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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

AGUA CALIENTE BAND OF CAHUILLA INDIANS, Petitioner, v. SUPERIOR COURT OF SACRAMENTO COUNTY, Respondent; FAIR POLITICAL PRACTICES COMMISSION, Real Party in Interest.	C043716 (Super. Ct. No. 02AS04545)

ORIGINAL PROCEEDINGS. Writ of mandate. Denied. Superior Court of Sacramento County, Loren E. McMaster, Judge.

Reed Smith Crosby Heafey, Bernard P. Simons, James C. Martin, George P. Schiavelli, Denise M. Howell; Law Offices of Art Bunce, Art Bunce, Kathryn Clenney; Reed & Davidson, Dana W. Reed and Darryl R. Wold for petitioner.

No appearance for Respondent.

Riegels Campos & Kenyon, Charity Kenyon; Fair Political Practices Commission, Steven Benito Russo, Luisa Menchaca, William L. Williams, Jr. and Holly B. Armstrong for Real Party in Interest.

Bill Lockyer, Attorney General, Andrea Lynn Hoch, Louis R.

Mauro, Assistant Attorneys General, Kenneth R. Williams, Robert C. Nash, Deputy Attorneys General for the Attorney General; Heller Ehrman White & McAuliffe, John C. Ulin and D. Eric Shapland for California Common Cause, Amici Curiae on behalf of Real Party in Interest.

The question in this case is whether the Fair Political Practices Commission (FPPC) can sue an Indian tribe to force it to comply with reporting requirements for campaign contributions contained in the Political Reform Act (PRA), Government Code section 81000 et seq.[1]

Real party in interest, the FPPC, filed suit against Agua Caliente Band of Cahuilla Indians (the Tribe), alleging failure to disclose lobbying activities and contributions to political campaigns, as required by the PRA. The Tribe claims that, as a federally-recognized Indian tribe, it is immune from suit under the doctrine of tribal immunity. In this writ proceeding, the Tribe asks this court to issue a peremptory writ of mandate directing the trial court to vacate its ruling denying the Tribe's motion to quash service of summons for lack of personal jurisdiction and enter a new order granting the motion.

We shall deny the Tribe's petition.[2] We shall conclude, on the one hand, that the doctrine of tribal immunity, as announced by the United States Supreme Court, has no foundation in the

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[1] Undesignated statutory references are to the Government Code.

[2] We disregard new arguments against the Tribe contained in a brief filed by FPPC on October 20, 2003, which purported to be a reply brief to the amicus curiae brief of California Common Cause (supporting FPPC's position), but which contained counterarguments to the Tribe's replication.

federal Constitution or in any federal statute but is rather a doctrine created by the common law power of the Supreme Court. On the other hand, the State has a constitutional right, under article IV, section 4 and the Tenth Amendment to the United States Constitution, to maintain a republican form of government. That form of government entails government by representatives elected by the People. The right to sue to enforce the PRA is necessary to preserve a republican form of government free of corruption and therefore has constitutional stature. The constitutional right of the State to sue to preserve its republican form of government trumps the common law doctrine of tribal immunity. The FPPC can therefore sue the Tribe.

FACTUAL AND PROCEDURAL BACKGROUND

FPPC's complaint sought civil penalties and injunctive relief for the Tribe's alleged violations of the PRA. The complaint alleged an express purpose of the PRA, as stated in section 81002, is to ensure that contributions to California election campaigns be fully disclosed to the public in order that voters may be fully informed and improper practices may be inhibited. Section 84200 mandates that specified contributions be disclosed to the public in a timely manner.[3] The PRA also

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[3] Section 84200 mandates disclosures by specified elected officers, candidates, and "committees." The definition of "committee" includes "any person or combination of persons who directly or indirectly . . . [¶] . . . [¶]

"(b) Makes independent expenditures totaling one thousand dollars ($1,000) or more in a calendar year; or

mandates reporting of lobbying activities to regulate lobbyists and ensure that lobbyists do not exert improper influence on public officials. (§§ 81002, 86116.)

The complaint alleged the Tribe is a federally recognized Indian tribe and constitutes a "person" pursuant to section 82047 of the PRA, which defines "Person" as "an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, limited liability company, association, committee, and any other organization or group of persons acting in concert."

The complaint alleged the Tribe constituted a major donor subject to PRA reporting requirements because of the Tribe's extensive contributions to political campaigns, including more than $7,500,000 in 1998, $175,250 in the first half of 2001, and $426,000 in the first half of 2002.

In the first cause of action, the complaint alleged two PRA violations for failure to file semi-annual campaign statements by July 31, 1998, and January 31, 1999, as required by section 84200. The Tribe made contributions to California candidates and committees totaling at least $1,218,413 between January 1 and June 30 of 1998, but failed to file the disclosure statement by the July 31, 1998, due date. The Tribe did not file the required statement until October 2000, more than two years after the due date. The Tribe made contributions totaling at least

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"(c) Makes contributions totaling ten thousand dollars ($10,000) or more in a calendar year to or at the behest of candidates or committees." (§ 82013.)

$6,291,764 between July 1 and December 31 of 1998, but failed to file the disclosure statement by the January 31, 1999, due date. The Tribe filed an untimely statement on March 8, 1999, but amended it in a final statement on November 27, 2000.

In a second cause of action, the complaint alleged the Tribe failed to report, in its July 31, 2002, semi-annual statement, a March 2002 contribution to a statewide ballot measure committee on Proposition 51. Proposition 51 authorized expenditure of $15 million per fiscal year for eight years for projects that included a passenger rail line from Los Angeles to an area of Palm Springs where the Tribe operates a casino.

In a third cause of action, the complaint alleged 13 PRA violations for failure to report late contributions (totaling more than $1 million) under section 84203, which requires the donor to file a report within 24 hours of making a contribution before an election but after the closing date of the last pre-election statement.

In a fourth cause of action, the complaint alleged four PRA violations for failure to report lobbying interests (§ 86116), leaving voters unable to correlate the Tribe's campaign contribution information with the interests being lobbied by the Tribe.

The complaint sought monetary penalties, as authorized by sections 91004 and 91005.5, and an injunction commanding the Tribe to file disclosure statements required by the PRA.

In November 2002, the Tribe, specially appearing, filed a motion to quash service of summons for lack of personal

jurisdiction. The Tribe asserted it was immune from suit under the doctrine of tribal sovereign immunity. The Tribe also asserted all the information sought by the lawsuit was available to FPPC through other sources, i.e., reports filed by the recipients of the campaign contributions.

On February 27, 2003, the trial court issued a written ruling denying the Tribe's motion to quash. The trial court observed that case law applying the doctrine of tribal sovereign immunity concerned activities affecting tribal self-governance or economic development, not activities affecting the governance and development of another sovereign. To apply immunity to PRA enforcement actions would (1) intrude upon the State's exercise of its reserved power under the Tenth Amendment of the United States Constitution, to regulate its electoral and legislative processes, and (2) interfere with the republican form of government guaranteed to the State by article IV, section 4 of the United States Constitution.

On April 7, 2003, the Tribe filed a petition for writ of mandate in this court, seeking a writ to make the trial court grant its motion to quash. We denied the petition.

On July 23, 2003, the California Supreme Court granted the Tribe's petition for review and transferred the matter to this court with directions to vacate the order denying mandate and to issue an order directing respondent to show cause why the relief sought should not be granted.

On August 12, 2003, we issued the order to show cause.

FPPC filed a return to the petition. We also allowed the filing of amicus curiae briefs by the Attorney General of the State of California and California Common Cause, both in support of FPPC's position.

DISCUSSION

In this proceeding, the Tribe does not contend it is immune from the PRA's requirements for disclosure of campaign contributions. Rather, the Tribe contends it is immune from a lawsuit to enforce the PRA.[4]

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).

Courts have recognized tribal immunity from suit in a variety of contexts. (E.g., *Kiowa Tribe v. Manufacturing Tech.* (1998) 523 U.S. 751 (*Kiowa Tribe*) [Indian tribes enjoy immunity from suit on contracts regardless of whether they were made on or off the reservation]; *Oklahoma Tax Com. v. Potawatomi Tribe* (1991) 498 U.S. 505 [state may impose tax on Indian cigarette sales to non-Indians, but may not sue tribe to collect tax];

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[4] The Tribe states in its replication that it does not agree that FPPC has a right to apply the PRA to the Tribe. However, this proceeding is about immunity from suit. Moreover, the Tribe in its petition stated: "The states indisputably have the power to regulate political campaigns or create contribution disclosure rules that operate within their borders. But the mere fact that the states may have the power to enact disclosure rules for their political campaigns does not mean they can on their own, and without express Congressional approval, sue federally-recognized Tribes in furtherance of such regulatory oversight."

Puyallup Tribe v. Washington Game Dept. (1977) 433 U.S. 165, 172-173 [state court had no jurisdiction to order tribe to limit number of fish which members may catch and report number]; *Middletown Rancheria v. Workers' Comp. Appeals Bd.* (1998) 60 Cal.App.4th 1340 [Workers' Compensation Appeals Board lacked jurisdiction over Indian tribe for purposes of enforcing California's workers' compensation laws]; *Redding Rancheria v. Superior Court* (2001) 88 Cal.App.4th 384 [Indian tribe was immune from tort suit arising outside of tribal lands, where woman alleged she was injured while working as a bartender at a Redding hotel, hosting a party for the Indian tribe's casino].)

The Tribe suggests tribal immunity from suit has a constitutional basis because the Constitution gives Congress plenary power over Indian affairs. However, the Tribe cites no authority specifically stating that tribal immunity from suit is a constitutional imperative.

In fact, the doctrine of tribal immunity from suit is not found in the federal Constitution or in any federal statute, but is a matter of federal common law. "The term 'federal common law,' although it has eluded precise definition, . . . is court-made law that is neither constitutional nor statutory. See Erwin Chermerinsky, *Federal Jurisdiction* 349 (3d ed. 1999) (defining federal common law as 'the development of legally binding federal law by the federal courts in the absence of directly controlling constitutional or statutory provisions'); Martha Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv. L.Rev. 881, 890 (1986) (defining federal common law as

'any rule of federal law created by a court . . . when the substance of that rule is not clearly suggested by federal enactments--constitutional or congressional')." (*United States v. Enas* (9th Circ. 2001) 255 F.3d 662, 674-675.)

Thus, the Supreme Court has said, "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. [Citations.]" (*Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58 [tribe was immune from suit in federal court brought by female tribe member alleging violation of the Indian Civil Rights Act (ICRA, 25 U.S.C. § 1301 et seq.) which required Indian tribes to afford equal protection to its members]; see also, *Kiowa Tribe, supra,* 523 U.S. 751, 756 [doctrine of tribal immunity developed "almost by accident"]; *Long v. Chemehuevi Indian Reservation* (1981) 115 Cal.App.3d 853, 856-857 ["Tribal immunity is based on policy considerations rather than specific constitutional provisions and is generally considered to be coextensive with the sovereign immunity of the federal government"].) "The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance. [Citation.] Of course, because of the peculiar 'quasi-sovereign' status of the Indian tribes, the Tribe's immunity is not congruent with that which the Federal Government, or the States, enjoy. [Citations.]" (*Three Affiliated Tribes v. Wold Engineering* (1986) 476 U.S. 877, 890-891 [state statute, insofar as it disclaimed pre-existing jurisdiction over suits by tribal

plaintiffs against non-Indians for which there was no other forum, was preempted by federal legislation].)

In support of its assertion that tribal immunity from suit is a constitutional imperative, the Tribe cites *Oneida v. Oneida Indian Nation* (1985) 470 U.S. 226, which held a tribe could sue counties in federal court for the counties' use of tribal land, and which referred to the constitutional provision giving Congress the power to regulate commerce with Indian tribes. (U.S. Const., art. I, § 8, cl. 3.) The Tribe also cites *Worcester v. The State of Georgia* (1832) 31 U.S. 515, 558, which said the Constitution "confers on Congress the powers of war and peace: of making treaties, and of regulating commerce with foreign nations, and among the several States, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians." *Worcester*, which rejected the State of Georgia's attempt to apply its criminal laws within tribal lands, also said, "[t]he whole intercourse between the United States and this [Indian] nation, is, by our constitution and laws, vested in the government of the United States." (*Id.* at p. 561.)

We recognize that state courts have said, "[f]ederal authority over Native American Indian matters derives primarily from the power to regulate commerce with Native American Indian tribes (U.S. Const., art. I, § 8, cl. 3) and secondarily from the power to make treaties (U.S. Const., art. II, § 2, cl. 2). [Citations.] The United States Constitution is silent regarding state action in these areas. A review of the evolving

decisional law makes clear the federal government's predominance over Native American Indian affairs in general and over Indian land in particular. [Citation.]" (*Middletown Rancheria v. Workers' Comp. Appeals Bd., supra,* 60 Cal.App.4th 1340, 1346.) The policy of leaving Indians free from state jurisdiction and control is deeply rooted in this nation's history and has "'two independent but interrelated bases: federal preemption and the internal sovereign rights of Indian tribes.' [Citations.] States may regulate within Indian country only when state control is not preempted by federal law or when state control does not infringe on tribal sovereignty. [Citations.]" (*Id.* at pp. 1347-1348, italics omitted [enforcement of California's workers' compensation laws by administrative board would unlawfully infringe on tribe's right to govern its own employment affairs].)

Additionally, "courts have come to favor federal preemption over inherent sovereignty as the primary justification for the preclusion of state authority over Indian affairs. [Citation.] 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* (1990) 51 Cal.3d 1140, 1147-1148 [construing

federal legislation for state court jurisdiction over individual Indians].)

Authority for applying the doctrine of tribal immunity in this case cannot be found in the Indian Commerce clause. The United States Constitution, article I, section 8, which describes the powers granted to Congress, states in clause 3 that Congress has the power "[t]o regulate commerce with foreign Nations, and among the several states, and with the Indian Tribes." This clause cannot support tribal immunity in this case because (1) it grants a power to Congress, and Congress has not granted the tribe immunity from this suit, and (2) it concerns the regulation of commerce, and this case concerns not commerce but rather the political process.

Nor can such authority be found in the treaty clause (art. II, § 2, cl. 2), because the Tribe has cited no treaty that exists between it and the federal government.

Nor does the supremacy clause[5] suggest that the doctrine of tribal immunity is other than a common law rule. The supremacy clause tells us that federal law trumps state law, but it does not provide textual support for adoption of the law in the first place.

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[5] Article VI, clause 2 of the United States Constitution provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the Untied States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

We therefore conclude that the doctrine of tribal immunity, as it is sought to be applied in this case, is neither a constitutional nor a statutory doctrine. Rather, it is a creature of the common law power of the United States Supreme Court.

On the other hand, the Tenth Amendment to the United States Constitution states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

But what are these powers that are reserved to the states? Surely one such power is the power and duty to maintain a republican form of government, since maintenance of that form of government is mandated by article IV, section 4 of the United States Constitution, which provides in relevant part, "[t]he United States shall guarantee to every State in this Union a Republican Form of Government . . . ."

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. Thus, "[b]y 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* (1891) 139 U.S. 449, 461.) "'[E]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen.' [Citations.] Such power inheres in the State by virtue of its

obligation . . . 'to preserve the basic conception of a political community.'" (*Gregory v. Ashcroft* (1991) 501 U.S. 452, 462 [Age Discrimination in Employment Act did not apply to appointed state judges, and mandatory retirement of state judges did not violate equal protection clause].)

In a series of cases in which *individuals* sought to rely upon the constitutional guarantee of a republican form of government, the United States Supreme Court held the question to be a nonjusticiable "political question." The situation was described most recently by the high court in *New York v. United States* (1992) 505 U.S. 144 at pages 184 through 185 (*New York*), as follows:

"In most of the cases in which the Court has been asked to apply the [guarantee] Clause, the Court has found the claims presented to be nonjusticiable under the 'political question' doctrine. [Citations.]

"The view that the Guarantee Clause implicates only nonjusticiable political questions has its origin in Luther v Borden, 7 How 1, 12 L Ed 581 (1849), in which the Court was asked to decide, in the wake of Dorr's Rebellion, which of two rival governments was the legitimate government of Rhode Island. The Court held that 'it rests with Congress,' not the judiciary, 'to decide what government is the established one in a State.' Id., at 42, 12 L Ed. 581. Over the following century, this limited holding metamorphosed into the sweeping assertion that '[v]iolation of the great guaranty of a republican form of

government in States cannot be challenged in the courts.' [Citation.]

"This view has not always been accepted. In a group of cases decided before the holding of Luther was elevated into a general rule of nonjusticiability, the Court addressed the merits of claims founded on the Guarantee Clause without any suggestion that the claims were not justiciable. [Citations.]

"More recently, the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions. [Citation.] Contemporary commentators have likewise suggested that courts should address the merits of such claims, at least in some circumstances. [Citations.]

"We need not resolve this difficult question today." (*New York, supra,* 505 U.S. 144, 184-185.)

We agree with Professor Laurence Tribe, who has opined that, in light of *New York*, *supra,* 505 U.S. 144, the question of the justiciability of the Guarantee Clause *when asserted by a state* is not foreclosed. (See 1 Tribe, American Constitutional Law (3rd ed. 2000) § 5-12, pp. 910-911.) As Professor Tribe has said, "To be sure, the Supreme Court has never held that the Guarantee Clause . . . confers judicially cognizable rights upon *individuals* . . . [but] it need not follow from the unavailability of the Guarantee Clause as a textual source of protection for *individuals* that the clause confers no judicially enforceable rights upon *states as states*. It is, after all, 'to every State' that the promise of the Guarantee Clause is addressed." (Tribe, *op. cit. supra,* § 5.12, pp. 910-911.)

We conclude 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. And we so hold.

There can be no doubt that the PRA accomplishes this aim.

The United States Supreme Court said recently, "'To the extent that large [political] contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined.'" (*Nixon v. Shrink Missouri Gov't. PAC* (2000) 528 U.S. 377, 388.)

The purpose of California's PRA is to insure a better-informed electorate and to prevent corruption of the political process. (§§ 81001-81002; *Thirteen Committee v. Weinreb* (1985) 168 Cal.App.3d 528, 532.) "Costs of conducting election campaigns have increased greatly . . . , and candidates have been forced to finance their campaigns by seeking large contributions from lobbyists and organizations who thereby gain disproportionate influence over governmental decisions." (§ 81001, subd. (c).) "The people enact [the PRA] to accomplish the following purposes: [¶] (a) Receipts and expenditures in election campaigns should be fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited. [¶] (b) The activities of lobbyists should be regulated and their finances disclosed in order that improper influences will not be directed at public officials."

(§ 81002.) Government has a substantial interest in (1) providing the electorate with information as to where political campaign money comes from; (2) deterring corruption and avoiding the appearance of corruption by exposing large contributions to the light of publicity; and (3) detecting violations of contribution limits. (*Buckley v. Valeo* (1976) 424 U.S. 1, 67-68 [upholding reporting requirements of federal election campaign statutes against a First Amendment challenge].) Statutes requiring campaign contribution disclosures serve to protect the integrity of the electoral process and a republican form of government.

But does this federal constitutional right of the state to maintain the integrity of its republican form of government entail the right to bring suit to enforce the right?

Our Supreme Court has recognized that rules or procedures necessary to secure a constitutional right may themselves be given constitutional stature. These rules and procedures add flesh to otherwise skeletal constitutional rights. Several examples should suffice.

In *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), the Supreme Court held that, in order to preserve a citizen's right not to incriminate himself under the Fifth Amendment, police officers had to give citizens in custody certain advisements ("*Miranda*" rights) before interrogating them. In *Dickerson v. United States* (2000) 530 U.S. 428, the court held that the *Miranda* warnings (and the consequences of not giving them) were

required by the federal Constitution and could not be overruled by an act of Congress. (*Id.* 530 U.S. at p. 432.)[6]

Similarly, the Fourth Amendment to the federal Constitution protects against "unreasonable searches and seizures." In *Wilson v. Arkansas* (1995) 514 U.S. 927 at page 934, the high court held that police officers were required to knock and announce their presence before entering a residence as "an element of the reasonableness inquiry under the Fourth Amendment." (Fn. omitted.)

Again, in another Fourth Amendment case, *Mapp v. Ohio* (1961) 367 U.S. 643 (*Mapp*), the high court held that the rule requiring the exclusion at trial of unlawfully obtained evidence "is an essential part of both the Fourth and Fourteenth Amendments." (*Id.* at p. 657.) The court reasoned, "Were it otherwise, . . . the freedom from state invasions of privacy would be . . . ephemeral . . . ." (*Id.* at p. 655.)[7]

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[6] Recently, four justices of the United States Supreme Court indicated the *Miranda* rule was not constitutionally-based. (*Chavez v. Martinez* (2003) 538 U.S. 760 [*Miranda* violation did not give rise to civil rights claim under Fifth Amendment where no criminal charges were ever filed].) However, those justices, who did not acknowledge *Dickerson*, did not constitute a majority and therefore *Chavez* did not overrule *Dickerson*. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (*Marks v. United States* (1977) 430 U.S. 188, 193.)

[7] In *United States v. Leon* (1984) 486 U.S. 897, 906, the court abandoned *Mapp*'s, *supra,* 367 U.S. 643, characterization of the exclusionary rule as a constitutional right.

In this case, the state's resort to the judicial process is a procedure essential to enforce its reserved right and duty to maintain a republican form of government. What else is it to do, call out its "well regulated militia"? We daresay no one would sanction such a remedy. We conclude that, without a right to bring suit, the state's constitutional right to preserve its republican form of government would be "ephemeral." (*Mapp v. Ohio, supra,* 367 U.S. 643, 655.)

The Tribe and our dissenting colleague argue that FPPC has alternatives for bringing suit, i.e., to approach the tribe and negotiate an agreement (which the Tribe asserts it would view with willingness and cooperation), or to seek legislation from Congress. These alternatives are uncertain; they do not persuade us to apply tribal immunity to bar this action to enforce the PRA. Moreover, absent the threat of a lawsuit, we see no incentive for the tribe to agree to comply with FPPC reporting requirements.

The Tribe says the information sought by FPPC is readily available because the Tribe posted information about its campaign contributions and lobbying activities on its website. However, FPPC is not required to rely on informal, perhaps incomplete, reporting.

The Tribe argues a PRA enforcement action against the Tribe is unnecessary for protection of the electoral process, because the PRA also requires recipients of campaign donations to report the contributions, and therefore disclosure by the contributor is merely duplicative of the same information. However, it

stands to reason that the requirement for both payor and payee to file disclosure statements will act as a check to discourage omissions by one or the other. Thus, the fact that recipients are supposed to report contributions does not constitute an alternative method of enforcement.

We therefore conclude that resort to a judicial remedy is essential to secure the state's constitutional right to guarantee a republican form of government free of corruption. As such, the right to sue must be given constitutional stature. (See *Dickerson v. United States, supra,* 530 U.S. 428.)

In this case, the state, through FPPC, is asserting a right guaranteed by the Constitution of the United States. The Tribe asserts a common law immunity. The state's constitutional right trumps the Tribe's common law immunity, because no court--not even the United States Supreme Court--has the common law power to make up a rule that conflicts with the United States Constitution. Thus, the United States Supreme Court has said, "The Departments of the government are Legislative, Executive *and Judicial*. They are coordinate in degree to the extent of the powers delegated to each of them. Each, in the exercise of its powers, is independent of the other, but all, rightfully done by either, is binding upon the others. *The Constitution is supreme over all of them*, because the people who ratified it have made it so; consequently, anything which may be done unauthorized by it is unlawful." (*Dodge v. Woolsey* (1856) 59 U.S. 331, italics added.)

The Tribe cites various cases where the doctrine of tribal immunity has been applied. (See *ante*, pp. 7-10.) However, all of these cases are distinguishable because in none of them did a state assert a federal constitutional right to bring suit that trumped the common law doctrine of tribal immunity. "'It is axiomatic that cases are not authority for propositions not considered.' [Citations.]" (*In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388.)

The Tribe cites cases for the supposed proposition that the Tenth Amendment is immaterial to the question of tribal immunity, which is controlled exclusively by federal law. The cited cases do not help the Tribe. *Matter of Guardianship of D.L.L.* (So. Dak. 1980) 291 N.W.2d 278, at pages 280 through 281 held federal legislation--the Indian Child Welfare Act--did not infringe on the State's Tenth Amendment reserved powers over domestic relations cases where there was no evidence the federal legislation was arbitrary. Here, there is no issue of federal legislation. The other case, *City of Roseville v. Norton* (D.C. 2002) 219 F.Supp.2d 130, at pages 153 through 154 (*City of Roseville*), also involved federal legislation. There, two California cities challenged the federal Secretary of the Interior's decision, under federal legislation to restore land to Indians, to take a parcel of land into trust for an Indian tribe for the purpose of operating a casino. The District of Columbia district court rejected the cities' argument that, in the absence of express powers granting the federal government authority to set land aside for the purpose of operating a

casino in contravention of state law, the taking violated the State's Tenth Amendment powers. The district court said Congress had plenary power to deal with Indians, and the Tenth Amendment does not reserve authority over Indian affairs to the States. (*Ibid.*) Unlike the *City of Roseville* case, no federal legislation is at issue here. In rejecting the Tenth Amendment argument, the *City of Roseville* case did state that Congress's power to deal with Indians "stems 'from the Constitution itself.' [Citation.]" (*Id.* at pp. 153-154.) However, the cited case, *Morton v. Mancari* (1974) 417 U.S. 535 at pages 551 through 552 (*Morton*), which held federal legislation granting Indians an employment preference in the Bureau of Indian Affairs (BIA) did not constitute impermissible discrimination against non-Indians, merely said, "The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. Article I, § 8, cl 3, provides Congress with the power to 'regulate Commerce . . . with the Indian Tribes,' and thus, *to this extent*, singles Indians out as a proper subject for separate legislation. Article II, § 2, cl 2, gives the President the power, by and with the advice and consent of the Senate, to make treaties. This has often been the source of the Government's power to deal with the Indian tribes. The Court has described the origin and nature of the special relationship:

"'In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them . . . dependent people, needing

protection . . . . Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic. . . . [Citations.] Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constitutuency of tribal Indians living on or near reservations." (*Morton, supra*, 417 U.S. 535, 551-552, italics added.) Thus, neither *Morton* nor *City of Roseville* stands for the proposition that the doctrine of tribal immunity has a constitutional basis or that the Tenth Amendment is immaterial to the question of tribal immunity, which is controlled exclusively by federal law.

In a letter filed after completion of briefing, the Tribe cites a recent case, *Carcieri v. Norton* (R.I. 2003) 290 F.Supp.2d 167, which held the federal Department of the Interior's acceptance of a parcel of land into trust for the benefit of an Indian tribe did not violate the Tenth Amendment. However, *Carcieri* merely relied upon *Morton, supra,* 417 U.S. 535 and *City of Roseville, supra,* 219 F.Supp.2d 130. As we have explained, those cases have no application here.

We recognize the United States Supreme Court recently heard oral argument in a case involving Indian tribes--*United States v. Lara* (8th Cir. 2003) 324 F.3d 635, cert. granted Sept. 30, 2003, __U.S.__ [156 L.Ed.2d 704]. However, *Lara* does not appear

to have any bearing on the case before us. In *Lara*, a nonmember Indian was prosecuted in a tribal court for public intoxication, resisting arrest and violence against a police officer on an Indian reservation. After he was convicted and served his sentence, the federal government sought to prosecute him in federal court for the same offense. The question in *Lara* was whether the federal court prosecution was barred by the Double Jeopardy Clause of the Fifth Amendment. The tribal prosecution was pursuant to a federal statute "recogniz[ing] and affirm[ing]" the "inherent power" of tribes to exercise criminal jurisdiction over all Indians. The federal statute was enacted in response to a United States Supreme Court case holding tribes had lost their inherent sovereign power to prosecute members of other tribes for offenses committed on their reservations. The question in *Lara*, as framed by the Department of Justice, was whether the federal statute validly restored the tribes' sovereign power to prosecute members of other tribes (rather than delegating federal prosecutorial power to the tribes) such that a federal prosecution following a tribal prosecution for offenses with the same elements was valid under the Double Jeopardy Clause. No such issue is presented in the case before us.

In the case before us, the trial court properly denied the Tribe's motion to quash service of summons. The trial court has jurisdiction to adjudicate this dispute.

This case confirms the wisdom of Justice Holmes's observation that "The life of the law has not been logic; it has

been experience." (Bartlett, *Familiar Quotations* (16th ed. 1992) p. 542 (Oliver Wendell Holmes, Jr., from *The Common Law*, 1881).)

DISPOSITION

The Tribe's petition for a writ of mandate is denied. The parties shall bear their own costs in this writ proceeding. (Cal. Rules of Court, rule 27(a)(4).)

SIMS, J.

I concur:

BLEASE, Acting P.J.

DAVIS, J.

I respectfully dissent. The issue in this case is a narrow one. The question is whether the Fair Political Practices Commission (FPPC) can *sue* a federally recognized Indian tribe to enforce California law regarding the reporting of political campaign contributions and lobbying activities. (Gov. Code, § 81000 et seq. (the Political Reform Act of 1974) (Political Reform Act).) I conclude that the Agua Caliente Band of Cahuilla Indians (the Tribe) has a constitutionally derived right of sovereign immunity from suit, and this right is not trumped by California's constitutionally derived right to regulate its electoral process through the authority of a lawsuit. As I shall explain, this case does not present the issue of federal common law versus a state's unchartered constitutional guarantee of a republican form of government. Rather, this case pits the Tribe's constitutionally derived right of sovereign immunity from suit against California's constitutionally derived right to regulate its electoral process, and these two rights can be harmonized here because viable regulatory alternatives to this lawsuit exist.

The majority opinion concludes that the FPPC can sue the Tribe in state court and therefore denies the Tribe's petition for writ of mandate. The majority determines that the Tribe does not have a federal constitutional right of sovereign immunity because the doctrine of tribal sovereign immunity is federal common law and has no foundation in the United States Constitution or in any federal statute. The majority concludes,

in contrast, that states do have a federal constitutional right to maintain a republican form of government, anchored in the Guarantee Clause and the Tenth Amendment. (U.S. Const., art. IV, § 4; *id.*, 10th Amend.) The majority reasons that the right to sue to enforce the Political Reform Act is necessary to preserve a republican form of government. Therefore, the constitutional right of the state to sue to preserve its republican form of government trumps the common law doctrine of tribal immunity.

The majority fails to recognize that while the doctrine of tribal sovereign immunity began as a judicially created doctrine, it is anchored in the United States Constitution. Therefore, the doctrine has a constitutional basis.

The United States Constitution delegates to Congress and the federal government the exclusive power to regulate Indian affairs. (*Montana v. Blackfeet Tribe of Indians* (1985) 471 U.S. 759, 764 [85 L.Ed.2d 753].) The constitutional basis of exclusive federal authority over Indian affairs is centered in the Indian Commerce Clause. (U.S. Const., art. I, § 8, cl. 3.)

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

Indian Nation (1985) 470 U.S. 226, 234 [84 L.Ed.2d 169] ["With the adoption of the Constitution, Indian relations became the exclusive province of federal law"]; *Cotton Petroleum Corp. v. New Mexico* (1989) 490 U.S. 163, 192 [104 L.Ed.2d 209] ["the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs"]; *Montana v. Blackfeet Tribe of Indians, supra,* 471 U.S. at p. 764 ["The Constitution vests the Federal government with exclusive authority over relations with Indian tribes"].)

The doctrine of tribal sovereign immunity began as a judicially created doctrine. In *Kiowa Tribe v. Manufacturing Tech.* (1998) 523 U.S. 751 [140 L.Ed.2d 981] (*Kiowa*), the United States Supreme Court traced the development of the doctrine, noting that a passing reference to immunity in *Turner v. United States* (1919) 248 U.S. 354 [63 L.Ed. 291] (*Turner*) became an explicit holding that tribes have immunity from suit. (*Kiowa*, *supra,* 523 U.S. at p. 756.) Since *Turner*, the high court has repeatedly affirmed the doctrine, holding that "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." (*Kiowa*, *supra,* 523 U.S. at p. 754; accord, *Three Affiliated Tribes v. Wold Engineering* (1986) 476 U.S. 877, 890 [90 L.Ed.2d 881]; *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58 [56 L.Ed.2d 106]; *United States v. United States F. & G. Co.* (1940) 309 U.S. 506, 512 [84 L.Ed. 894].)

The United States Supreme Court has come to recognize that the doctrine of tribal sovereign immunity is ultimately in the hands of Congress pursuant to Congress' constitutional power to regulate Indian affairs. *Kiowa* explains, "[the non-tribal party] does not ask us to repudiate the [doctrine] outright, but suggests instead that we confine it to reservations or to noncommercial activities. We decline to draw this distinction in this case, as we defer to the role Congress may wish to exercise in this important judgment." (*Kiowa*, *supra*, 523 U.S. at p. 758.)

Through its constitutionally delegated power to regulate Indian affairs, Congress has recognized and adopted the doctrine of tribal sovereign immunity through both action and nonaction. As *Kiowa* again explains, "Congress has acted against the background of our [immunity doctrine] decisions. It has restricted tribal immunity from suit in limited circumstances. [Citations.] And in other statutes it has declared an intention not to alter it." (*Kiowa, supra,* 523 U.S. at p. 758.) As stated plainly in *Oklahoma Tax Com. v. Potawatomi Tribe* (1991) 498 U.S. 505 [112 L.Ed.2d 1112] (*Oklahoma Tax*), ". . . Congress has consistently reiterated its approval of the immunity doctrine." (498 U.S. at p. 510.) "Like foreign sovereign immunity, tribal immunity is a matter of federal law." (*Kiowa, supra*, 523 U.S. at p. 759.) "As with tribal immunity, foreign sovereign immunity began as a judicial doctrine. . . . [¶] . . . Although the Court has taken the lead in drawing the bounds of tribal immunity, Congress, subject to constitutional

limitations, can alter its limits through explicit legislation." (*Ibid.*)

Because the doctrine of tribal sovereign immunity now stands as a proper exercise of constitutionally delegated Congressional authority, California reserves no power to challenge this doctrine under the premise of the Tenth Amendment. The Tenth Amendment states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." (U.S. Const., 10th Amend.) The Tenth Amendment does not grant powers to the states. It only confirms that the states retain whatever powers are not granted to the United States. (*New York v. United States* (1992) 505 U.S. 144, 157 [120 L.Ed.2d 120].)

It is undisputed, though, that individual states do reserve a constitutional power, under the Tenth Amendment, to regulate their electoral processes. (*Oregon v. Mitchell* (1970) 400 U.S. 112, 124-125 [27 L.Ed.2d 272] [the framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate their elections].) Therefore, there is no dispute that California can require the Tribe to comply with California's electoral laws, including accurate and timely reports of campaign donations and lobbying payments. However, the issue in this case is narrower. The issue is whether California can *sue* the Tribe to enforce those laws. This narrow legal question presents a potential constitutional conflict: the Tribe's constitutionally derived

right of sovereign immunity from suit and California's constitutionally derived right to regulate its electoral process. Does one of these constitutionally derived rights trump the other, or can they be interpreted harmoniously?

There is a principle of interpretation that provides help with the dilemma of considering two possibly conflicting constitutional provisions. Instead of finding a conflict that would result in one of the provisions impliedly repealing the other, whenever possible the two provisions should be harmonized so as to give effect to both to the extent possible. (*City and County of San Francisco v. County of San Mateo* (1995) 10 Cal.4th 554, 563.)

If this court allows California to sue the Tribe, it will eviscerate the Tribe's constitutionally derived right of tribal sovereign immunity from suit. In contrast, if the suit is not allowed to proceed, the state's constitutionally derived right to regulate the electoral process for its republican form of government is not destroyed. Rather, California is simply deprived of one of its tools (the option to bring suit against the Tribe) to enforce its regulatory authority. The United States Supreme Court has stated that "[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them." (*Kiowa, supra,* 523 U.S. at p. 755; accord, *Oklahoma Tax, supra,* 498 U.S. at p. 514.)

It is true that tribal sovereign immunity bars California from pursuing perhaps its most efficient remedy, an enforcement lawsuit. However, it is also true that viable alternatives are

available. With respect to the information about campaign contributions and lobbyists that the FPPC seeks from the Tribe, there already exist alternative sources for the state to retrieve that information. The recipients of the campaign contributions and the lobbyists are themselves required to file disclosures with the FPPC showing contributions and payments. In addition to these alternative sources of information, the FPPC also has the option of pursuing a government-to-government agreement with the Tribe. Such an agreement might include a waiver by the Tribe of its suit immunity for the specific purpose of enforcement by the FPPC of the terms of the agreement. Finally, the FPPC has the alternative of petitioning Congress to obtain relief from the sovereign immunity doctrine. As the United States Supreme Court has recognized, there are instances where Congress has acted to restrict or limit the doctrine. (*Kiowa, supra,* 523 U.S. at p. 758.) These alternative remedies are similar to the alternative remedies deemed adequate by the high court in *Oklahoma Tax. (Oklahoma Tax*, *supra,* 498 U.S. at p. 514.)

This analysis dispenses with the majority's conclusion that the Indian Commerce Clause cannot support tribal immunity here because Congress has not granted the Tribe immunity from suit. As I have concluded, Congress has generally granted such immunity by recognizing and adopting the doctrine of tribal sovereign immunity through its constitutionally delegated power to regulate Indian affairs.

As for the majority's point that the Indian Commerce Clause does not apply here because this case concerns the state's political process, not commerce, this point ignores the broad reach of the Indian Commerce Clause.

As just one concrete example of that broad reach, I offer the federal Indian Child Welfare Act of 1978 (ICWA). (25 U.S.C. § 1901 et seq.) ICWA was enacted out of an increasing concern over the consequences to Indian children, Indian families, and Indian tribes of child welfare practices that separated large numbers of Indian children from their families and tribes, and placed them in non-Indian homes through state adoption, foster care, and parental rights termination proceedings. (*Ibid.*) The Congressional findings for ICWA state that the act was adopted pursuant to Congress' constitutional power found in the Indian Commerce Clause. (25 U.S.C. § 1901(1).) The subject of child custody is a legal area traditionally reserved to the states. But ICWA exemplifies Congress' broad constitutional power derived from the Indian Commerce Clause "to promote the stability and security of Indian tribes and families" as part of a more general mandate to act as a guardian to Indian tribes and to protect tribal self-government. (25 U.S.C. § 1902; *In re Bridget R.* (1996) 41 Cal.App.4th 1483, 1511.)

The United States Supreme Court and Congress have repeatedly affirmed the doctrine of tribal sovereign immunity. While the high court recognizes the weaknesses of the doctrine, it also recognizes that the doctrine derives from the constitutional power of Congress to regulate Indian affairs.

For this reason, the court has refrained from exercising its judicial power to materially alter a doctrine that properly belongs in the sphere of the legislative branch. This court should do the same. As noted, this case does not present the issue of federal common law versus a state's unchartered constitutional guarantee of a republican form of government. Rather, this case pits the Congressionally adopted, and constitutionally anchored, doctrine of tribal sovereign immunity from suit against a state's constitutionally derived right to regulate its electoral process. A tribe's constitutionally based right to sovereign immunity cannot be abrogated by a state's constitutionally based right to regulate its electoral process through the use of a lawsuit, where viable regulatory alternatives exist.

I would grant the Tribe's petition.

DAVIS, J.