on March 3, 2004.

The Tribe's petition for review followed, and the parties' briefs were submitted as Californians voted on and defeated Proposition 70, an initiative funded largely by the Tribe, which would have imposed limits on the State's power to negotiate revenue sharing gaming compacts with tribes.

ARGUMENT

The Tribe argues it has immunity from any state lawsuit unless it waives immunity (which it has not done) or unless Congress expressly authorizes the suit (which Congress has not done).

The FPPC argues, and the Court of Appeal found, the State courts have jurisdiction over this action to enforce the PRA because resorting to a judicial remedy is essential to secure the State's constitutional guarantee of a republican form of government.

Specifically, the Tribe's common law immunity from suit--created by the courts to effectuate Congress' Article I, cl. 3, § 8 powers--does not affect the State's rights guaranteed by Article IV, § 4 and reserved to the State by the Tenth Amendment--which limit Congress' Article I powers. In

this sense the State's constitutional authority "trumps" the Tribe's common law protections for self-governance and economic self-sufficiency. (See Slip. op. p.20).

Since the Supreme Court created this doctrine to effectuate Article I powers and the State relies on Article IV's *limit* on those powers, this case calls for no "harmonizing" of constitutional rights. (*Cf.* Slip dissenting op. p.1). No precedent has extended and this Court should not extend the common law doctrine to the facts of this case of first impression.

I. STATUTORY LIMITS ON CAMPAIGN CONTRIBUTIONS ARE A LEGITIMATE EXERCISE OF POWERS RESERVED TO THE STATES

The Tribe does not dispute the power of the State to regulate political campaigns or create contribution disclosure rules that operate within State borders. (Ptn. for Writ of Mandate p.24; Slip op. p.7).[5] Nor does the Tribe dispute that it is subject to those regulations. *See generally, Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973) (Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the state).

Instead, the Tribe argues that the State is "merely" powerless to *enforce* those regulations by bringing an action against the Tribe. The Tribe argues that the Tenth Amendment is not a source of state power but only a limit on the federal government and does not "constitutionalize" any powers that were reserved to the States (OBM pp.45-46). Further, the Tribe argues, the Guarantee Clause only requires the federal government to guarantee the States a republican form of government (OBM p.47), but does not empower States affirmatively to protect their reserved powers. Citing a 1972 law review article, the Tribe would limit this guarantee to the

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[5] The dissent agrees that the Tribe is subject to State regulation. (Slip. dissenting op. p.5).

States' right to a federal defense against slave revolts or monarchist revolutions. *Id.*

The Court of Appeal disagreed, holding that it is "entirely appropriate for the State to invoke the Guarantee Clause, together with its reserved right under the Tenth Amendment, to preserve its republican form of government--the very essence of its political process--from corruption." (Slip op. p.16).

It is the involvement of these express constitutional limits on the power of the federal government and specifically on Congress' Article I power that distinguishes this case from those upon which the Tribe relies. (OBM pp.42-44). The Tribe argues that the Tenth Amendment acts as a *disclaimer* of State power over tribes. (OBM p.43). To the contrary, the Tenth Amendment *reserves* the *specific* power, authority and obligation of States to protect their republican form of government guaranteed by Article IV, section 4. In turn, these state powers limit Congress' Article I power and limit (or "override" or "trump") any common law doctrine (such as Indian tribal immunity from suit) created by courts to effectuate Article I powers. This is why there is no "harmonizing" to be done of "conflicting constitutional provisions." (*Cf.* OBM p.11, Slip dissenting op. p.6).

A. THE GUARANTEE CLAUSE EMPOWERS STATES TO PROTECT THEIR REPUBLICAN FORM OF GOVERNMENT

The United States Supreme Court's more recent decisions have recognized a broader role for the Guarantee Clause and the Tenth Amendment than the Tribe describes. These decisions recognize Article IV, § 4 as a source of state power and name those Guarantee powers as powers specifically reserved to the States by the Tenth Amendment. They also recognize that States' Article IV powers and the Tenth Amendment are constitutional limitations on Congress' Article I powers.

In *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991), the Court describes its "recent line of authority" "recogniz[ing] explicitly the States' c*onstitutional power* to establish the qualifications for those who would govern" and "the manner in which they will be chosen" as well as the power to "regulate elections." (Emphasis added; citing cases). Where the question goes "to the heart of representative government," the States exercise authority and power "reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States 'guarantee[s] to every State in this Union a Republican Form of Government.'" 501 U.S. at 463 (citing U.S. Const., Art. IV, § 4 and *Sugarman v. Dougall*, 413 U.S. 634, 648 (1973) (recognizing State's constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of office holders; citing the Guarantee Clause and the Tenth Amendment)).

Justice O'Connor in *Gregory*, 501 U.S. at 508, and in *New York v. United States*, 505 U.S. 144, 157 (1992), cites a law review article in which Professor Merritt observed that the Guarantee Clause supplies a firmer base for restrictions on congressional interference with state or local franchises than vague references to the Tenth Amendment or "considerations of federalism." Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L.Rev. 1, 38 (1988). "The plain language of the guarantee clause, . . . secures this power to state governments in a way that other provisions of the Constitution cannot. The courts can affirm state control over the franchise for state and local elections by recognizing that this power is one of the aspects of republican government promised the states by the guarantee clause." *Id.*

B. ANTI-CORRUPTION CAMPAIGN LAWS ARE AN EXERCISE OF ARTICLE IV POWERS

Consistent with this reasoning, the Court of Appeal determined that the right and duty of the State to maintain a republican form of government necessarily includes the right to elect representatives and to protect against corruption of the political process. (Slip op. p.13).

"By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration." *Duncan v. McCall,* 139 U.S. 449, 461 (1891)(Slip op. p.13). "[T]he Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." *Oregon v. Mitchell,* 400 U.S. 112, 124-125 (1970) (footnote omitted) (opinion of Black, J.). Similarly, the authority of the States to determine the qualifications of their government officials is an authority that lies at " 'the heart of representative government.' " *Gregory v. Ashcroft,* 501 U.S. at 463. "It is a power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States 'guarantee[s] to every State in this Union a Republican Form of Government.' U.S. Const., Art. IV, § 4." *Id.*

Oregon v. Mitchell invalidated a provision of the federal Voting Rights Act of 1965 making eighteen year olds eligible to vote in state and local elections. While the decision has since been abrogated by the 26th Amendment, *Gregory* invoked Justice Black's forceful expression of state sovereign powers*:* "No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices." 400 U.S. at 125.

State statutes like the PRA are legitimate expressions of state sovereign power to protect the integrity of state elections. *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377 (2000), upheld a Missouri statute limiting contributions to state candidates. The Court held that *Buckley v. Valeo,* 424 U.S. 1 (1976) (construing provisions of the Federal Election Campaign Act), is authority for comparable state limits on contributions to state political candidates. 528 U.S. at 381. The Court recognized the State's legitimate and substantial "interests of preventing corruption and the appearance of it that flows from munificent campaign contributions." 528 U.S. at 390. *See also, e.g. Rosario v. Rockefeller,* 410 U.S. 752, 761 (1973) (citing additional cases) (preservation of the integrity of electoral processes is a valid state goal); *Libertarian Party v. Eu,* 28 Cal. 3d 535, 542 (1980) (state interest in preserving integrity of elections is compelling). The *Shrink Missouri* Court concluded: "Even without *Buckley,* there would be no serious question about the legitimacy of these interests, which underlie bribery and antigratuity statutes."[6] 528 U.S. at 899.

Institute of Governmental Advocates v. Fair Political Practices Com'n, 164 F.Supp. 2d 1183, 1194-95 (E.D. Cal. 2001), recognized that the State's interest in preventing corruption supported limitations on contributions by lobbyists. (Getman Dec., Ex. E)(App. Vol. 3, pp.0680-0681). *Fair Political Practices Commission v. Superior Court,* 25 Cal. 3d 33, 46-49 (1979), upheld the lobbyist registration and reporting requirements of the PRA, finding the State had a "valid interest in determining the source of voices seeking to influence legislation and could reasonably require the professional lobbyist to identify himself and disclose his lobbying activities" as well as "disclosure of financial activities of persons engaged in political processes." *Id.* at 47.

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[6] The PRA also contains antigratuity provisions. (Gov't Code §§ 89501-89503).

Thus, as a matter of fact and of law, California voters exercised sovereign powers integral to preservation of their republican form government--reserved to the States through the Tenth Amendment and guaranteed by Article IV, § 4--when they adopted the PRA. This statute, aimed at the potentially corrupting influence of money on elections and legislative processes, promotes interests within the "essential, fundamental core" of State sovereignty. According to this Supreme Court precedent, the State's exercise of this authority is an exercise of constitutionally protected powers. The Court of Appeal agreed; this Court should reject the Tribe's argument to the contrary.

II. THE SUPREME COURT HAS SUGGESTED THAT STATES MAY INVOKE THE GUARANTEE CLAUSE AND TENTH AMENDMENT TO ENFORCE STATE RIGHTS

The Court of Appeal noted the suggestion of Guarantee Clause justiciability in *New York v. U.S.*, 505 U.S. 144 (1992), and agreed with Professor Laurence Tribe that, in light of *New York*, the question of the justiciability of the Guarantee Clause *when asserted by a state* is not foreclosed. (Slip op. p.15 (citing 1 Tribe, American Constitutional Law (3rd ed. 2000) §§ 5-12, pp.910-911)).

A. THE COURT'S DECISIONS SUPPORT THE STATE'S INVOCATION OF THE GUARANTEE CLAUSE

The Tribe's argument would deny States the means to enforce their reserved powers. The Tribe argues that even assuming the State's power and authority to protect the integrity of its elections and legislative processes is constitutional, the United States Supreme Court has "never suggested" that a state can invoke its Guarantee Clause authority to initiate a lawsuit in pursuit of maintaining its republican form of government. (OBM p.48).

However, that is exactly what the Court "suggested" when the State of New York and three of its counties sued the United States in connection with the Low-Level Radioactive Waste Policy Act. As the Court of Appeal points out, in the Supreme Court cases relied on by the Tribe (OBM p.48) and discussed in *New York*, 505 U.S. at 185, *individuals*, as opposed to *States*, invoked the Guarantee Clause. (Slip. op. p.14).

The State petitioners asserted that certain provisions of the Act were inconsistent with the Tenth Amendment and with the Guarantee Clause. *Id.* 505 U.S. at 155.

The Court first found that the Tenth Amendment alone limited Congress' Article I power and required a finding that the statute's "take title" provision was an unconstitutional infringement on state sovereignty. Recognizing the Tenth Amendment "confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States," the Court observed: "The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power." *Id.* at 157. Ultimately, "it makes no difference whether one views the question at issue in these cases as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment." *Id.* at 159. Viewed either way, the Act's requirement that States either take title to radioactive waste or adopt state regulations consistent with federal policy was inconsistent with the federal structure of our Government established by the Constitution. *Id.* at 177.

New York next addressed the petitioners' argument that the Act was also inconsistent with the Guarantee Clause. *Id.* at 184. The Court recounted the origin of the view that the Guarantee Clause implicates only nonjusticiable political questions. *Id.* The Court pointed to several cases in

which the Court had in fact reviewed the merits of Guarantee Clause claims, *id.* at 184-85, and to its recent "suggestion" that "perhaps not all claims under the Guarantee Clause present nonjusticiable political questions," *id.*.

The Court determined that it "need not decide that difficult question today" because it was unnecessary to analysis of the "take title" provisions (which affected the "core of sovereignty" retained by the States under the Tenth Amendment) and because the remaining provisions of the Act at issue could not reasonably be said to "deny any State a republican form of government." *Id.* at 185.

Because the United States Supreme Court has *not* resolved "this difficult question," there is no basis for this Court to determine that it is bound by the Supreme Court's "exposition of federal law" (Slip. op. p.15; *cf.* OBM at p.49 (and cases cited)) or by lower federal court rulings. *See Rohr Aircraft Corp. v. County of San Diego*, 51 Cal. 2d 759, 764-765, *revd. on other grounds* 362 U.S. 628 (1960) (state supreme court enjoys position equal to that of lower federal courts where questions of federal statutory and constitutional law are involved, and is bound only by contrary rulings of United States Supreme Court).

B. THE STANDARDS FOR RESOLVING THESE CLAIMS ARE JUDICIALLY DISCOVERABLE AND MANAGEABLE

The standards for resolving this dispute are both judicially discoverable and manageable. Again, Professor Merritt is persuasive:

> The Supreme Court itself has declared that "we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution." [citing *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 176 (1875)] Widespread concurrence exists over the core notion of republican government; scholars and jurists agree that a republican government is one in which all power stems from the people. [fn omitted] Enforcing the fundamentals of

> republican government provides a judicial standard at least as manageable as the malleable standards supplied by the equal protection or due process clauses. [fn. omitted.]
>
> Judicial enforcement of the guarantee clause's solicitude for the independence of state governments, moreover, does not require "an initial policy determination of a kind clearly for nonjudicial discretion." [fn. omitted] The only "policy determination" demanded by this interpretation of the guarantee clause is that the states should maintain a "separate and independent existence." [fn. omitted] That policy decision, however, has already been made by the Constitution and is embedded in our constitutional history. Enforcement of a state's claim to autonomy under the guarantee clause hardly involves the Court in an "initial" policy decision of any kind.

88 Colum. L. Rev. at 76. The Court of Appeal had no difficulty finding and applying those standards.

The Tribe cites two lower court cases involving claims by States (as opposed to individuals). These decisions do not hold that Guarantee Clause assertions by States are never justiciable and are not binding on this Court in any event. *Rohr Aircraft,* 51 Cal. 2d at 764-65.

The Ninth Circuit in *California v. United States*, 104 F.3d 1089 (9th Cir. 1994) (OBM p.48), pointed to the discussion in *New York* but then stated "assuming, *arguendo,* that California has presented a justiciable claim, there is nothing in this record other than a mere bare contention that the federal government's policies deny California a republican form of government." *Id.* at 1091. *See also New Jersey v. United States*, 91 F.3d 463, 470 (3rd Cir. 1996) (decisions about immigration law enforcement involve policy judgments committed by the Constitution to the political branches of government; there are no "judicially discoverable and manageable standards for resolving" them; independent resolution by courts would express lack of respect due a coordinate branch of government).

Here, in contrast to the immigration policy issues posed by *California v. United States* and *New Jersey v. United States*, the United

States Supreme Court *has* recognized that the Constitution reserves power and authority to protect the State franchise, including the integrity of the State's elections, to the State. The FPPC has not merely contended, but provided evidence of the threat to California's republican form of government.

State court resolution of the issues in this case expresses no disrespect for Congress. Congress has not acted in this arena, its authority to act is limited by the Guarantee Clause and the Tenth Amendment, and its affirmative obligation as a branch of the federal government is to guarantee the State's republican form of government. As a matter of constitutional law, there is no basis for deference to Congress for resolution of the issues presented by this case.

C. ARTICLE IV PRESUPPOSES THE MEANS TO EFFECTUATE ITS GUARANTEE

Finally, the Supreme Court not only recognizes that Article IV, section 4 is an express statement of powers reserved by the Tenth Amendment, but it also recognizes that the Clause "presupposes the continued existence" of "those *means and instrumentalities* which are the creation of [the States'] sovereign and reserved rights." *Printz v. United States,* 521 U.S. 898, 919 (1997) (emphasis added). The Court recognized long ago that one of those "means and instrumentalities" is the "creation of a judicial department and the appointment of officers to administer their laws." *Helvering v. Gerhardt,* 304 U.S. 405, 414-415 (1938) (cited by *Printz,* 521 U.S. at 919). Without the "means and instrumentality" of state court actions, the promise of the Guarantee Clause would be "ephemeral." (Slip. op. pp.17-19). Specifically with respect to the PRA, all of its enforcement provisions would be abrogated.

Professor Merritt's article concludes that "[d]espite these sweeping statements, the . . . guarantee clause should be fully enforceable in the

courts. Even if the courts continue to dismiss some claims bottomed on the guarantee clause as political questions, neither Supreme Court precedent nor considerations of policy foreclose adjudication of claims that the federal government has violated the guarantee clause by intruding upon state autonomy." 81 Colum. L. Rev. at 70-71.

Here, the FPPC invokes the Guarantee Clause and the Tenth Amendment as the constitutional guarantees of its power and authority to protect its republican form of government, free from express or implied interference by Congress. The FPPC asserts that state court actions, the means and instrumentality to protect the integrity of its elections, are an incident of State sovereignty protected by a limitation--the Guarantee Clause and the Tenth Amendment--on a congressional Article I power--power conferred under the Indian Commerce Clause.

III. CONGRESS MAY NOT, BY ACTION OR INACTION, INFRINGE ON THE STATE'S POWER TO PROTECT ITS FRANCHISE

Implicit in the Tribe's argument is the premise that tribal sovereign immunity is coextensive with Congress' power over Indian commerce, However, because the Guarantee Clause and the Tenth Amendment limit congressional Article I power, it cannot be, contrary to the Tribe's argument, that either congressional inaction or a common law doctrine created to effectuate Article I powers has the effect of precluding this action to enforce the PRA against California's largest campaign contributors.

The parties agree that Congress has not authorized (or proscribed) this action. (OBM pp.2, 10). Further, the Tribe recognizes that Congress could authorize States to enforce their campaign contribution laws against tribes. That is, Congress may restrict or relax tribal sovereign immunity from suit. (OBM p.15 (citing cases)).

The Tribe asserts that the lack of an affirmative congressional grant of authority ends the matter. (OBM p.20). Or, stated otherwise, unless Congress authorizes States to protect the integrity of their elections against corruption by tribes, the States are powerless to do so. In effect the Tribe argues that Congress *may* interfere with the integrity of state elections by remaining silent and by failing to effectuate the State's Article IV powers by authorizing state enforcement against Indian tribes.

However, to protect the federal system of dual or joint sovereigns the United States Supreme Court has articulated a "plain statement rule" applicable to "traditionally sensitive areas, such as legislation affecting the federal balance." *Gregory,* 501 U.S. at 461. *Gregory v. Ashcroft* applied the plain statement rule in the context of the Guarantee Clause and the Tenth Amendment to preclude a finding of implied congressional intent to interfere with state elections by applying age discrimination laws to state judicial officers. Quoting *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 242 (1985), the Court expressed the rule:

> "[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute."

Id. at 460-61. The plain statement rule applies to the unique arena of state decisions that "go to the heart of representative government." As has been shown, regulating the influence of money on elections and legislative processes is as much at the heart of representative government as would be the selection of judicial retirement ages.

More recently, the Supreme Court's decision upholding the McCain Feingold Bipartisan Campaign Reform Act of 2002 (BCRA), *McConnell v. Federal Election Com'n,* 540 U.S. 93 (2003), emphasized the right of States to enforce their own protective statutes free from congressional interference. The Court noted the constitutional limits on congressional

power to interfere with such state protections: "[T]his Court has done more than just prevent Congress from commandeering the States. We have also policed the absolute boundaries of congressional power under Article I." *Id.* at 187. Upholding BCRA as a legitimate exercise of Election Clause powers, the Court reasoned, "Congress has a fully legitimate interest in maintaining the integrity of federal office holders and preventing corruption of federal electoral processes through the means it has chosen." *Id.* The Court rejected a Tenth Amendment challenge to the statute because BCRA only regulates the conduct of private parties and the statute "imposes no requirements whatsoever upon States or state officials, and, because it does not expressly pre-empt state legislation, it leaves the States free to enforce their own restrictions on the financing of state electoral campaigns." *Id.* at 186.

In summary, the Supreme Court has recognized that Congress may not interfere directly--whether expressly *or by silence*--with state regulation of state elections (except through application of the Civil War Amendments[7]). The Guarantee Clause, the Tenth Amendment *and* the "plain statement" rule all preclude reliance on congressional inaction to find a federal barrier to this enforcement action.

IV. "MERELY" DEPRIVING STATE COURTS OF JURISDICTION TO PROTECT THE INTEGRITY OF STATE ELECTIONS WOULD BE A DRAMATIC INFRINGEMENT ON STATE SOVEREIGNTY

The Tribe would have this Court disregard the lack of precedent for the Tribe's position and find that lack of state court jurisdiction over actions

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[7] *See generally, City of Rome v. U. S.*, 446 U.S. 156, 179-80 (1980) (principles of federalism that might otherwise be an obstacle to congressional authority may be overridden by power to enforce Civil War Amendments).

to enforce state laws protecting the "essential, fundamental core" of state sovereignty would be "merely" an inconvenience that would not impair state sovereignty. (OBM p.50).

For this Court to announce that the State lacks the power to enforce the PRA through actions brought in the State's courts, would be to announce a dramatic infringement on state sovereignty. It would be to announce, in effect, that States, through the Commerce Clause, ceded to federally-recognized Indian tribes power to undermine our shared republican form of government--unless Congress undertakes affirmatively to guarantee powers *reserved by the Constitution to the States*. It would be to announce, in effect, that Congress, by inaction, may authorize these groups of citizens to deprive their fellow citizens of constitutionally guaranteed power to protect our shared elections from actual or threatened corruption. It would abrogate every enforcement provision of the PRA.

The Article IV, § 4 guarantee and Tenth Amendment reservation of powers would be meaningless, if either depended on affirmative action by the branch of government limited by those state powers. (*Cf.* OBM p.51 (California is free to ask Congress to abrogate suit immunity)).

The Tribe is not merely advocating a rule of comity for state judges to observe; it is advocating a rule that pre-empts state power. However, the fact that the States surrendered power over Indian commerce to Congress under the constitution does not in any way support an exception for Indian tribes from enforcement of state laws essential to preserving a republican form of government.

A. *OKLAHOMA TAX COMMISSION* DOES NOT SUPPORT THE TRIBE

No precedent supports the Tribe's argument that congressional action is necessary to effectuate a constitutional *limit* on Congress' Article I powers.

The Tribe cites *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma***,** 498 U.S. 505 (1991) (OBM p.52), for the proposition that the FPPC must avail itself of "less efficient" alternatives to bringing actions in state courts.[8] Because Oklahoma did not rely on (and the Court did not analyze) the Guarantee Clause, and because the subject matter was Indian commercial transactions (cigarette sales to non-members) occurring *on* Indian trust lands, *Oklahoma Tax Com'n* does not support the Tribe or affect the state court's jurisdiction in this case.

Oklahoma Tax Commission barred a suit to require a tribe to collect state sales tax on on-reservation cigarette sales to non-members. The Court agreed that Oklahoma had the right to tax the sales but applied the doctrine of sovereign immunity from suit to effectuate Congress' desire to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *Id.* at 510. While Oklahoma argued that the tribal sovereign immunity doctrine impermissibly burdened administration of state tax laws, the Court found no basis to modify the doctrine in the face of specific federal acts reflecting this federal policy. Oklahoma did not rely on Article IV, § 4 or any other reserved state power. On-reservation commercial activity, missing in this case, supported the Court's deference to Congress.

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[8] The Tribe also cites *Kiowa*, 523 U.S. at 758-59 (OBM at p.52) for this proposition. However, at this point in the *Kiowa* decision the Court questions the "wisdom of perpetuating" the doctrine. *Kiowa* describes *Oklahoma Tax Commission* as retaining the doctrine "on the theory that Congress had failed to abrogate it in order to promote economic development and tribal self-sufficiency." *Id.* at 757.

B. ALTERNATIVES TO COURT ACTIONS ARE UNAVAILABLE TO THE FPPC AS A MATTER OF FACT AND LAW

Lacking authority, the Tribe resorts to downplaying the impact of adopting its position. The Tribe argues that nothing in the record supports the proposition that recognition of tribal sovereign immunity from suit would deprive the people of the State of California of the right to protect their franchise. (OBM pp.49-50). It argues that immunity from suit "merely eliminates one of several options available to the FPPC." *Id.* at 50. It argues, without citation to authority, that the FPPC could negotiate an agreement, collect information from recipients of campaign contributions, or ask Congress to intervene to protect it. *Id.* at 51. The Tribe is incorrect as a matter of fact and law.

First, the FPPC is not free to disregard its statutory obligation to enforce the PRA. Until a court of appeal determines that a statute is unconstitutional, all administrative agencies must follow it. Cal. Const. Art. III, § 3.5; *see also,* Gov't Code §§ 81002(a) (requiring vigorous enforcement), (f) (limiting power to amend statute); *see generally, Lockyer v. Superior Court,* 33 Cal. 4th 1055, 1095-96 (2004) (regarding constitutional obligation).

The FPPC has no authority to negotiate with the Tribe concerning whether or the extent to which the Tribe will voluntarily observe its statutory obligations as a campaign contributor and lobbyist employer. The FPPC can neither agree to accept anything less than full compliance with the law nor agree not to enforce the law. The PRA itself precludes this. Gov't Code §§ 81002 (f), 81003. Indeed, as noted above, the Tribe does not dispute that it is bound by the PRA and FPPC regulations in the same manner as any other group of citizens. (Ptn. for Writ of Mandate p.24; Slip op. p.7). While administrative agencies such as the FPPC have implied authority to settle lawsuits (Ret. p.38; *see Stermer v. Board of Dental*

Examiners, 95 Cal. App. 4th at 133), no authority supports the Tribe's assertion that the FPPC (or any other State agent) may negotiate a "government-to-government agreement" with the Tribe as an alternative to enforcing the PRA according to its terms. (*Cf.* OBM at pp.9, 51). Moreover, the FPPC and the Tribe were unable even to reach an agreement to settle this action, as the Opening Brief on the Merits recognizes (OBM at pp.9-10).

Second, the FPPC addressed each "alternative" the Tribe has raised and supported its argument with evidence. The evidence showed that, as a matter of fact, it is not possible to determine the extent of the Tribe's contributions or lobbyist employer activity, unless the Tribe complies with the PRA's disclosure requirements. Nor can the FPPC accurately audit the contribution recipients' compliance. (Dec. of Alan Herndon, Chief Investigator for the Enforcement Division of the FPPC (Ex. 14 to Petition at pp.3-5 ¶¶ 4-10, Ex. A)(App. Vol. 3, 0694-0696, 0699-0700); (Dec. of James K. Knox, Executive Director of California Common Cause, ¶¶ 13-17)(App. Vol. 3, pp.0713-0714). Moreover, tribes can make independent expenditures to candidates or ballot measures. Gov't Code § 82031. However, the PRA contains no reciprocal reporting obligation for the beneficiaries of such independent expenditures. Voters cannot make informed decisions, when required reports are untimely or incomplete.

The FPPC's evidence showed voters can and do change their voting behavior when they are informed of the identities of the supporters or opponents of candidates or ballot measures. (See Getman Dec. Ex. A and C (Dec. of David Binder, principal in David Binder Research, dated Sept. 29, 2000, ¶¶ 10, 13; and Dec. of David Binder dated Dec. 7, 2001, ¶¶ 10, 21, with exhibits)(App. Vol. 3, pp.0526, 0528) and Ex. B (Dec. of Stephen Hopcraft, President and co-owner of Hopcraft Communications, ¶ 17)(App. Vol. 3, p.0548)).

Additional evidence showed information gleaned from publicly filed campaign finance disclosure reports is "absolutely critical" to sorting through claims and counter-claims about ballot measures. The Declaration of Bill Jones showed that neutral, nonpartisan application of the PRA's disclosure requirements is essential to accomplishing the PRA's purposes and the democratic process is grossly undermined when voters do not receive full and timely information about major contributors. The high public interest was indicated by the Cal-Access web site receiving more than 500,000 "hits" in the months leading up to the March 2002 primary election, giving public access to some 35,000 electronic filings. (Dec. of Bill Jones, Ex. B)(App. Vol. 2, p.0515).

This evidence showed the alternatives suggested by the Tribe and by Justice Davis' dissent (Slip. dissenting op. p.6)[9] are not, as a matter of *fact*, effective to accomplish the PRA's mandate.

Finally, the allegations of the FPPC's complaint (App. Vol. I, pp.0003-0018) belie the Tribe's assertions (OBM pp.5-6, 50) that its voluntary compliance suffices to protect its fellow citizens and the integrity of the State's elections. The FPPC sued the Tribe and brought the companion case as well, because these tribes were *not* complying voluntarily with the PRA.

C. COURT ACTIONS ARE A NECESSARY INCIDENT TO ENFORCEMENT OF THE PRA

In summary, the FPPC showed that without the power to enforce by bringing actions in state courts, the guarantee of Article IV, § 4 and the reservation of powers by the Tenth Amendment would be empty promises.

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[9] The dissenting opinion makes factual conclusions that contradict the FPPC's evidence and does not cite legal authority for its "viable alternatives." (Slip dissenting op. pp.6-7)

This action asserts the State's "residuary and inviolable sovereignty," *Printz*, 521 U.S. at 919, and constitutes the "means or instrumentality" of its preservation, the "continued existence" of which is "presupposed" by the Guarantee Clause, *id.*. The FPPC showed that without the power of state courts to adjudicate violations of the PRA, California could not preserve the existence of its republican form of government from the threat of corruption by tribal campaign contributions.

In addition, where, as here, tribes have no tradition of sovereignty and where state sovereign interests are extraordinary, even in the absence of an express delegation of authority by Congress, the courts have recognized that a necessary incident of the power to regulate is the power to enforce. For example, *Fort Belknap Indian Community of Fort Belknap Indian Reservation v. Mazurek*, 43 F.3d 428 (9th Cir. 1994), *cert. denied* 516 U.S. 806 (1995), dealt with the regulation of liquor *in* Indian Country. Since there is no tradition of Indian sovereignty in this arena, "little if any weight" would be accorded to asserted interests in tribal sovereignty. *Id.* at 433. The court in *Fort Belknap* reasoned that, without the power to prosecute violations, the state authority to regulate would be meaningless and the state's high interest unprotected. *Id.* at 434.

The same reasoning applies *a fortiori* to the exercise of inherent state authority--guaranteed by the Constitution--to protect the integrity of State elections and legislative processes through the means and instrumentalities protected by the Guarantee Clause.

For all of these reasons resort to a judicial remedy is essential to secure the state's constitutional right to guarantee a republican form of government free of corruption. (Slip. op. pp.17-20). This Court should reject the suggestion of the Tribe and the dissent that depriving the state courts of jurisdiction over FPPC enforcement actions would be a mere inconvenience. It would be an impairment of powers guaranteed and

reserved to the States by the Constitution, protections of state sovereignty that preclude Congressional infringement where the integrity of state elections and legislative processes *including* tribal participation (as opposed to protecting the integrity of tribal *separation* through self-governance and economic self-sufficiency) are concerned.

V. TRIBAL SOVEREIGN IMMUNITY FROM SUIT IS A COMMON LAW DOCTRINE, THE SCOPE OF WHICH THIS COURT HAS JURISDICTION TO DETERMINE

Having demonstrated that the PRA is a legitimate exercise of State constitutional powers, having demonstrated that in this arena Congress' Article I powers are limited by Article IV, § 4 and the Tenth Amendment and that congressional silence is insufficient to alter the core of state sovereignty, and, finally, having shown that the proposed infringement on State power would vitiate the constitutional guarantee upon which the State relies, we turn to the Court-created doctrine of tribal sovereign immunity from suit.

In this section, the FPPC shows that tribal immunity from suit is a common law doctrine and that this Court has the power to determine whether it applies to this case of first impression. In the following sections of the Argument, the FPPC shows that *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), does not address the issues raised in this case and that neither the concept of "inherent sovereignty" nor the preemption analysis in the decisions cited by the Tribe supports the Tribe's proposed extension of the doctrine to thwart state court jurisdiction in this case.

A. THE DOCTRINE OF IMMUNITY FROM SUIT IS A COMMON LAW CREATION

Despite the Court's persistent and growing unease with the doctrine it unleashed "almost by accident," *Kiowa,* 523 U.S. at 756, and despite its

express recognition that it could, and perhaps should, reexamine and decline to extend it,[10] the Tribe treats the doctrine as one that, *as a matter of constitutional law,* is uniquely within the power of Congress to expand or curtail. (OBM p.33-40). The Tribe's argument misapprehends the nature of common law doctrines and the courts' role in their development.

The Court of Appeal found that the so-called doctrine of tribal immunity from suit is a creature of federal common law, not a requirement of constitutional law. (Slip. op. pp.20). This conclusion is supported by the Supreme Court's opinions. *Kiowa* recounted the origins of the doctrine in the Court's decisions and described the doctrine as court-created. 523 U.S. at 757-59. Law developed by federal courts in the absence of controlling constitutional or statutory provisions is federal common law. (Slip op. pp.8-9 (citing *United States v. Enas*, 255 F.3d 662, 674-75 (9th Cir. 2001)). *See also, Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("Indian tribes have long been recognized as possessing the common-law immunity from suit"); *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 890-891 (1986) ("The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance.").

Even as it applied this common law doctrine, *Kiowa* recognized that Congress itself is "subject to constitutional limitations" in legislating the limits of the doctrine. 523 U.S. at 759. These "constitutional limitations," according to the Court's reasoning, necessarily also limit the common law

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[10] The doctrine of sovereign immunity from suit is founded upon "an anachronistic fiction." *Oklahoma Tax Com'n*, 498 U.S. at 514 (Stevens, J. concurring). There are "reasons to doubt the wisdom of perpetuating the doctrine." *Kiowa* 523 U.S. at 758. While it is too late to repudiate the doctrine entirely, it should not be extended "beyond its present contours." *Kiowa, id.* at 764 (Stevens, J. dissenting with Ginsberg and Thomas, JJ.). "[T]he time has come to reexamine the premises and logic of our tribal sovereignty cases." *United States v. Lara*, 541 U.S. 193, 124 S.Ct. at 1641 (2004) (Thomas, J. concurring).

doctrine created by the Court to effectuate Congress' Article I powers. In other words, the *Kiowa* Court understood that it was under no *constitutional* compulsion to extend the doctrine to that case but chose to do so in deference to Congress' Article I authority over Indian affairs. In the context of a "commercial suit against an Indian Tribe" (*id.* at 753), the Court retained the doctrine "on the theory that Congress had failed to abrogate it in order to promote economic development and tribal self-sufficiency" (*id.* 757-58).

This case raises constitutional limits on Congress' Article I power (and therefore on the common law doctrine created to effectuate that power)--Article IV, § 4 and the Tenth Amendment--anticipated in *Kiowa*, but not yet considered by the Supreme Court. The State's constitutional rights in this case expressly limit or "trump" a common law doctrine "anchored in" congressional legislative power over Indian affairs. (See Slip. op. p.20).

B. WHETHER THE COMMON LAW DOCTRINE EXTENDS TO THE FACTS OF THIS CASE IS WITHIN THIS COURT'S JURISDICTION TO DETERMINE

Since courts do not legislate and are bound by the Constitution, the Tribe's challenge to the decision below as creating an impermissible "*exception*" to the common law is untenable. (OBM pp.33-66) *Cf. Kiowa*, 523 U.S. at 764-65 (Stevens, J. dissenting) (creation of a federal common-law "default" rule of immunity would not be deferring to Congress or exercising caution but would be performing a legislative function).

While Congress has abrogated the doctrine in myriad contexts, the courts retain the power to determine whether the court-created doctrine *extends* to novel circumstances, especially those involving Article IV and Tenth Amendment limits on Article I power, an arena where the Supreme

Court has not spoken. *Kiowa* requires this analysis by recognizing the constitutional limits to Congressional authority. 523 U.S. at 759.

As a general proposition this Court's authority and duty to examine the principles underlying the common law rule and to determine, in light of the facts presented, whether they apply to the novel circumstances before the Court is well-established. *See generally, Rodriguez v. Bethlehem Steel Corp.,* 12 Cal. 3d 382, 393 (1974) (describing judicial responsibility for the upkeep of the common law; rejecting argument that spouse's recovery for loss of consortium "should be left to legislative action"); *see also* Mosk, *The Common Law and the Judicial Decision-making Process* (1988) 11 Harv. J.L. & Pub. Pol'y 35, 36 ("The vitality of the common law can flourish if the courts remain alert to their obligation and have the opportunity to change it when reason and equity so demand.").

Justice Souter's concurring decision in *Washington v. Glucksberg,* 521 U.S. 702, 771 (1997) (considering Washington statute on assisted suicide), explains why the common law tradition rejects the all-or-nothing, absolutist approach advocated by the Tribe:

> the usual thinking of the common law is suspicious of the all-or-nothing analysis that tends to produce legal petrification instead of an evolving boundary between the domains of old principles. Common-law method tends to pay respect instead to detail, seeking to understand old principles afresh by new examples and new counterexamples.

Id. This method of analysis applies to determining the contours of constitutional rights (*see e.g. People v. Sandoval*, 87 Cal. App. 4th 1425, 1434 (2001) (recognizing process of defining requirements of Confrontation Clause; analyzing underlying interests)) as well as of common law rights (*see e.g. Rodriguez v. Bethlehem Steel Corp.,* 12 Cal. 3d 382 (1974) (recognizing cause of action for loss of spousal consortium;

examining experience in other States as well as reason for prior contrary rule).

"This case confirms the wisdom of Justice Holmes's observation that 'The life of the law has not been logic: it has been experience.' (Holmes, *The Common Law* (1881) p.1)." (Slip op. pp.24-25 (as modified)).

In the absence of any United States Supreme Court (or even lower federal court) precedent applying the common law doctrine of tribal immunity from suit to state exercises of Article IV, § 4 and Tenth Amendment reserved powers, this Court has the power and duty to determine whether the doctrine should be extended to this case. The origins and application of the doctrine (which happen to be matters of substantial dispute among the current justices of the United States Supreme Court) indicate that this Court should not (and the Supreme Court would not) extend the doctrine to this case.

VI. THE SUPREME COURT'S DECISIONS DO NOT SUPPORT EXTENSION OF THE DOCTRINE TO ABROGATE RESERVED POWERS

Finally, the FPPC demonstrates that the United States Supreme Court cases upon which the Tribe relies (1) do not address the issues raised by this case, (2) do not support the Tribe's view of unlimited congressional power to interfere with state sovereign power over state elections and (3) are not inconsistent with the FPPC's argument that the State is empowered by the Guarantee Clause and the Tenth Amendment to protect its elections from corrupting contributions, including from Indian tribes.

The Court has rejected an "inflexible *per se* rule precluding state jurisdiction over tribes and tribal members in the absence of express congressional consent," *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-15 (1987) in favor of a case-by-case analysis trending away from the idea of inherent Indian sovereignty as an independent bar to

state jurisdiction and toward reliance on federal pre-emption, *Three Affiliated Tribes*, 476 U.S. at 884.

Neither the older "inherent sovereignty" nor the more recent "federal preemption" decisions support the extension advocated by the Tribe. All of these decisions are "anchored in" an analysis of Congress' Article I legislative authority over Indian affairs. Most involve interpretation of federal statutes. All relate to tribal internal self-governance or commercial activities. Many do not involve immunity from suit. And, of course, many are split, reflecting not only the Court's unease with broad application of Indian sovereignty in this era of interconnected commercial enterprises on- and off-reservations, but also intense disagreement about how these concepts relate to each other and whether they support a given result.

None deals with state self-governance, state elections, or state legislative processes. None deals with tribes as groups of state citizens participating in state self-governance (rather than entities, the separateness of which is to be preserved, protected and promoted). None raise the Article IV and the Tenth Amendment "constitutional limitations" on Congress' legislative power anticipated but not at issue in *Kiowa*. 523 U.S. at 759.

No precedent cited by the Tribe states or suggests that Article IV, § 4 and the Tenth Amendment have ever been determined by the United States Supreme Court to be immaterial to the question of tribal immunity from suit. (Slip op. p.23).

In the absence contrary precedent, this State's highest Court should find that the United States Constitution does not constrain but only protects the State's power to protect the integrity of its elections.

A. *KIOWA* DOES NOT SUPPORT THE TRIBE

Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998), is the Supreme Court's most recent discussion of tribal

sovereign immunity from suit. The Court described the action as a "commercial suit against an Indian Tribe." *Id.* at 753. The Kiowa Industrial Development Commission agreed to buy certain stock and gave the respondent a promissory note in the name of the Tribe. In a paragraph entitled "Waivers and Governing Law," the note provided: "Nothing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma." *Id.* at 754-54. The respondent sued in state court to enforce the note.

In this commercial context the Court extended the doctrine to "suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." 523 U.S. at 760. In so doing, the Court relied on the Indian Commerce Clause and deferred to Congress as the appropriate branch of the federal government to determine the extent to which tribal sovereign immunity from suit should be abrogated or restricted. *Id.*

As broad as its holding is phrased, *Kiowa* says nothing about tribal sovereign immunity from suits in connection with tribal participation in a state's political processes or affecting sovereign powers reserved to the States by the Guarantee Clause and the Tenth Amendment. In fact, it recognized that Congress' authority in this arena is "subject to constitutional limitations." 523 U.S. at 759.

Three dissenting justices criticized the Court for suggesting that precedent supported this extension:

> Despite the broad language used in prior cases, it is quite wrong for the Court to suggest that it is merely following precedent, for we have simply never considered whether a tribe is immune from a suit that has no meaningful nexus to the tribe's land or its sovereign functions. Moreover, none of our opinions has attempted to set forth any reasoned explanation for a distinction between the States' power to regulate the off-reservation conduct of Indian tribes and the States' power to adjudicate disputes arising out of such off-reservation conduct.

523 U.S. at 764 (Stevens, J., dissenting).

Here, in contrast to the situation in *Kiowa*, not only is there no commercial context and no nexus to the Tribe's land or its sovereign functions to support deference to Congress' Article I powers, but the Guarantee Clause and the Tenth Amendment independently preclude such deference, as discussed above. This case concerns not commerce but rather the political processes of state government. (Slip op. p.12). *Kiowa* did not consider or in any way involve these issues.

B. TRIBAL INHERENT AUTHORITY RECOGNIZED BY THE SUPREME COURT HAS NO RELATION TO TRIBAL PARTICIPATION IN STATE GOVERNMENT PROCESSES

Supreme Court discussions of the scope of tribal "inherent authority" (to legislate, regulate or adjudicate) do not assist the Tribe. (OBM pp.12-16). These discussions point toward effectuating congressional power to develop policies preserving the *separateness* of tribes. They point away from having anything to do with the scope or source of tribal authority to be *included* in the operation of state governments and selection of state public officials. These cases emphasize the "geographical component" of tribal sovereignty--its relation to tribal authority over *on reservation* activities of members and sometimes non-members--as well as the federal policy commitment to tribal self-governance and economic self-sufficiency. This case, in contrast, involves no on-reservation activity. It involves *State* self-governance, not tribal self-governance.

Thus, citing *Worcester v. Georgia,* 31 U.S. 515 (1832) (OBM p.12), the Supreme Court has said that the sovereignty of Indian tribes derives from their pre-existing indigenous rights to land and powers of self-governance. *Santa Clara Pueblo v. Martinez,* 436 U.S. at 55 (OBM p.13) (citing *United States v. Kagama,* 118 U.S. 375, 381-382 (1886) ("possessed

of the full attributes of sovereignty," tribes remain "separate people, with the power of regulating their internal and social relations.")); *see also Cherokee Nation v. Georgia*, 5 Pet. 1, 16, 8 L.Ed. 25 (1831) (OBM p.12) (describing tribe as "a distinct political society, separated from others, capable of managing its own affairs and governing itself").

The authors of the opinions from which the immunity doctrine arose could not have understood that the States gave up power to protect their own rights of self-governance as a consequence of delegating to Congress the power and duty to protect tribal self-governance. They could not have imagined grant of full citizenship to Indians (in 1924), when they first described tribal sovereignty in terms of separate, non-intersecting spheres of federal/Indian and state jurisdiction. *See generally, Organized Village of Kake v. Egan*, 369 U.S. 60, 73 (1962) (OBM pp.15-16) (early notion that an Indian reservation is a distinct nation within whose boundaries state law cannot penetrate, has yielded to closer analysis when confronted, in the course of subsequent developments, with diverse concrete situations).

Discussions of "inherent sovereignty" have emphasized that it refers to tribal powers over internal affairs and does not authorize control over non-members with respect to external affairs. Thus, "[w]here non-members are concerned, the 'exercise of tribal power *beyond what is necessary to protect tribal self-government or to control internal relations* is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.'" *Nevada v. Hicks*, 533 U.S. 353, 359 (2001) (emphasis added). Also, "the retained sovereignty of the tribes is that needed to control their own internal relations, and to preserve their own unique customs and social order." *Duro v. Reina*, 495 U.S. 676, 685-86 (1990)[11]; *see also, Strate v. A-1 Contractors*, 520 U.S. 438, 445-446 (1997) ("In the main . . . 'the inherent sovereign powers of an Indian tribe'--

those powers a tribe enjoys apart from express provision by treaty or statute--'do not extend to the activities of non-members of the tribe'" (quoting *Montana v. United States*, 450 U.S. 544, 565 (1981)).

The most recent discussion of the nature and scope of inherent sovereignty involved a tribal criminal prosecution (without objection by the defendant) of a non-member Indian for assault on a federal officer occurring in Indian country. *United States v. Lara*, 541 U.S. 193, 124 S.Ct. 1628 (2004), emphasized the *geographical* limits of inherent sovereignty. The Court held that Congress possessed constitutional power (under the Indian Commerce Clause) to lift or relax restrictions on Indian tribes' criminal jurisdiction over nonmember Indians for conduct occurring in their territory that political branches of government had previously imposed. The Court explained, among other factors, that the federal statute concerning tribal exercise of power was "similar in some respects to the power to prosecute a tribe's own members--a power that this Court has called 'inherent.'" (Citing *United States v. Wheeler*, 435 U.S. 313, 322-323 (1978)). *Id.* at 1636. "In large part it concerns a tribe's authority to control events that occur upon the tribe's own land" (citing *United States v. Mazurie*, 419 U.S. 544, 557 (1975) ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and *their territory*" (emphasis added by Supreme Court)). *Id*. The critical fact underlying all of the justices' analyses[12] was that the assault and prosecution occurred *in Indian Country.*

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[11] Legislatively overruled by 25 U.S.C. § 1301(2) and (3).

[12] The concurring opinions of Justices Kennedy, 124 S.Ct. at 1639-41, and Thomas , 124 S.Ct. at 1641-49, and the dissenting opinion of Justice Souter (joined by Justice Scalia), 124 S.Ct. at 1649-51, took issue with the majority's constitutional analysis, including its discussion of "inherent sovereignty."

As the Tribe points out, this inherent sovereignty has not only preserved tribal power over internal affairs, but has also shielded tribes from state regulation of *on-reservation* activities by members and even non-members. (OBM pp.15-17). Thus, for example, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (OBM pp.15, 17 n.7), held that the state had no authority to apply ordinances regulating bingo and prohibiting the playing of draw poker and other card games inside reservations. *See also Mescalero Apache Tribe*, 476 U.S. at 339 (finding no jurisdiction to enforce state game laws with respect to *on reservation* hunting and fishing; concurrent state jurisdiction would nullify tribe's authority to regulate use of its wild life resources and threaten Congress' commitment to encouragement of tribal self-sufficiency and economic development) (OBM pp.13, 17 n.7)

On the other hand, the "geographical component" of tribal sovereignty dictates that the *off-reservation* activities of Indians are generally subject to the prescriptions of a "nondiscriminatory state law" in the absence of "express federal law to the contrary." *Mescalero Apache Tribe*, 476 U.S. at 336 n.18 (citing cases); *see also Organized Village of Kake*, 369 U.S. at 75 (Indian communities not authorized to use fish-traps in Alaska waters in violation of Alaska law) (OBM p.15); *Boisclair*, 51 Cal. 3d 1140, 1158 (1990) (if primary situs of acts is outside Indian territorial boundaries, tribal defendants have acted beyond their sovereign authority and are not protected by sovereign immunity).

It is in the context of this "territorial component" of tribal sovereignty that the Court has described tribal sovereign immunity from suit as an attribute of their inherent powers of self-governance. *See Oklahoma Tax Commission*, 493 U.S. at 509 (tribal suit seeking injunction against collection of state taxes on cigarette sales on land held in trust for tribe; Indian tribes are domestic dependent nations that exercise sovereign

authority; suits against the tribes are thus barred by sovereign immunity); *Three Affiliated Tribes,* 476 U.S. at 890-91 (tribal suit against engineering firm for negligence in design and construction of water system located entirely within boundaries of Indian reservation; common law sovereign immunity possessed by an Indian tribe is a necessary corollary to Indian sovereignty and self-governance); *United States v. United States Fidelity and Guaranty Co.,* 309 U.S. 506, 512 (1940) (tribes exempt from suit under "public policy that exempted dependent as well as dominant sovereignties from suit without consent").

The Tribe would have this Court overlook the "geographical component" (and factual context) underpinning these "inherent sovereignty" decisions. While the Supreme Court has described immunity from suit as effectuating the federal policy of tribal autonomy over internal affairs, it has not applied (or described) the policy of protecting inherent tribal sovereignty to preclude state court action to enforce regulatory authority over *state* governmental processes, including the processes of electing public officers and enacting *state* laws.

The *only* decision in which the Court has even described the doctrine as applying to off-reservation conduct was in the commercial, economic self-sufficiency context of a promissory note in *Kiowa,* discussed above.

C. FEDERAL PREEMPTION ANALYSIS DOES NOT SUPPORT THE TRIBE

Nothing in the Opening Brief on the Merits supports the implicit assertion that the States delegated regulation of tribal participation in state government processes to Congress. The "federal preemption" decisions concern a delegation of power by the States to Congress--but do not address powers reserved to the States by the Constitution. They do not support extension of the common law doctrine to this case.

"The basis for this 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. VI, cl. 2), which, together with extensive congressional legislation on Indian affairs, has broadly preempted state law. [Citation.]" *Boisclair v. Superior Court*, 51 Cal. 3d at 1147-1148, (Slip op. p.11).

Here the parties agree there is no federal statute authorizing (or prohibiting) this action and therefore no statutory basis for application of the Supremacy Clause.

Nor does the Tribe rely on any treaty. *Lara* recognized that since 1871 Congress has not had the power to negotiate new treaties with Indian tribes. 124 S.Ct. at 1634; *see* 25 U.S.C. § 71. (Cf. OBM p.35).

Moreover, contrary to the Tribe's suggestion, the FPPC does not suggest that this case requires a "balancing of tribal sovereign interests and state regulatory interests" (OBM p.21) that figures in the preemption decisions. Instead, *State* sovereign powers guaranteed by the Constitution and a complete absence of tribal sovereign interests preclude finding federal preemption of Tenth Amendment powers reserved to the States to protect the integrity of the State franchise. *Cf. Printz v. United States*, 521 U.S. 898, 932 (1997) (invalidating Brady Act; "balancing" analysis is inappropriate where it is the very *principle* of separate state sovereignty that is offended, and no comparative assessment of the various interests can overcome that fundamental defect (citing cases)).

The issue, rather, is whether by virtue of the States' delegation to Congress of power "[t]o regulate commerce with foreign Nations, and among the several states, and with the Indian Tribes," Art. I, § 8, cl. 3, federal law preempts state court jurisdiction over this action. Certainly the

Indian Commerce Clause, Art. I, § 8, cl. 3, which says *nothing* about tribal immunity from suit, also does not constitute a "plain statement" of state delegation to Congress of authority over Indian tribal participation in state political processes. No precedent supports application of the Commerce Clause to the context of this case.

1. THE EARLIEST PREEMPTION DECISIONS VIEWED TRIBES ONLY AS SEPARATE POLITICAL COMMUNITIES

The history of the Supreme Court's decisions applying the constitutional delegation of power theory does not support the Tribe.[13] (*Cf.* OBM pp.36-37). When the United States Supreme Court in *Worcester v. Georgia*, 31 U.S. at 559, first made the sweeping assertion that the Constitution vested exclusive power in the federal government to regulate intercourse with the tribes, it was dealing with "separate and distinct political communities." (OBM p.13).[14]

The 1832 Court was not speaking of Indian tribes as groups of citizens whose members run for and hold state elective offices, who support, oppose and contribute vast sums of money to candidates for state executive and legislative offices, or who propose or oppose legislative measures and initiatives and hire lobbyists to influence state legislators. Indians, as non-citizens, had *no* right to participate in state electoral and legislative processes when the Indian Commerce Clause was debated and adopted. Even after adoption of the 15th Amendment to the United States Constitution, Indians who had not severed tribal ties had no right to vote

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[13] Nor do the federal statutes cited by the Tribe (OBM pp.38-39) relate to, much less circumscribe, state authority over state elections and legislative processes.

and did not become citizens until the General Allotment Act of 1924. 43 Stat. 253 (codified at 8 U.S.C. § 1401 (b)).

The States could not have understood in delegating plenary authority over Indian Commerce to Congress that, with respect to their own self-governance, they gave up powers to the federal government vis-à-vis Indian tribes that were specifically reserved to the States under Article IV, § 4 and the Tenth Amendment. Instead, this historical context and "backdrop" that informs the Supreme Court decisions, supports the conclusion of the Court of Appeal that the guarantee of a republican form of government limited Congress' Article I power, particularly where no issue of tribal commerce or self-governance was involved.

In a comparable context, the United States Supreme Court concluded that the States could not have understood that they surrendered their Eleventh Amendment immunity from suit to tribes by virtue of adopting Article III of the United States Constitution. The Court held that Article III did not constitute a plain statement of such intent. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67-68 (1996) (OBM p.14) (citing cases) (we cannot rest with a mere literal application of the words of § 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States).

2. CASES UPHOLDING FEDERAL STATUTES PROTECTING TRIBES AS SEPARATE ENTITIES DO NOT FORECLOSE STATE COURT JURISDICTION

The Tribe points to cases upholding federal statutes "reasonably and rationally designed to further Indian self-government" that describe Congress' "plenary power" over tribes. *See Morton v. Mancari*, 417 U.S.

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[14] The Tribe points out that congressional policy has evolved from separation to assimilation and back again (OBM p.15). None of this evolution has been with respect to tribal participation in state governments.

535, 555 (1974) (OBM pp.43-44). *Morton* describes the power of Congress to deal with the "special problems of Indians," 417 U.S. at 55, stemming from "[dis]possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence," *id.* at 552. *See also Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759 (1985) (State of Montana could not tax Indian tribe's royalty interests under oil and gas leases issued to non-Indian lessees pursuant to Indian Mineral Leasing Act) (OBM p.14); *Oneida County, N.Y. v. Oneida Indian Nation of New York State,* 470 U.S. 226 (1985) (approving tribal action against New York county to enforce possessory right to tribal lands) (OBM p.14).

The "special problems of Indians" are not involved in this case and no basis for differential treatment arises by virtue of Tribe members living on or near reservations.

Morton observed that "[l]iterally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations." *Id.* at 552. On this basis, the Court upheld the federal statute providing for Indian hiring preferences within the BIA against constitutional challenge. *See also City of Roseville v. Norton,* 219 F.Supp. 2d 130 (D.D.C. 2002)[15] (OBM pp.43-44) (reviewing Secretary of Interior's execution of powers granted by Auburn Indian Restoration Act and Indian Restoration Act); *Carcieri v. Norton*, 290 F.Supp. 2d 167, 189

[15] *City of Roseville* recognized that the State of California was not a party and found that the State could "defend its interests under the Enclaves and Statehood Clauses and under the Equal Footing Doctrine, should it choose to do so." *Id.* at 146. "[T]he State is in no way barred from bringing these claims. *Id.*

(D.R.I. Sep 29, 2003) (OBM pp.43-44) (construing Rhode Island Indian Claims Settlement Act and the Indian Reorganization Act).

Nor would it be appropriate to apply the balancing test required to determine whether a particular exercise of state authority over *on-reservation* activity violates federal law. *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*[16], 458 U.S. 832, 837 (1982) (citing *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 141-45 (1980)). (*Cf.* OBM p.21). *See also Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (OBM p.14) (New Mexico oil and gas severance tax on non-Indian oil and gas producers whose operations were located on Indian reservations and whose operations were taxed by tribe was not preempted by federal laws promoting tribal economic self-sufficiency).

The Supreme Court has described the Indian Commerce Clause as a *potential* barrier to the exercise of state authority "over *commercial* activity *on* an Indian reservation" *Ramah Navajo School Bd.*, 58 U.S. at 837 (state authority may be pre-empted by federal law, or it may interfere with the tribe's ability to exercise its sovereign functions). Even so, the "Court has often confronted the difficult problem of reconciling 'the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations.'" *Id.* at 836-37.

The remaining Supreme Court preemption decisions upon which the Tribe relies all involve on-reservation commercial transactions, self-governance or both--arenas the Supreme Court has described as within the States' delegation of Article I Commerce Clause power to Congress. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978) (barring action to enforce Indian Civil Rights Act) (OBM p.22), dealt with Congress' Article I

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16 The State tax in *Ramah Navajo* was preempted by the pervasive federal regulation of financing and construction of Indian schools, the State

legislative authority to "limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." *Id.* at 57. The Court exercised its traditional role to construe the Indian Civil Rights Act, keeping in mind that in "matters involving commercial and domestic relations," "subject[ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves," may undermine the authority of the tribal court and infringe on the right of the Indians to govern themselves. *Id.* at 59-60. The Court concluded that Congress intended to foreclose any federal court remedy except habeus corpus.

Three Affiliated Tribes, 476 U.S. 877 (1986) (OBM p.23) (barring cross-action where Tribe sued for breach of contract to construct on-reservation water system), also construed a federal statute, Public Law 280, and found it pre-empted a North Dakota statute that would require tribes to accept a "potentially severe intrusion on the Indians' ability to govern themselves according to their own laws in order to regain their access to the state courts." *Id.* at 888.

Other than *Oklahoma Tax Commission*, discussed above (*see* Argument IV.A), this exhausts the United States Supreme Court decisions that the Tribe describes as "repeatedly" holding that sovereign immunity from suit "ceases to exist" only in instances of "unequivocal congressional abrogation or express tribal consent." (OBM pp.21-28). The remaining decisions are lower federal or state court decisions applying Supreme Court precedent. (OBM pp.28-33). None is binding on this Court, none involves a threat to the republican form of government guaranteed the States by the Constitution. None invokes the Guarantee Clause or the Tenth Amendment.

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having "declined to take any responsibility for the education of these Indian children." *Id.* at 843.

3. THIS COURT HAS NOT ADDRESSED THE ISSUES RAISED IN THIS CASE

The two decisions of this Court on which the Tribe relies do not help its argument. *Boisclair v. Superior Court*, 51 Cal. 3d 1140 (1990) (OBM p.31), involved a dispute over a road and a gate. The plaintiff construction company claimed the road was non-Indian and sued for declaratory relief and to enjoin barring the road. This Court held that the trial court lacked subject matter jurisdiction to grant relief affecting the Indian defendants' use of the road, since Title 28 United States Code section 1360(b) precluded States from asserting jurisdiction over disputes concerning Indian land, including disputes in which one party claims the disputed land is non-Indian. "The predominance of the federal government in Indian affairs is nowhere more pronounced than in the field of Indian property law." *Id.* at 1148. The Court held further, however, a determination whether sovereign immunity protected the Indian defendants from liability for alleged tortious acts committed on non-Indian land could be made only in the course of further proceedings in the trial court. If the Indian defendants "committed or conspired to commit tortious acts the primary situs of which was outside Indian territorial boundaries, they have acted beyond their sovereign authority and are not protected by sovereign immunity." *Id.* at 1158.

Thus, *Boisclair* expressed its recognition of broad immunity for tribes , *id.* at 1157, in a case where (1) neither the tribe nor the State was a party, (2) a federal statute preempted state court jurisdiction and (3) the (private) plaintiff raised no other basis for asserting state court jurisdiction. At the same time, this Court recognized the "geographic component" of Indian sovereign immunity. *Id.* at 1158. It did not foreclose a finding that, by virtue of constitutional guarantees protecting the State's republican form of government, tribes are without protection of immunity from suit when

they participate in State elections and legislative processes having nothing to do with tribal self-governance or commercial activity.

Similarly, *Department of Transportation v. Naegele Outdoor Advertising Co.,* 38 Cal. 3d 509 (1985) (OBM p.31), held that state regulation of outdoor advertising *on Indian reservations* was preempted by the operation of federal law. This Court agreed with the Ninth Circuit's conclusion that "a state may not impose general civil/regulatory laws *on the reservation,*" *id.* at 521 (emphasis added) (citation omitted). The Court noted, however, that the United States Supreme Court "has observed that under certain circumstances a state may validly assert authority over on-reservation activities even in the absence of a congressional mandate to do so." *Id.* at 521. Further, " in the area of state regulation of tribal enterprises, generalizations have become treacherous." *Id.* The Court went on to analyze "familiar principles of preemption." *id.* at 522, and concluded that Congress intended that the Highway Beautification Act leave Indian reservation lands entirely unregulated under the Act (i*d).*

In contrast, this action involves no federal statute and no commercial activity on- or off-reservation. It poses no threat to tribal self-governance or economic development. It has everything to do with encouraging political participation by all of the State's citizens and protecting the integrity of political processes for the benefit of all of the State's citizens, including the Tribe's members. This is a question of first impression for this Court.

D. THE FPPC DOES NOT RELY ON A SURRENDER OF TRIBAL IMMUNITY AT THE CONSTITUTIONAL CONVENTION

The Tribe finally sums up it position in a single broad sweeping sentence: "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." (OBM p.57). The FPPC has shown that this statement is not supported by any federal constitutional provision or statute or by any United States Supreme Court decision.

The Tribe then points out that the tribes did not participate in the Constitutional Convention and the plan of the Convention did not surrender the tribes' immunity for the benefit of the States (or the States' immunity for the benefit of the tribes). (OBM pp.58-59). The FPPC does not, however, rely on any such "surrender" by a sovereign nation to overcome the common law doctrine that has effectuated the States' delegation to Congress, through the Indian Commerce Clause, the power to protect tribal self-governance and economic self-sufficiency.

As explained above, the FPPC relies upon the State's reserved power and authority guaranteed to the States by the constitution, and among the few express limits on Congress' Article I powers: the power and obligation to protect its republican form of government for the benefit of all of its citizens. This, too, was part of the "plan of the convention" as explained by many Supreme Court decisions. Thus, for example, in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 800-01 (1995) (finding no preconstitutional power in the States to add qualifications to members of Congress):

> The "plan of the convention" as illuminated by the historical materials, our opinions, and the text of the Tenth Amendment draws a basic distinction between the powers of the newly created Federal Government and the powers retained by the pre-existing sovereign States. As Chief Justice Marshall explained, "it was neither necessary nor proper to define the powers retained by the States. These powers proceed, not from the people of America, but from the people of the several States; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument." [citing *Sturges v. Crowninshield*, 4 Wheat. 122, 193, 4 L.Ed. 529 (1819)].

See also, Printz v. United States, 521 U.S. at 899 ("[a]lthough the States surrendered many of their powers to the new federal government, they

retained a residuary and inviolable sovereignty that is reflected throughout the Constitution's text").

In the context of this case the Tribe does not act as a sovereign nation, but as a group of California citizens (a "person" under the PRA (Gov't Code § 82047)) who may and should participate *as citizens of the State* in California elections. Their members and officials may *as citizens of the State* run for and hold public office and they have. They may *as citizens of the State* contribute to political campaigns, public officials, ballot initiatives, and may employ lobbyists and they have.

None of this was envisioned at the Constitutional Convention, including Tribe member citizenship in the United States and the various States. However, the eventual rights of Tribes as groups of State citizens--with rights of full participation in all branches of local, state and federal governments--*were* protected through the Convention's adoption of the federal, "dual sovereignty" form of government discussed in *Gregory v. Ashcroft*. 501 U.S. at 457. Paraphrasing *U.S. Term Limits,* these State powers proceed, not from the people of America, but from the people of the States; and remain, after the adoption of the constitution, what they were before--not merely unabridged by that instrument, but expressly guaranteed and reserved to the State by that instrument.

If the Tribes as sovereign nations did not surrender their immunity to the States, it is also true that the States, as protectors of their franchise, did not surrender to Congress the power to create a special class of citizens who may threaten state sovereignty through unregulated, potentially corrupting, contributions of vast sums of money to public officials. Rather, the States reserved the power to protect the integrity of their elections and legislative process for the benefit of all their citizens, including members of Indian tribes and that power exists as an express limitation on Congress' Article I powers.

Like the Brady Gun Control Act, a federal statute purporting to authorize unlimited tribal contributions to state public officials or to grant immunity from state prosecution of campaign finance laws would not be "necessary and proper" for carrying into execution the Commerce Clause. *See Printz,* 521 U.S. at 924 (Brady Act). Congress has plenary power to protect or restrict inherent tribal powers of self-governance, but not to dictate the scope of tribal power (nonexistent at the time of the Convention) to affect state elections and legislative processes.

No precedent supports the Tribe's implicit argument that it has a constitutionally protected right to participate in state elections free from regulations applying to every other citizen or group of citizens or that the State's power to protect the integrity of elections from corruption of tribal money depends on federal authorization.

E. THE COURT SHOULD REJECT THE PANDORA'S BOX ARGUMENT IN FAVOR OF A NARROW RULING

The Tribe's final argument is that chaos will reign if the Court agrees that the State has the power to protect the integrity of its elections and legislative processes from corruption by tribal campaign contributions, now the single largest source of money flowing into California campaign coffers. (OBM pp.61-62). The Court should reject this argument.

It may be that the nation is entering an era in which Congress and the courts will be called upon to authorize suits against tribes engaged in off- or even on-reservation commercial activity. The Tribe recognizes that federal policy has evolved and will continue to evolve. (OBM pp.15-17).

However, the Court below made, and this Court should affirm, a narrow ruling unrelated to tribal self-governance or self-sufficiency. The court of appeal determined that where the State acts pursuant to obligations, power and authority to protect its republican form of government from

corruption, it does so pursuant to constitutional powers that limit the power of the federal government, including Congress' Article I Commerce Clause powers. It determined that the PRA is a legitimate exercise of the State's Article IV, § 4 powers reserved by the Tenth Amendment. It determined that state court jurisdiction over enforcement actions against tribes, the largest single group of campaign contributors, is essential to effectuating the purposes of the PRA and the guarantee of the Constitution. The result will not be chaos, but fairer, more transparent elections protecting all California's citizens, including the Tribe's members.

There may "be reasons to doubt the wisdom of perpetuating the doctrine" of tribal sovereign immunity from suit, *Kiowa* 523 U.S. at 758, but the FPPC does not assert them here. Instead the FPPC has demonstrated that the courts have never extended the doctrine to abrogate State exercise of constitutional power to protect the integrity of state elections and legislative processes. The FPPC has further demonstrated that extending the common law doctrine to the facts of this case would be to negate constitutional limitations on the doctrine arising by virtue of power and authority guaranteed to the States by Article IV, § 4 and reserved by the Tenth Amendment. *Kiowa* requires those limitations to be observed. 523 U.S. at 759.

CONCLUSION

The FPPC urges this Court to affirm the decision of the Court of Appeal and to reject the petitioner's proffered extension of the doctrine of tribal sovereign immunity in derogation of the State of California's constitutionally secured sovereign rights and powers protected by the Guarantee Clause and the Tenth Amendment to the United States Constitution.

The FPPC recognizes that this is a case of first impression, in that no case has addressed the scope of the common law doctrine of tribal sovereign immunity from suit in this context. Petitioner and other federally recognized Indian tribes will continue to engage in conduct governed by the PRA. This case will authoritatively resolve whether the common law doctrine of tribal sovereign immunity will bar FPPC enforcement actions against the largest contributors of funds to California elected officials, candidates and ballot measures.

Because the Tribe relies on a common law doctrine created by courts to effectuate Congress' Article I powers, the FPPC submits that the Court of Appeal correctly determined that the doctrine cannot abrogate the State's reserved power and obligation to protect its elections, which lie at the core of its republican form of government.

For all of the reasons and based on the authorities cited in this Opposition Brief on the Merits and in the opinion of the Court of Appeal, this Court should affirm respondent court's order.

Dated: December 29, 2004

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CERTIFICATE OF COMPLIANCE

(California Rules of Court, rule 14(c)(1))

Pursuant to California Rules of Court, rule 14(c), this Opposition Brief on the merits is proportionately spaced in Times New Roman 13 point type, consisting of 15,664 words as counted by the Word:mac 2001 processing program used to generate the brief.

Counsel for real party in interest has submitted with this brief an application to file an oversized brief.

Dated: December 29, 2004

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

UNITED STATES CONSTITUTIONAL PROVISIONS

FEDERAL STATUTES

CALIFORNIA CONSTITUTIONAL PROVISIONS

CALIFORNIA STATUTES

OTHER AUTHORITIES