No. S123832

In the Supreme Court of California

Agua Caliente Band of Cahuilla Indians,

Petitioner and Defendant,

vs.

Sacramento County Superior Court,

Respondent.

Fair Political Practices Commission,

Real Party in Interest and Plaintiff.

AGUA CALIENTE BAND OF CAHUILLA INDIANS' PETITION FOR REHEARING AND REQUEST FOR STAY OF REMITTITUR

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

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

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I.
INTRODUCTION

Petitioner Agua Caliente Band of Cahuilla Indians recognizes that granting rehearing is an extraordinary step for this Court to take. But the Court's respective opinions here reflect the closeness of this case on the merits and that alone would bear a second look. More fundamentally, rehearing is warranted because the majority's reasoning in this case departs in a material way from jurisprudential principles at the core of our federal system.

As the majority opinion acknowledges, the United States Supreme Court has never held or suggested that the factual or legal context in which an assertion of tribal suit immunity arises has any bearing on its applicability, nor has the Supreme Court ever recognized more than two exceptions to that immunity: Where Congress abrogates the immunity or where the tribe itself clearly and unequivocally waives the immunity. The Supreme Court's Guarantee Clause and Tenth Amendment jurisprudence is equally clear and just as restrained: The Guarantee Clause has never even been deemed to present justiciable questions on issues like those presented here, and neither it nor the Tenth Amendment has ever been construed to create anything like the broad, affirmative state power declared by the majority.

To be sure, state and federal courts are free to criticize and comment on the United States Supreme Court's pronouncements of

federal law. But the Supremacy Clause and well-established jurisprudential principles governing the application and development of federal law foreclose state courts from making new federal law, as the majority undisputedly has done here. Rather, as the Supreme Court itself has directed, the proper approach for a state court is to adhere to existing federal law and not to take affirmative steps to create novel legal principles of federal law that the Supreme Court itself has yet to recognize. Rehearing is warranted for this reason and respectfully urged.

II.
ARGUMENT SUPPORTING REHEARING

A. THE REASONING IN THE MAJORITY OPINION REJECTING APPLICATION OF TRIBAL SUIT IMMUNITY INDISPUTABLY CREATES NEW FEDERAL LAW WITHOUT RELIANCE ON, AND IN CONTRAVENTION OF, EXISTING FEDERAL PRECEDENT

The majority opinion here correctly acknowledges the settled understanding of tribal suit immunity: "that as 'a matter of federal law, an Indian tribe is subject to suit *only* where Congress has authorized the suit or the tribe has waived its immunity.'" Slip Op. at 11 (quoting *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998)) (emphasis added). Indeed, the United States

Supreme Court, lower federal courts and state courts consistently and repeatedly have rejected a wide range of state encroachments on tribal suit immunity, rigorously reiterating that tribal suit immunity may only be diminished by Congress or a tribe's clear waiver.[1]

The majority opinion also acknowledges that the Supreme Court has never "applied the Tenth Amendment or the guarantee clause to uphold a state's enforcement of a state election provision against a sovereign tribe." *See* Slip Op. at 23. Nor are there any express indications in the Supreme Court's opinions that it would do so. *See, e.g., New York v. United States*, 505 U.S. 144, 184-85 (1992) (noting current view is that "Guarantee clause implicates only nonjusticiable political questions"); William M. Wiecek, *The Guarantee Clause of the U.S. Constitution* 11, 42-43, 59-60 (Cornell Univ. Press 1972) (Guarantee Clause is a defensive state bulwark against extreme federal intrusion into a state's prerogative to maintain a republican form of government).

Without any affirmative precedents to work from, and in contravention of what precedent there is, the majority looks to dicta,

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[1] *See, e.g., Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998); *Okla. Tax. Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505 (1991); *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877 (1986); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Dawavendewa v. Salt River Project Agricultural Improvement & Power Dist.*, 276 F.3d 1150, 1159 (9th Cir. 2002); *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 356-58 (2d Cir. 2000); *Ackerman v. Edwards*, 121 Cal. App. 4th 946, 951-52 (2004).

a dissenting opinion and legal commentators as support for its novel holding.[2] It first relies on language in the majority opinion in *Kiowa Tribe* purporting to express doubt about preserving tribal suit immunity (despite *Kiowa Tribe*'s express *holding* preserving tribal suit immunity), *see* Slip Op. at 12, as well as the dissenting opinion of three justices in *Kiowa Tribe*, to support its conclusion that "United States Supreme Court precedent" in this area is "evolving," leading to an implicit conclusion that tribal suit immunity has somehow been weakened. *See* Slip Op. at 14-15.

The majority then finds support for its novel extension of the Guarantee Clause and Tenth Amendment in the views of a few academic commentators and the purported *absence* of precedent holding expressly "that the federal common law doctrine of tribal sovereign immunity trumps state authority when a state acts in political 'matters resting firmly within [its] constitutional prerogatives.'" *See* Slip Op. at 23 (citations omitted). That assertion, however, leaves only the commentators, for, as the Supreme Court itself has noted, silences in precedent carry no

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[2] The majority opinion also cites Supreme Court cases involving federal preemption. *See* Slip Op. at 8-9. But just as it has never wavered in its approach to tribal suit immunity, the Supreme Court has made it clear that its preemption cases have no relevance to the application of tribal suit immunity. *See Kiowa Tribe*, 523 U.S at 755 (explaining that the balancing-of-interests preemption analysis used to determine whether a tribe is subject to a state's regulatory scheme does not apply to the issue of a tribe's sovereign immunity from suit) (citing *Okla. Tax Comm'n*, 498 U.S. at 514).

weight. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 232 n.6 (1995) ("the unexplained silences of our decisions lack precedential weight.") (citation omitted).

This leads to the fundamental question raised by this rehearing petition: Can a state court in the first instance properly create new federal law on the basis of Supreme Court dicta at odds with the Court's actual holding, a dissenting opinion of three justices never adopted by a Supreme Court majority, selected academic commentary, and precedential silence? For the reasons set forth in the following section, the answer must be "no," and that is why rehearing is warranted and respectfully urged.

B. THE MAJORITY OPINION'S NOVEL AND EXPANSIVE CREATION OF NEW FEDERAL LAW CANNOT BE RECONCILED WITH THE JURISPRUDENTIAL PRINCIPLES THAT CONTROL THE PROPER DEVELOPMENT OF FEDERAL LAW

In our constitutional system of federalism, state courts often apply federal law, and federal courts often apply state law. The Supreme Court has long recognized the competence of state and federal courts in this regard. *See Howlett by Howlett v. Rose*, 496 U.S. 356, 367-68 (1990). The Supremacy Clause mandates that state courts apply federal law when it supplies the rule of decision in a particular case. *See Printz v. United States*, 521 U.S. 898, 928

(1997) ("[S]tate courts cannot refuse to apply federal law—a conclusion mandated by the terms of the Supremacy Clause."). There is no dispute that the supreme federal law that controls here is tribal suit immunity, only reducible by Congress or tribal waiver, neither of which has occurred in this case. *See Kiowa Tribe*, 523 U.S. at 760 (Supreme Court "defer[s] to Congress" when considering the scope of federal tribal suit immunity; "immunity governs" unless abrogated by Congress or waived by the tribe).[3]

At the same time it prescribes the applicable, supreme federal law, the Supremacy Clause proscribes state-court creation of new federal law. The Supremacy Clause describes several categories of federal law, each of which can only be made pursuant to a particular constitutionally-mandated procedure. *See* Anthony J. Bellia Jr., *State Courts and the Interpretation of Federal Statutes*, 50 VAND. L. REV. 1501, 1548-49 (2006); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1331-72 (2001). A state court purporting to create new federal law, without basis in existing Supreme Court precedent or other valid

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[3] Tribal suit immunity—however characterized—is supreme federal "law" established by the Supreme Court that must be followed by command of the Supremacy Clause. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964) (federal act of state doctrine prevails over state law; "there are enclaves of federal judge-made law which bind the States"); *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 314 (1955) (where the federal courts have the authority to fashion federal common law, "[s]tates can no more override such judicial rules validly fashioned than they can override Acts of Congress") (citation omitted).

source of federal law, impermissibly bypasses these procedures. *See* Bellia, *State Courts and the Interpretation of Federal Statutes*, 50 VAND. L. REV. at 1549. If new federal law is going to be created by judicial decision, it can only be accomplished by the United States Supreme Court.

To protect against the impermissible creation of federal law by state and lower federal courts, the Supreme Court has formulated a number of principles that constrain state and federal courts who are asked to expand federal law beyond the boundaries of existing Supreme Court precedent. Foremost among these, of course, is *stare decisis*, "the basic legal principle that commands judicial respect for a court's earlier decisions and the rules of law they embody." *Randall v. Sorrell*, 126 S. Ct. 2479, 2489 (2006) (citation omitted). *Stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Id*. (citations and internal quotations omitted). "*Stare decisis* thereby avoids the instability and unfairness that accompany disruption of settled legal expectations. For this reason, the rule of law demands that adhering to our prior case law be the norm. Departure from precedent is exceptional, and requires 'special justification.'" *Id*. (citation omitted); *see also Vasquez v. Hillery*, 474 U.S. 254, 265 (1986) (*Stare decisis* is the very "means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible

fashion."). "This is especially true where, as here, the principle [of tribal suit immunity] has become settled through iteration and reiteration over a long period of time." *Id*.

A second constraining principle is the Supreme Court's repeated rejection of lower court speculation as to the scope and vitality of the Court's precedents where the Court itself has not explicitly cast doubt on those precedents. *See Tenet v. Doe*, 544 U.S. 1, 10-11 (2005) ("if the 'precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'") (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)); *cf. Sabree v. Richman*, 367 F.3d 180, 194 (3d Cir. 2004) (Alito, J., concurring) (noting that "[w]hile the analysis and decision of the District Court may reflect the direction that future Supreme Court cases in this area will take, currently binding precedent supports the decision of the Court.").[4]

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[4] The federal courts frequently invoke this principle in refusing to extend federal law into new frontiers without prior Supreme Court approval. *See, e.g., United States v. Davis*, 260 F.3d 965, 969 (8th Cir. 2001) ("It is our role to apply Supreme Court precedent as it stands, and not as it may develop."); *Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1107 n.3 (6th Cir. 1995) ("we do not sit as fortune tellers, attempting to discern the future by reading the tea leaves of Supreme Court alignments. Each case must be reviewed on its own merits in light of precedent, not on speculation about what the Supreme Court might or might not do"); *United*

(continued…)

Yet a third constraining principle is found in the Supreme Court's admonition that while "a State is free as a matter of its own law to impose greater restrictions [ ] than those this Court holds to be necessary upon federal constitutional standards,' it 'may not impose such greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them.'" *Arkansas v. Sullivan*, 532 U.S. 769, 772 (2001) (quoting *Oregon v. Hass*, 420 U.S. 714, 719 (1975)). *See also Fare v. Michael C.*, 442 U.S. 707, 717 (1979) (reversing this Court's decision which had "extend[ed] *Miranda*" because it had impermissibly done so on the basis of a more expansive interpretation of the federal constitution than that adopted by the Supreme Court); *J & J Construction Co. v. Bricklayers And Allied Craftsmen, Local 1*, 664 N.W. 2d 728, 731 n.9 (Mich. 2003) ("In interpreting the *federal* constitution, state courts are not privileged to provide greater protections *or restrictions* when the Supreme Court of the United States has refrained from doing so.") (citation omitted) (emphasis added).

Guided by each of these principles, as well as additional principles of comity and respect for the federal courts and federal

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States v. Olivera-Hernandez, 328 F. Supp. 2d 1185, 1186 (D. Utah 2004) ("it is not the province of the district courts to anticipate the direction, or holding, of future Supreme Court cases."); *United States v. Gebele*, 117 F. Supp. 2d 540, 549 (W.D. Va. 2000) (lower court cannot ignore Supreme Court precedent by "speculating about what the Supreme Court might do in the future.").

law,[5] state courts applying federal law are "obligated to decide the [federal] issue as we believed the United States Supreme Court would do so if it were instead considering the matter." *Corp. Sec. Grp. v. Lind*, 753 So. 2d 151, 152 (Fla. Dist. Ct. App. 2000); *see also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.6 (1981) (Supreme Court, "[i]n reviewing state court resolutions of federal constitutional issues, … has simply determined whether the state court's federal constitutional decision is 'correct,' meaning, … whether it is the decision that the Supreme Court would independently reach.") (citation and internal quotations omitted); Kevin M. Clermont, *Reverse-Erie*, 82 NOTRE DAME L. REV. 1, 32 (2006) (a state court applying federal law "is not free just to go its own way, because at bottom we are talking about a state applying federal law under the constraint of the Supremacy Clause. … The state courts are under a duty to follow what the U.S. Supreme Court has decided or would rule."); Donald H. Zeigler, *Gazing Into the Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law*, 40 WM. & MARY L. REV. 1143, 1177 (1999) ("State courts should decide federal questions the way they believe the Supreme Court would decide them."). In this "reverse-*Erie*" mode, state courts "will decide in accordance with *existing* federal law, but *never create* federal law." *See* Clermont, *Reverse-*

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[5] *See Ryan v. American Honda Motor Co., Inc.*, 896 A.2d 454, 457 (N.J. 2006) ("it is well-established that under principles of comity, and in the interests of uniformity, federal interpretations of federal enactments are entitled to our respect.") (citation omitted).

Erie, 82 NOTRE DAME L. REV. at 32 (emphasis added); Anthony J. Bellia Jr., *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825, 908 (2005) ("when a state court purports to enforce the 'supreme Law of the Land,' it must seek to enforce its best understanding of existing principles of federal law.").

This settled approach to ascertaining federal law mirrors the approach federal courts must follow when applying state law pursuant to *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and affords federal law the same dignity in state courts that state law receives in federal courts. *See* Clermont, *Reverse-Erie*, 82 NOTRE DAME L. REV. at 30-31 ("the state court should act as federal courts do when applying state law under *Erie*."). *Erie* commands that federal courts ascertaining state law "must 'carefully predict how the state's highest court would resolve'" an issue of state law, "giv[ing] the fullest weight to" that court's pronouncements. *Travelers Ins. Co. v. Carpenter*, 411 F.3d 323, 329 (2d Cir. 2005) (citation omitted). In so doing, "[a] federal court in a diversity case is not free to engraft onto [ ] state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits." *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3, 4 (1975) (*per curiam*). Instead, federal courts must "look to existing state law without predicting potential changes in that law," *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1203 (9th Cir. 2002) (citation omitted), applying "the law of the forum as we infer it presently to

be, not as it might come to be[,]" *Dayton v. Peck, Stow & Wilcox Co.*, 739 F.2d 690, 694 (1st Cir. 1984).

As a result, "it is not the role of a federal court to expand state law in ways not foreshadowed by state precedent." *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 421 (3d Cir. 2002) (citation omitted). Federal courts therefore "avoid speculation about trends in diversity cases: 'our policy will continue to be one that requires plaintiffs desirous of succeeding on novel state law claims to present those claims initially in state court.'" *Birchler v. Gehl Co.*, 88 F.3d 518, 521 (7th Cir. 1996) (citation omitted). The Third Circuit put it well in *City of Philadelphia v. Lead Indus. Ass'n, Inc.*, 994 F.2d 112, 123 (3d Cir. 1993):

> A federal court may act as a judicial pioneer when interpreting the United States Constitution and federal law. In a diversity case, however, federal courts may not engage in judicial activism. Federalism concerns require that we permit state courts to decide whether and to what extent they will expand state common law. Our role is to apply the current law of the appropriate jurisdiction, and leave it undisturbed.

See also Combs v. Int'l Ins. Co., 354 F.3d 568, 577-78 (6th Cir. 2004) ("[F]ederal courts sitting in a diversity case are in 'a particularly poor position … to endorse [a] fundamental policy innovation …. Absent some authoritative signal from the legislature

or the courts of [the state], we see no basis for even considering the pros and cons of innovative theories… .") (citation omitted); *National Union Fire Ins. Co. of Pittsburgh, PA. v. Stroh Cos., Inc.*, 265 F.3d 97, 106 (2d Cir. 2001) (expressing "reluctance to announce such a [new] rule in the absence of clear guidance from state courts: 'Our rule as a federal court sitting in diversity is … not to adopt innovative theories that may distort established state law.'") (citation omitted); *Martel v. Stafford*, 992 F.2d 1244, 1247 (1st Cir. 1993) (refusing to "steer state law into unprecedented configurations.") (citations omitted); *Tidler v. Eli Lilly & Co.*, 851 F.2d 418, 424 (D.C. Cir. 1988) ("Judicial pioneers must no doubt make bold forays into *terra incognita* in order to chart the way to justice, but that is not the office of a federal court exercising diversity jurisdiction.").

The established approach to determining federal law forecloses state-court expansion and creation of federal law. Not only does this approach heed the commands of the Supremacy Clause, but it fosters the policies of stability, predictability and uniformity that are critically important to our federal judicial system. "By any measure, the vast majority of particular adjudications of federal constitutional rights take place in state courts[.]" Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457, 1473 (2005) (citing *Michigan v. Long*, 463 U.S. 1032, 1042 n.8 (1983) (noting that the "vast bulk" of criminal litigation takes place in state courts)). At the same time, the United States Supreme Court's shrinking docket has

been well-documented. As a consequence, state courts play a substantial part in the adjudication and determination of federal law. Taking an approach to this task that is unconstrained by the limiting principles discussed above would permit not only a vast expansion of federal law beyond that contemplated by Congress and the Supreme Court, but also the creation from state to state of a myriad of views on the meaning of a particular principle of federal law. The established approach, exercised cautiously to avoid the creation of novel legal doctrines, prevents these consequences, and promotes stability, predictability and uniformity in the development of federal law.

The United States Supreme Court has never indicated its support for the novel and unprecedented conclusions reached by the majority opinion on pure issues of federal law. What its precedents do *hold*, moreover, is at odds with what the majority has held. These precedents, by the plain command of the Supremacy Clause, should compel adherence to existing federal law—not an expansion beyond the scope of that law as delineated by existing precedents. For this reason, and the reasons expounded by the dissent, we urge this Court to grant this petition, reconsider the important issues of federal law raised here, and reverse the decision of the court of appeal.

III.
REQUEST FOR STAY OF REMITTITUR

In the event this Court does not grant this petition for rehearing, we respectfully request that the Court stay its issuance of remittitur. The issues presented in this case are novel, complex and unsettled, and thus are likely candidates for review by the United States Supreme Court. Any petition for writ of certiorari that Agua Caliente may file with the Supreme Court would not be due for ninety (90) days following this Court's grant of this petition for rehearing and subsequent judgment, or its denial of this petition. *See* United States Supreme Court Rule 13.3. Any petition for writ of certiorari likely would not be disposed of by the Supreme Court for many months beyond its filing, and while it is pending, this Court may deny this petition for rehearing and issue its remittitur, sending this case back to the trial court.

If this occurs while a petition for writ of certiorari is pending, the trial court may attempt to move the case forward without a final determination of the tribal suit immunity defense asserted by Agua Caliente. To prevent this result, Agua Caliente respectfully requests that this Court stay its issuance of remittitur until such time as either (a) Agua Caliente files a timely petition for writ of certiorari with the United States Supreme Court, and the Supreme Court grants or denies such petition, or (b) the time for filing a petition for writ of certiorari expires.

IV.
CONCLUSION

The majority opinion applies a flawed approach to ascertaining federal law, ignoring the Supreme Court's admonition to "defer to Congress" on tribal suit immunity, *Kiowa Tribe*, 523 U.S. at 760, and creating federal law not endorsed by Congress or the Supreme Court. This Court should grant this petition to correct those errors.

Additionally, we respectfully request that this Court stay the issuance of remittitur until such time as a petition for writ of certiorari in the United States Supreme Court is filed, and the Supreme Court grants or denies such petition, or the time for filing such petition has expired.

DATED: January 5, 2007.

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CERTIFICATION OF COMPLIANCE WITH CAL. R. CT. 8.204(c)(1)

Pursuant to California Rule of Court 8.204(c)(1), the foregoing Petition for Rehearing and Request for Stay of Remittitur of Agua Caliente Band of Cahuilla Indians is double-spaced and was printed in proportionately spaced 14-point CG Times typeface. It is 16 pages long (inclusive of footnotes, but exclusive of tables and this Certificate) and contains 4,373 words. In preparing this Certificate, I relied on the word count generated by MS Word 2003.

Executed on January 5, 2007, at San Francisco, California.

_____

James C. Martin