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## Winner, Best Appellate Brief in the 2005 Native American Law Student Association Moot Court Competition

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# **WINNER, BEST APPELLATE BRIEF IN THE 2005 NATIVE AMERICAN LAW STUDENT ASSOCIATION MOOT COURT COMPETITION**

*Brian McClatchey\* & Paul Porter\*\**

## *Questions Presented*

1) Does the State of California have the authority to apply the California Political Reform Act of 1974 to petitioner Piñon Tribe and the tribal chairperson?

2) Does tribal sovereign immunity bar California from enforcing the California Political Reform Act against the Piñon Tribe and the tribal chairperson?

3) Is the March 2001 amendment to the California Political Reform Act, barring tribal campaign contributions and lobbying by Indian tribes, preempted by federal law?

4) Is the March 2001 amendment to the California Political Reform Act, barring campaign contributions and lobbying by Indian tribes, a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

## *Statement of the Case*

This case presents the questions of whether a state may apply its election regulations to Indian tribes, and whether an Indian tribe may avail itself of sovereign immunity from suit by a state to enforce such election regulations. Also presented are the questions of whether a state's election regulations of tribal campaign donations violate the Fourteenth Amendment to the United States Constitution, and whether such regulations are preempted by federal law.

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*Proceedings Below*

This cause comes before the Court upon writ of certiorari from the Supreme Court of California. Respondent Fair Political Practices Commission [hereinafter FPPC] filed suit in January of 2002 in the California Superior Court against petitioner Piñon Tribe ("Tribe") and the tribal chairperson ("Chair Rocha"), for violation of the California Political Reform Act of 1974 [hereinafter CPRA]. (R. at 1.) The relief sought was an injunction against future contributions and the civil penalties authorized for past violations of the CPRA. (*Id.*) In June of 2002, petitioners Tribe and Chair Rocha moved to quash the complaint, arguing that both the Tribe and the Chair had sovereign immunity. (*Id.* at 2.) They also argued that the 2001 amendments to the CPRA were preempted by federal law and violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (*Id.*) The Superior Court denied the petitioners' motion, holding that the doctrine of tribal sovereign immunity did not prevent the state from applying the CPRA to the Tribe and its officers. *Fair Political Practices Comm'n v. Piñon Tribe*, No. 2002-746 MH (Cal. Super. Ct. Oct. 12, 2002). The key to this holding was that the activity in question affected, and, indeed was aimed at affecting, the governance and development of another sovereign, the State of California. The Superior Court also found no federal preemption and no violation of the Equal Protection Clause of the United States Constitution, since the CPRA only encompassed an entity, the Tribe, and not any individual persons. *Id.*

Denying a writ of mandate in part and granting it in part, the California Supreme Court, J. Knight, held that the doctrine of tribal sovereign immunity is a common-law doctrine, not a matter of constitutional law, which must yield to the reserved rights contained in the Tenth Amendment to the United States Constitution, as well as the Guarantee Clause of Article IV, § 4, of the United States Constitution. *Fair Political Practices Comm'n v. Piñon Tribe*, 560 Cal. 335 (2003). The California Supreme Court also held that the CPRA's ban on tribal campaign contributions to candidates for state office was preempted by federal law, but did not reach the equal protection argument. *Id.*

*Statement of Facts*

The CPRA is administered by Respondent Fair Political Practices Commission (FPPC). The CPRA requires that all lobbyists be registered with the FPPC, and that all campaign contributions over \$10,000 be reported to the FPPC. Cal. Gov't Code § 82400 (West 2004). Under a March 2001 amendment to the CPRA, it is "a civil and criminal offense for any candidate

for state office to accept contributions from an Indian tribe or nation, and for any Indian tribe or nation to contribute to a candidate for state office.” Cal Gov’t Code § 84900.7 (West 2004).

In January of 2001, Petitioner Chair Rocha handed a candidate for state office a check for \$15,000 while both individuals were situated on Piñon tribal land. (R. at 1.) The tribe, however, did not report the donation, while the candidate did. (*Id.*) In June of 2001, the tribe purchased a table at a campaign event held off-reservation for that same candidate for state office, for an undisclosed sum. (*Id.*) Again, the tribe did not report the contribution, though the candidate did. (*Id.*)

### *Summary of Argument*

Respondent FPPC argues that it may properly enforce the CPRA, including the March 2001 amendment to that Act [hereinafter the Amendment], against the Piñon Tribe, and that this regulation is not barred by the doctrine of tribal sovereign immunity. Respondent FPPC also argues that the Amendment does not violate the Fourteenth Amendment to the United States Constitution, under either rational basis or strict scrutiny, and is not preempted by federal law.

### *Argument*

#### *I. The State of California Has the Authority to Apply the CPRA to the Tribe and its Officers*

##### *A. The State of California can apply the CPRA to tribes under the plain language of the statute and as an exercise of its reserved rights under the Tenth Amendment to the United States Constitution*

California may apply the CPRA to Indian tribes based on the plain language of the statute. The CPRA states that a “person” is “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.*” Cal. Gov’t Code § 82047 (West 2004). Petitioner Piñon Tribe is, manifestly, an “organization or group of persons acting in concert,” *id.*, and as such, the Tribe is a “person,” to which the CPRA applies.

Petitioners may point to *Inyo County v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony*, 538 U.S. 701 (2003), for the notion that tribes are not “persons.” However, *Inyo County* is inapplicable here, because it dealt specifically with 42 U.S.C. § 1983, which guaranteed

protection from abrogation of civil rights under color of law. *Id.* In order for a tribe to be a person within that statute, it would have to possess constitutionally-protected rights. Tribes have no such rights; their rights are not guaranteed by the Constitution, but under the federal trust and plenary power doctrines, judicially and legislatively imposed, are enforced by the executive branch. *See, e.g., United States v. Lara*, 541 U.S. 193, 219 (2004) (Thomas, J., concurring) (“The tribes, by contrast, are not part of this constitutional order, and their sovereignty is not guaranteed by it. . . . Although the tribes never fit comfortably within the category of foreign nations, the 1871 Act [ending treaty-making] tends to show that the political branches no longer considered the tribes to be anything like foreign nations. And it is at least arguable that [at that early date] the United States no longer considered the tribes to be sovereign.”).

California may apply the CPRA to Indian tribes under the Tenth Amendment to the United States Constitution, which states, “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. Const. amend. X. In the instant case, the power in question is the power to regulate the electoral process of the State of California, which has not been “delegated to the United States by the Constitution, nor prohibited by” the Constitution to the State of California. *Id.* In fact, the Court has deferred to the judgment of the states themselves in this area. *See infra* Part I.B.

Throughout the Court’s history, there has been a tension between the Commerce Clause and the Tenth Amendment. This tension is attenuated when considering the so-called Indian Commerce Clause. U.S. Const. art. I, § 8, cl. 3. *See, e.g., Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (Indian Commerce Clause does not have same reach as Interstate Commerce Clause, as historically understood). *United States v. Darby*, 312 U.S. 100, 114 (1941), points up this tension. A unanimous Court in *Darby* held: “The power of Congress over interstate commerce is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed by the Constitution. That power can neither be enlarged nor diminished by the exercise or non-exercise of state power.” *Id.* at 114. “[The Court’s] conclusion [was] unaffected by the Tenth Amendment.” *Id.* at 123.

Lately, however, the importance of states’ rights under the Tenth Amendment, along with the concomitant decline in importance of the Commerce Clause, have combined to lessen *Darby*’s impact. For example, in *New York v. United States*, 505 U.S. 144, 156 (1992), the Court, holding that Congress could not, under its Commerce Clause power, compel states to

provide for radioactive waste disposal within their borders, stated that “Congress exercises its conferred powers subject to the limitations contained in the Constitution. . . . [T]he 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.” *Id.* at 156-157.

Other recent cases bear out the notion that the Tenth Amendment’s “reserved powers” doctrine carries great weight. In *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991), the Court noted that its precedents have

recognized explicitly the States’ constitutional power to establish the qualifications for those who would govern: “Just as ‘the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections,’ [e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen.” Such power inheres in the State by virtue of its obligation, already noted above, ‘to preserve the basic conception of a political community.’

*Id.* at 461-462 (citations omitted). The Court should follow this reasoning in the present case, where it is considering the vital question of a State’s conduct of its elections.

*B. The State of California may apply the CPRA to the tribes under Article IV, § 4, of the Constitution, the “Guarantee Clause,” which presents a non-justiciable, political question, and to which this Court should continue to defer to Congress*

Another constitutional source of authority for California to apply the CPRA to Indian tribes is Article IV, § 4, of the United States Constitution: “The United States shall guarantee to every State in this Union a Republican Form of Government.” U.S. Const. art. IV, §. 4. The prime determinant of whether California operates under a “republican form of government” is whether its elections are fair, free and open. It is toward the accomplishment of this goal that the CPRA strives. *See* Cal. Gov’t Code § 81002 (West 2004) (purpose of CPRA is to provide public disclosure to inhibit improper campaign practices and improper influences on elections).

Throughout the Court’s history, beginning with *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849), through *Baker v. Carr*, 369 U.S. 186, 209-210 (1962), the Court has held that questions presented under the Guarantee Clause of Article IV, § 4, are nonjusticiable, political questions, the resolution of which is properly left to Congress. In doing so, the Court has recognized

the authority of the people of the States to determine the qualifications of their most important government officials. It is an authority that lies at "the heart of representative government." 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.

*Gregory*, 501 U.S. at 463 (citations omitted).

Though the Guarantee Clause is seldom considered, due to its political, nonjusticiable nature, if the Court were to entertain the question, it should consider that the guarantee of a republican form of government must necessarily entail the ability to enforce laws enacted to preserve that republican form of government. *See, e.g., Fair Political Practices Comm'n. v. Santa Rosa Indian Community of the Santa Rosa Rancheria*, 20 Cal. Rptr. 3d 292, 301-302 (Ct. App. 2004):

[W]ithout a right to bring suit, the state's constitutional right to preserve its republican form of government would be 'ephemeral.' . . . 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 from corruption. As such, the right to sue must be given constitutional stature.

*Id.* (citations omitted). Without the means to enforce those laws, Article IV, § 4, of the United States Constitution is a dead letter. This cannot be the Framers' intent; just as "the power to regulate interstate commerce 'would be incomplete without the authority to render states liable in damages,'" *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 59 (1996) (citation omitted), so, too, would the right to be guaranteed a "republican form of government," U.S. Const., art. IV, § 4, be incomplete without the power to enforce those state laws that are clearly and rationally related to the accomplishment of that objective. This right must have an accompanying remedy. This Court should follow its reliable precedents on this question.

*C. State jurisdiction is not limited to activities occurring outside reservation lands, but can exist for those activities which have an effect on off-reservation State interests*

Recently, this Court, in *Nevada v. Hicks*, 533 U.S. 353, 361 (2001), stated:

Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory

authority on the reservation. State sovereignty does not end at a reservation's border . . . "Ordinarily," it is now clear, "an Indian reservation is considered part of the territory of the State."

. . . When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest. When, however, state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land . . . The States' inherent jurisdiction on reservations can of course be stripped by Congress.

*Id.* at 361-365 (citations omitted). Here, Congress has given, and California has accepted, via P.L. 280, 18 U.S.C. § 1162 (2004), greater jurisdictional authority over Indian lands than is the norm throughout the rest of Indian country. If it is true that, as this Court unanimously held, "[w]hen . . . state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land," *Hicks*, 533 U.S. at 361-365, it is *a fortiori* true that it may do so when it has been given, and has accepted, a broad mandate to regulate the activities of Indians on reservation lands, as California has done via the mechanism of P.L. 280.

## *II. The Doctrine of Tribal Sovereign Immunity Does Not Bar the State of California from Enforcing the CPRA Against Petitioner Piñon Tribe and Its Officers*

### *A. The doctrine of tribal sovereign immunity does not bar an action by the State of California against the Piñon Tribe*

The doctrine of tribal sovereign immunity has its origins in this Court's decision in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1939). There, the United States brought suit on behalf of the Choctaw and Chickasaw Nations to enforce their leasehold interests in a bankruptcy proceeding. The Court held:

The public policy which exempted the dependent as well as the dominant sovereignties from suit without consent continues this immunity without Congressional authorization. These Indian Nations are exempt from suit without Congressional authorization. It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did.



*Id.* Of importance for the present action is the fact that the United States, not the Choctaw and Chickasaw Nations, filed and maintained suit against the debtor in bankruptcy. For this reason, *USF & G* should be read in a limited fashion, to mean that where the United States takes part in law suits on behalf of Indian tribes, the sovereign immunity of the United States, not that of the Indian tribes, should bar the action, unless waived.

While this Court's "[l]ater cases, with little analysis, [have] reiterated the [tribal sovereign immunity] doctrine," *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 757 (1998), they have also shown "reasons to doubt the wisdom of perpetuating the doctrine." *Id.* at 758. In *Kiowa Tribe*, this Court noted that in the sphere of economic activity, where tribes have become increasingly active, the blanket rule of "tribal immunity extends beyond what is needed to safeguard tribal self-governance." *Id.* This is also a case in which that immunity, which would enable tribes to subvert (or apparently subvert) the electoral process of a state, "extends beyond what is needed to safeguard tribal self-governance." *Id.* It would, in fact, allow tribes to interfere with the electoral process of any state with complete impunity, which could undermine the right of California to maintain a "republican form of government." U.S. Const. art. IV, § 4.

The Court noted, however, that "[t]o say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit. . . . There is a difference between the right to demand compliance with state laws and the means available to enforce them." *Kiowa Tribe*, 523 U.S. at 755. However, later cases have confirmed that this is an artificial distinction; in some cases, as here, where on-reservation activities severely affect state interests, States must have a remedy where they have a right.

Finally, the Court in *Kiowa Tribe* noted that "tribal immunity is a matter of federal law, and is not subject to diminution by the States." *Id.* at 756. Respondent FPPC does not seek to diminish this tribal immunity; the doctrine is limited by the United States Constitution itself.

In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 513 (1991), the Supreme Court held that Oklahoma could tax cigarette sales to non-members conducted on the reservation and that the Tribe had to collect the State taxes in sales to non-members and remit them to the State. For this solely on-reservation, commercial activity, the Court implicitly considered the off-reservation effects on the public finances of the State of Oklahoma in reaching its conclusion.

That case is relevant here, because this case also concerns the off-reservation effects of on-reservation activities. In *Oklahoma Tax Commission*,

the tribe was selling cigarettes free of state taxes to enable it to fund its governmental activities. In other words, the tribal activity in *Oklahoma Tax Commission* was focused squarely on the internal effects of the sales. Here, by contrast, petitioner Piñon Tribe is undertaking campaign donation activities solely in order to influence the functioning of a state election, with the off-reservation effects of its activities clearly in view. The implicit reasoning behind *Oklahoma Tax Commission*, therefore, is applicable with even greater force in this case; where on-reservation activity affects, to a significant degree, the off-reservation environment, a state should be able, as in *Oklahoma Tax Commission*, to extend its laws to govern activities occurring within a reservation, despite the doctrine of tribal sovereign immunity.

At least two courts in California have examined the issues before the Court, and can provide persuasive arguments, if not binding precedent, for this Court's consideration. In *Agua Caliente Band of Cahuilla Indians v. Superior Court*, 10 Cal. Rptr. 3d 679, 682 (Ct. App. 2004), the California Court of Appeals held that tribes could not avail themselves of sovereign immunity in suits by the State of California to enforce the CPRA:

[T]he doctrine of tribal immunity, as announced by the United States Supreme Court, has no foundation in the federal Constitution or in any federal statute, but is rather a doctrine created by the common law power of the Supreme Court. . . . The constitutional right of the State to sue to preserve its republican form of government trumps the common law doctrine of sovereign immunity.

*Id.*; see also *Santa Rosa*, 20 Cal. Rptr. 3d at 298 (state's right to sue to maintain republican form of government trumps judicial doctrine of sovereign immunity). While of course not binding on this Court, these decisions are persuasive authority, and should guide this Court's decision.

*B. The doctrine of tribal sovereign immunity does not bar an action by the State of California against Chair Rocha, an officer of the Piñon Tribe*

The Eleventh Amendment to the United States Constitution states that: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. Though tribes are not states, their officers are given broad sovereign immunity, except where the tribe has waived its sovereign immunity or where Congress has expressly acted to clearly abrogate that immunity from suit. See *Okla. Tax Comm'n*, 498 U.S.

at 509. In many situations, namely off-reservation, commercial conduct, those with whom the tribe is dealing (commercial entities outside the reservation in a contractual relationship with the tribe) are very aware of the tribe's sovereign status. Here, by contrast, the voters of California often have no idea who contributes to which candidate, nor do they often perceive the complex interplay between State and tribal governments within the federal scheme. In fact, this is one motivation of the CPRA: to increase voter awareness of the source of candidates' campaign donations. *See* Cal. Gov't Code § 81002 (statement of legislative purpose). Where those involved in commercial dealings with a tribe have the benefit of the relative transparency and clarity afforded by contractual dealings, voters in an election have no such benefit, and it would frustrate California's goal of open, free, and fair elections to allow tribes to operate behind a shadowy veil of sovereign immunity in the context of election contributions.

The Supreme Court's decision in *Ex Parte Young*, 209 U.S. 123, 155 (1908), is, in effect, an exception to the Eleventh Amendment. The Court there held that acts of a public official undertaken outside his or her official capacity are valid grounds for asserting action against the sovereign. In other words, sovereign immunity is not available where an officer of the state acts outside the scope of official duties. In an action to enjoin the act of an officer of the state, sovereign immunity is not available, because

the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. . . . If the act which the Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

*Id.* at 159-160.

However, *Ex Parte Young* does not apply to tribes, because of their non-State status within the federal system. The Supreme Court has "never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State." *Okla. Tax Comm'n*, 498 U.S. at 514. The doctrine of *Ex Parte Young* is simply, by this Court's own precedents, not applicable to Chair Rocha here.

Even assuming *Ex Parte Young* is applicable against tribal officials here, the campaign contributions were impermissible under California's laws, which the State exercises as one of its Tenth Amendment "reserved powers." U.S. Const. amend. X. Since Chair Rocha's actions contravened both the Article IV, § 4, "republican form of government" guarantee, as well as the Tenth Amendment's "reserved powers" doctrine, it would be an unconstitutional act within the meaning of *Ex Parte Young*. For this reason, Chair Rocha would not be able to avail herself of the sovereign immunity otherwise held by the Piñon Tribe.

### *III. The March 2001 Amendment to the CPRA Does Not Violate the Equal Protection Clause of the Fourteenth Amendment*

The 2001 amendment to the CPRA is valid under the Equal Protection Clause of the Fourteenth Amendment. Legislation facing challenge under the Equal Protection Clause is valid if the classification drawn by the legislation is rationally related to a legitimate state interest. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). However, because statutory classifications based on race, alienage or national origin are so seldom relevant to the achievement of a legitimate state interest, and because such discrimination is unlikely to be soon rectified by legislative means, laws that so classify are subject to strict scrutiny and will be sustained only if they are narrowly tailored to serve a compelling state interest. *Id.* at 440. The March 2001 Amendment, Cal. Gov't Code § 84900.7 (West 2004), is sustainable under either a strict scrutiny or rational basis equal protection analysis.

#### *A. The Piñon Tribe is a political group and not a racial minority, and requires only a rational basis test for equal protection*

Where individuals in a group affected by a law have distinguishing characteristics relevant to the interests the state has the authority to implement, the Equal Protection Clause only requires the rational basis test. *City of Cleburne*, 473 U.S. at 441. The more stringent strict scrutiny test only applies when the law in question discriminates against a suspect class or abrogates a fundamental right. *See Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 311 (1976).

The Supreme Court has declined to categorize Indian tribes as a suspect class and to apply strict scrutiny to legislation affecting Indians, stating that Indians constitute a political class rather than a racial one. *See Morton v. Mancari*, 417 U.S. 535, 554 n.24 (1974). "Historically, the formal relationship between the United States and American Indian tribes has been

political, rather than race-based. The Indian Commerce Clause speaks to regulation of commerce with tribes, not individuals.” *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1278 (9th Cir. 2004) (citing U.S. Const., art. I, § 8, cl. 3).

The Supreme Court has further ruled that federal legislation with respect to Indian tribes is not based upon impermissible racial classifications, but rather political classifications that are expressly provided for in the Constitution and supported by the ensuing history of the federal government’s relationship with Indians. *Id.* (citing *United States v. Antelope*, 430 U.S. 641, 645 (1977)). The Court has also stated that Indian tribes are to be regarded as “once-sovereign political communities” and not “racial group[s] consisting of Indians.” *Mancari*, 417 U.S. at 553.

Although discrimination based on classifications of race is subject to strict scrutiny, *see, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995), recognition of Indian tribes remains a political, rather than a racial determination. *Norton*, 386 F.3d at 1279. The Amendment only discriminates against tribes as political entities and not individual Indians based on their race. Indeed, under the Amendment, individuals of Indian descent, including tribal members, are free to contribute to candidates for statewide office in California. The restriction in question affects only tribal organizations. Therefore, the Amendment does not discriminate against a suspect class.

The Amendment does not abrogate a fundamental right. Although political speech is a fundamental right enshrined in the Bill of Rights, *see* U.S. Const. amend. I, legislative restrictions on political contributions do not constitute an abrogation of a fundamental right to free political speech. *See Buckley v. Valeo*, 424 U.S. 1, 29 (1976). Although lobbying is a fundamental right to petition the government, which is protected by the First Amendment, *United States v. Sawyer*, 85 F.3d 713, 731 n.15 (1st Cir. 1996), the Amendment does not restrict the tribes from lobbying activities, but regulates tribal lobbying by requiring tribes to divulge their campaign contributions to the FPPC. The Amendment also restricts the tribes from entering into contracts with professional lobbyists, which is not a violation of a right subject to strict scrutiny. *See Nebbia v. New York*, 291 U.S. 502, 510 (1934). Since Indian tribes are not a suspect class, and the Amendment does not abrogate a fundamental right, the rational basis test is the appropriate standard to apply to the Amendment.

The state of California has a legitimate interest in freeing the political process of its state legislature from corruption. In doing so, the state need not seek to regulate all parts of the problem at once, but may select one phase of one field and neglect others without this action amounting to a legislative classification violative of the rational basis test. *Williamson v. Lee Optical*,

348 U.S. 483, 489 (1955). Although the Amendment discriminates against Indian tribes on its face, the state of California can, under *Lee Optical*, eradicate the evil of political corruption by implementing a law that discriminates against only one group.

*B. Judicial declaration of Indian tribes as a racial minority subject to strict scrutiny would create far-reaching economic harm to the tribes*

As a policy, to declare legislation affecting Indian tribes racially discriminatory and subject to strict scrutiny would be far more pernicious than the restrictions on political contributions under the Amendment. In the post-*Adarand* era, legislation that seeks to benefit racial minorities through set-aside programs is disfavored and subject to strict scrutiny. Indian tribes depend on *Mancari* to decouple them from racial considerations, allowing Congress to continue “benign” discrimination towards Indian tribes where it cannot otherwise benefit racial groups. See L. Scott Gould, “Mixing Bodies and Beliefs: The Predicament of Tribes,” 101 Colum. L. Rev. 702, 717 (2001). Categorizing Indian tribes as a suspect class in the present case could lead to the elimination of tribal access to, *inter alia*, hiring preferences and subsidies, which could result in disproportionate economic harm to Indian tribes and lessen their political clout. This would undermine the current federal policy of tribal self-determination.

*C. California has a compelling state interest in applying the Amendment to Indian tribes, which would survive strict scrutiny*

Even if strict scrutiny were applied, the Amendment would still not offend the Equal Protection Clause of the Fourteenth Amendment since California has a compelling state interest in preventing political corruption, particularly when contributions from certain groups are especially susceptible to creating an appearance of corruption. See *State v. Alaska Civil Liberties Union*, 978 P.2d. 597, 621 (Alaska 1999), *cert. denied*, 528 U.S. 1153 (2000). The need for lobbying regulation originates in the appearance of impropriety that can arise from political contributions, see Cal. Gov’t Code § 81002, but this appearance can be particularly acute if the contributions come from foreign or other sources not ordinarily subject to the state’s jurisdiction. This is true of Indian tribes, as they are recognized as having quasi-sovereign status in the federal union. See *Cherokee Nation v. Georgia*, 43 U.S. 1, 38 (1831); *Worcester v. Georgia*, 31 U.S. 515, 570 (1832).

The Amendment also would survive the test of strict scrutiny because it is narrowly tailored to the compelling state interest. Narrow tailoring requires a consideration of race-neutral means as opposed to the discriminatory

measure. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989). Additionally, the discrimination must not be over-inclusive. *Id.* at 508.

There is no race-neutral means of accomplishing the compelling state interest of prohibiting political contributions from quasi-sovereign organizations that are not ordinarily subject to the state's jurisdiction. The Amendment would not be over-inclusive, since it does not limit all political contributions. Indeed, individual Indians, including individual members of the Piñon Tribe, would not be barred from making contributions to their candidates of choice. Only Indians acting on behalf of their tribal organizations would be subject to the restriction under the Amendment.

The Amendment both serves a compelling state interest, and is narrowly tailored to withstand strict scrutiny analysis. Therefore, even if Indian tribes are considered a suspect, racial class, the Amendment does not offend the Equal Protection Clause of the Fourteenth Amendment.

#### *IV. The March 2001 Amendment to the CPRA Is Not Preempted by Federal Law*

The Amendment is not preempted by federal law. Preemption analysis falls into two categories. The modern form of preemption analysis deals with the question of regulating non-Indians on tribal lands, *see, e.g., New Mexico v. Mescalero Apache Tribe*, 426 U.S. 324, 334 (1983), while a more traditional test is applied to cases where a state seeks to regulate tribes or tribal members. *See, e.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 (1987). The Amendment offends neither of these tests.

The modern preemption analysis articulated by the Court involves a balancing test. *Mescalero*, 426 U.S. at 334. State regulation of non-Indians on tribal lands is preempted in the interest of tribal sovereignty, unless "the state interests at stake are sufficient to justify the assertion of state authority." *Id.* Even in the absence of contrary federal statutes or treaties, preemption can still occur in the interest of inherent tribal sovereignty as the Court has rejected narrow analyses of congressional intent to find preemption. *White Mountain Apache Tribe v. Bracker*, 488 U.S. 136, 144 (1980). Normally, the balancing test is met when a state provides functions or services in connection with on-reservation activity. *Mescalero*, 426 U.S. at 336. The hunting and fishing regulatory statute in *Mescalero* was struck down on the basis of a cooperative agreement between the tribe and the federal government to develop wildlife resources on tribal land which went to the heart of tribal sovereignty. *Id.* at 327.

State regulation of Indian tribes and their members is a more serious matter than that of regulation of non-Indians on Indian land, as it goes further to the issue of tribal sovereignty. For that reason, the balancing test of the modern preemption analysis does not apply, and the Court will generally preempt any such laws unless the state can show “exceptional circumstances” why the regulation is necessary. *Cabazon*, 480 U.S. at 215 (quoting *Mescalero*, 426 U.S. at 331-332). However, the Court has not clearly articulated a test for exceptional circumstances, saying that instances where these circumstances exist are “few.” See *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 74 (1962); see also Cameron A. Reese, Comment, “Tribal Immunity from California’s Campaign Contribution Disclosure Requirements,” 2004 BYU L. Rev. 793, 795 (2004) (illustrating ambiguity of judicial decisions regarding a state’s ability to regulate tribes). In *Puyallup Tribe, Inc. v. Washington Department of Game*, 433 U.S. 165, 175-176 (1977), the Court found an exceptional circumstance when the state regulated the on-reservation fishing activities of tribal members. *Id.* This was so because the land at issue did not belong to the tribe, although it lay within reservation boundaries, and because the state had an interest in conserving wildlife that had become scarce. Implicit in this analysis is the off-reservation effects of game regulations: game does not respect political boundaries, and a state’s regulatory scheme in the area of fish and game regulation can be impaired by on-reservation activity. A similar situation persists here, where on-reservation activity has a significant impact on an off-reservation regulatory scheme. The analogy is particularly apt here, where the on-reservation activity occurs with full knowledge and intent regarding the off-reservation effects.

Congress has no general power to regulate state elections, except by the Fourteenth and Fifteenth Amendments to the Constitution. See *Guinn v. United States*, 238 U.S. 347, 358 (1915). States also have a compelling interest in the prevention of corruption in the state political system. *Valeo*, 424 U.S. at 29. This state interest in its own electoral system is one of pure state sovereignty, and does not preclude any special relationship between the federal government and Indian tribes. Nor does this state interest interfere with Indian tribal sovereignty and right to self-determination. The Amendment seeks to protect California’s sovereign rights to govern its own elections, which outweighs any tribal interests in influencing California state politicians. The state’s recognized compelling interests are exceptional circumstances which should enable regulation of the tribe in this area. Therefore, the Amendment is not preempted under either the modern preemption or the traditional tribal sovereignty analyses, and the state can



enforce its provision against both non-Indians on tribal land and against the tribes and tribal members.

*V. Conclusion*

The State of California may enforce the CPRA against Indian tribes in California, and this regulation is not barred by the doctrine of tribal sovereign immunity. The Amendment does not violate the Fourteenth Amendment to the United States Constitution, under either rational basis or strict scrutiny, and is not preempted by federal law.