PUBLIC JUSTICE

April 14, 2014

Hon. Tani Cantil-Sakauye, Chief Justice
Associate Justices
Supreme Court of the State of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: *People v. Miami Nation Enterprises, et al.*, No. S216878
Letter in Support of Petition for Review (Cal. Rule of Court 8.500(g))

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Amicus curiae Kathrine Rosas respectfully requests that this Court grant review of *People v. Miami Nation Enterprises, et al.* (2014) 223 Cal.App.4th 21 ("*People v. MNE*" or "Opinion"). In *People v. MNE*, the Second District Court of Appeal effectively held that a business can qualify as an "arm of the tribe"—and thereby exempt itself from state consumer protection laws and evade state enforcement actions—so long as it has paperwork showing that it is nominally affiliated with an Indian tribe. Opinion at p. 24; Reply in Support of Petition at p. 5. This ruling conflicts with an earlier decision of the Fourth Appellate District which, in accordance with leading federal authority, held that courts should look behind the smoke screen of formal tribal affiliation and conduct a meaningful factual inquiry into factors such as how much control the tribe has over the business and the nature of the financial relationship between the tribe and the business. As outlined in the Petition, this Court should grant review to resolve the conflict among the courts of appeal and to clarify the proper legal test for determining when a corporation qualifies as an arm of the tribe for purposes of tribal immunity.

Amicus writes to offer three additional considerations in support of review. First, abuses of tribal immunity—such as extending it to predatory lenders with dubious tribal ties—undermine the tribal immunity doctrine and threaten Indian tribal sovereignty. Second, a helpful analogy can be drawn from case law addressing "rent-a-bank" arrangements between banks and payday lenders, where courts did not simply take the defendants' statements about bank affiliations at face value, but rather engaged in a factual inquiry to determine the identity of the true lender. Third, the arm-of-the-tribe test adopted by the court below can too easily be abused by businesses that are in reality operated by and for the benefit of non-Indians. The better-reasoned approach, established by the U.S. Court of Appeals for the Tenth Circuit and applied by the Fourth District, instructs that courts should determine based on factual evidence whether a business is actually controlled, managed, and

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overseen by the tribe for the benefit of the tribe, as opposed to non-tribal entities. (*See Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort* (10th Cir. 2010) 629 F.3d 1173; *American Property Mgmt. Corp. v. Super. Ct.* (2012) 206 Cal.App.4th 491.)

STATEMENT OF INTEREST

Kathrine Rosas is the named plaintiff in *Rosas v. Miami Tribe of Oklahoma, et al.*, Ct. App. No. A13947, an appeal of a putative class action on behalf of California consumers against AMG Services, Inc. and Scott and Blaine Tucker for violations of state consumer protection laws arising out of their Internet payday loan enterprise. While the specific issues in her case and the identity of the entities involved differ from those in the instant case, the defendants in Ms. Rosas' case, like the defendants here, are attempting to use the tribal immunity doctrine to shield their usurious lending activities from California laws. Ms. Rosas thus has a strong interest in seeing that in cases involving claims of tribal immunity by a non-tribe, California courts conduct a robust examination of factual evidence so that they can distinguish between those businesses that are legitimately acting as an arm of the tribe and those businesses that associate themselves with tribes only for the purpose of escaping the reach of consumer protection laws. In light of some of the unfortunate and legally incorrect language in the Court of Appeal's decision in this case, Ms. Rosas has an interest in seeing this Court grant the Petition and correct the law.

REASONS WARRANTING REVIEW

A. Abuses of tribal immunity threaten to undermine tribal sovereignty.

The inherent sovereignty of Indian tribes, which predates the sovereignty of federal and state governments of the United States, is enshrined in our Constitution and has been repeatedly recognized and affirmed by both statutory and judge-made law. (*See* Nathalie Martin & Joshua Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection At Risk?* (2012) 69 Wash & Lee L. Rev. 751, 767-68.) The U.S. Supreme Court first recognized the unique nature of Indian tribal sovereignty as early as 1831, classifying tribes as "domestic dependent nations." (*Cherokee Nation v. Georgia* (1831) 30 U.S. 1, 8.) This Court has explained that "[t]ribal sovereign immunity from suit is not synonymous with tribal sovereignty. Rather, it is merely one attribute of the status of Indian tribes . . . ." (*Agua Caliente Band of Cahuilla Indians v. Super. Ct.* (2006) 40 Cal.4th 239, 247.) While the doctrine of tribal immunity developed in U.S. law "almost by accident," it has since become a general rule, with Indian tribes enjoying immunity from state jurisdiction subject to certain exceptions. (*Id.*)

Tribal immunity is understood to serve several important policies, including "protection of the tribe's monies, as well as 'preservation of tribal cultural autonomy, preservation of tribal self-determination, and promotion of commercial dealings between Indians and non-Indians.'" (*Breakthrough*, 629 F.3d at p.1188, citations omitted.) However, as tribal enterprises become further removed from tribal self-governance, courts have begun to question whether tribal immunity continues to serve those policies. In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* (1998) 523 U.S. 751, the U.S. Supreme Court noted that the historical justifications for the doctrine may be dwindling as tribes expand their commercial activities:

> There are reasons to doubt the wisdom of perpetuating the doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. In this economic context, immunity can harm those who are unaware they are dealing with a tribe, who do not know of tribal immunity, or who have a choice in the matter, as in the case of tort victims.

(*Id.* at p. 758, citations omitted.) While the *Kiowa Tribe* Court declined to limit tribal immunity to the governmental or noncommercial activities of tribes on Indian reservations, the Court noted that "[t]hese considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule." (*Id.*)

This Court has addressed the issue of tribal immunity just once, in *Agua Caliente Band*, 40 Cal.4th 239. The defendant in *Agua Caliente Band* was an actual Indian tribe—not, as in the present case, a business claiming tribal affiliation. This Court held, nonetheless, that tribal immunity did not bar the Fair Political Practice Commission from suing the tribe in state court to force it to comply with reporting requirements for campaign contributions. (*Id.* at p. 243.) The Court relied on the U.S. Supreme Court's observations in *Kiowa Tribe* in support of its departure from the immunity doctrine under the circumstances of the case. (*Id.* at p. 251.) Analyzing *Kiowa Tribe* and other tribal immunity decisions, the Court noted that the high court, "while consistently affirming the sovereign immunity doctrine, has grown increasingly critical of its continued application in light of the changed status of Indian tribes as viable economic and political nations." (*Id.* at p. 254; *see also Allen v. Gold Country Casino* (9th Cir. 2006) 464 F.3d 1044, 1046 ("the Supreme Court has expressed limited enthusiasm for tribal sovereign immunity").)

In the years since *Kiowa Tribe* and *Agua Caliente Band*, non-tribal businesses—and particularly online payday loan companies—have increasingly sought to affiliate themselves with Indian tribes in an effort to take advantage of the tribes' immunity from state consumer protection laws and gain an advantage over state-licensed competitors. Under the typical model, "a non-tribal payday lender makes an arrangement with a tribe under which the tribe receives a percentage of the profits, or simply a monthly fee, so that otherwise forbidden practices of the lender are presumably shielded by tribal immunity." (Martin & Schwartz, *supra*, at p. 777.) As the Wall Street Journal reported, "[a]ll it takes to make a deal is a willing tribe and an eager payday lender," which then "incorporates on tribal land, agreeing to pay the chief a salary of a few thousand dollars a month[.]" (Jessica Silver-Greenberg, *Payday Lenders Join with Indian Tribes*, Wall St. J., Feb. 10, 2011)). The evidence in the present case, for example, shows that the online payday lending company defendants were operated by non-Indian third parties for years, and only sought to associate with Indian tribes after their lending activities attracted the attention of state regulators. (Petition at p. 6.)

The online payday lending industry is exceptionally lucrative. (Carter Dougherty, *Payday Lenders and Indians Evading Laws Draw Scrutiny*, BusinessWeek.com, June 5, 2012, citing report showing that, of the $32 billion in payday loans made in 2010, online loans accounted for 35 percent.) But there is little evidence that tribes are getting rich from participating in these arrangements. On the contrary, an investigation by iWatch News revealed that Scott Tucker—the (non-Indian) Kansas businessman whose companies are at the center of this case—has amassed a fortune from the payday loan business, using his money to purchase Lear jets and opulent properties and finance his private racecar company, while members of the Miami Tribe of Oklahoma (which on paper appears to "own" the lending companies) struggle with continued poverty. (David Heath, *Payday Lending Bankrolls Auto Racer's Fortune* (Sept. 26, 2011) Center for Public Integrity, at http://www.publicintegrity.org/2011/09/26/6605/payday-lending-bankrolls-auto-racers-fortune.)

The success of the "sovereign model" has even generated a new crop of payday loan consultants that specialize in instructing payday lenders on how to organize with Indian tribes and even act as matchmakers between tribes and lenders. (*See, e.g.*, Consultants4Tribes.com, *Tribe Payday Loan Lending: An Additional Layer of Legal Protection* (June 5, 2013), at www.consultants4tribes.com/tribe-payday-loan-lending-an-additional-layer-of-legal-protection/.) As one consultant posted:

> The tribe payday model, if for no other reason than to arbitrage the risk in employing an off-shore, state-by-state, or choice-of-law lending model, makes a great deal of sense. Of course, your ultimate exit strategy, risk tolerance, etc. play a role in a lender's ultimate course of

> action. And, if you have the ability to "run" simultaneous portfolios, the tribe model is a "no-brainer."

(*Id.*) A second consultant responded, "[T]he economics of the tribe lending model are SERIOUSLY better than the alternatives as well!" (*Id.*) One legal commentator, referring to boasts by such consultants about the numbers of payday companies they have connected with tribes, argues that this phenomenon "highlight[s] the absurdity of the practice and make[s] a mockery of regulators' enforcement efforts." (Heather L. Petrovich (2012) *Circumventing State Consumer Protection Laws: Tribal Immunity and Internet Payday Lending*, 91 N.C. L. Rev. 326, 343.)

While some tribes may believe it is in their current best interests to share their special legal status with payday loan companies in exchange for some small financial reward, some scholars caution that the proliferation of these arrangements between tribes and payday lenders may not be in the tribes' long-term interests. Specifically, warn Professors Martin and Schwartz, the "[u]se of [tribal] sovereign immunity to evade consumer protection laws may be exactly the type of activity referred to in *Kiowa* as having the potential to undermine the congressional rationale for a robust sovereign immunity doctrine presumed by the Supreme Court." (Martin & Schwartz, *supra*, at p. 787.) They explain:

> Use of tribal sovereign immunity to engage in unregulated payday lending in contravention of state law might engender a backlash . . . . The use of tribal sovereign immunity to escape state regulation as the value in a business partnership might attract the attention of Congress or the Supreme Court. Once the issue is taken up, congressional intervention or binding federal precedent might not be narrowly tailored, and tribal sovereign immunity could be hampered beyond payday lending.

(*Id.* at pp. 787-88.) These concerns are echoed by Professor Alex Tallchief Skibine, who predicts that the tribal lending model "will eventually stretch the envelope of tribal sovereign immunity." (Alex Tallchief Skibine, *The Indian Gaming Regulatory Act at 25: Successes, Shortcomings, and Dilemmas* (April 2013) Fed. Law. 35, 40.) Professor Skibine describes his concerns:

> In such cases, tribal sovereign immunity is being used to avoid complying with state usury laws even though what is involved here are loans issued over the internet and mostly involving non-Indian customers not living on Indian reservations. In addition, a majority of the lending outfits seem to be corporations that are only partially owned by the tribe[.] I believe that the issues and problems raised by

> these tribal payday lending activities will only increase in the future. . . Tribes have sovereign rights and have survived as sovereign nations primarily because of the willpower and tenacity of their people but tribal immunity from state laws remain a very precarious right. If tribal immunity is perceived as being abused in order to victimize non-Indians otherwise protected under state law, such immunity will be severely tested and will be in danger of being lost.

(*Id.*) In sum, where non-Indian payday lenders attempt to use tribal immunity to insulate themselves from being held accountable for violating consumer protection laws, they put the entire doctrine of tribal sovereignty at risk of being wiped away by the U.S. Supreme Court or Congress as an unworkable model. This Court should grant review in order to help ensure that the tribal immunity doctrine is not abused to the ultimate detriment of Indian tribal sovereignty.

B. In the analogous "rent-a-bank" cases, courts analyzing payday lenders' claims that their affiliation with national banks immunized them from state usury laws looked behind superficial affiliation and focused on the true relationship between the entities.

Native American Tribes are only the latest entities with which payday lenders have sought to associate in order to avoid compliance with state laws. Previously, they entered into pacts with national banks—known as "rent-a-bank" or "rent-a-charter" arrangements—in an attempt to use the preemptive power of federal laws to shield themselves from liability under state payday lending laws. In an approach that is instructive here, courts overwhelmingly rejected these sham arrangements, looking behind superficial affiliations to the functioning of the lending enterprise as established by facts and evidence.

The National Banking Act ("NBA") and the Federal Deposit Insurance Act ("FDIA") provide national banks and state-chartered banks, respectively, with the ability to export the interest rates from their home states and apply them to borrowers in other states. (*See* 12 U.S.C. § 85 (NBA); 12 U.S.C. § 1831d(a) (FDIA).) These federal provisions preempt some conflicting state law provisions. (*See, e.g.*, *Barnett Bank of Marion County., N.A. v. Nelson* (1996) 517 U.S. 25, 33.) By masquerading as agents for state-chartered or national banks, payday lenders attempted to avail themselves of an ability to export higher interest rates around the country, thereby avoiding state usury laws and other payday lending regulations.

In cases where payday lenders claimed immunity from state law by virtue of their affiliation with banks, courts have not simply accepted the superficial paperwork provided by the lender. Rather, they have examined the factual evidence showing how

the lending operation actually functioned, and specifically, which entity—the bank or the payday lender—was the actual lender. The Eleventh Circuit, for example, considered the workings of the entire lending operation to determine the true lender. (*BankWest, Inc. v. Baker*, 411 F.3d 1289, *vacated as moot* (11th Cir. 2006) 446 F.3d 1358.) In *BankWest*, payday lenders claimed merely to be "procur[ing] such payday loans for out-of-state banks." (*Id.* at p. 1293.) In reality, however, the court found that the "payday stores market the loans, process applications, collect loans after maturity, submit reports about the loans to the out-of-state bank, and remit the loans payments to a local bank in the out-of-state bank's name." (*Id.* at p. 1294.) The payday lenders also received the vast majority of the loan revenues and maintained "the predominant economic interest in the payday loan." (*Id.*) Regardless of the classification the payday lender provided, the court found that "the payday stores effectively d[id] all the work," and could not avoid adherence with state law.

In another case involving payday loans, a West Virginia court looked at the "scheme" between a payday lender and a bank chartered in South Dakota. (*West Virginia v. CashCall, Inc.* (S.D. W. Va. 2009) 605 F.Supp.2d 781, 783.) There, a written agreement created a link between a payday lender and a bank. (*Id.* at p. 783.) Although, the bank had some role—approving and initially funding the loan—the court found it significant that the payday lender marketed the loans to consumers and purchased all the loans only three days after they were funded. (*Id.*) Accordingly, the court held that the State's action against the payday lender for violations of West Virginia usury laws was not preempted by the FDIA. (*Id.* at p. 788.)

Courts in Colorado, Florida, Oklahoma, New York, and North Carolina have also examined the lending relationship to determine who is the true lender and held that payday lenders do not obtain preemptive protections from state laws from sham relationships with national banks. (*See Flowers v. EZ Pawn* (N.D. Okla. 2004) 307 F.Supp.2d 1191, 1195-96 (in case for fraud and usury, holding that the NBA was not implicated because payday lender "exerts ownership and control over these loans[,] . . . carries out all interactions with the borrowers, accepts the ultimate credit risk, collects and pockets virtually all of the finance charges and fees, and owns and controls the branding of the loans"); *Salazar v. ACE Cash Express, Inc.* (D. Colo. 2002) 188 F.Supp.2d 1282, 1284 (in case against check cashing business alleging violations of Colorado lender licensing statute, holding that "the Defendant and the national bank are separate entities and their relationship does not give rise to complete preemption under the NBA" and granting a motion to remand); *Goleta Nat'l Bank v. Lingerfelt* (E.D.N.C. 2002) 211 F.Supp.2d 711, 718-19 (in action brought by payday lender for declaratory and injunctive relief from North Carolina lending laws and circumvent enforcement action by state, dismissing case because there was "no merit" to the NBA preemption defense); *Long v. Ace Cash Express, Inc.* (M.D. Fla. June 18, 2001) No. 3:00-CV-1306-

J-25-TJC, 2001 WL 34106904 at *1 (in case against payday lender alleging violations of Florida statutes holding NBA "does not apply to Defendant because Defendant is not a national bank" and granting motion to remand); *Matter of People v. County Bank of Rehoboth Beach, Del.* (N.Y. App. Div. 2007) 45 A.D.3d 1136, 1138, 846 N.Y.S.2d 436 (in case by New York Attorney General against payday lender, finding it necessary to "look to the reality of the arrangement and not the written characterization that the parties seek" through "an examination of the totality of the circumstances. . . to determine who is the 'true lender'").)

Just as courts found it necessary to delve into the actual lending enterprise in the context of the rent-a-bank associations, courts tasked with determining whether a business claiming tribal immunity is in fact an "arm of the tribe" must look beyond the formalities of formal ownership.

C. The arm-of-the-tribe test adopted by the court below fails to distinguish between legitimate tribal businesses and "rent-a-tribe" arrangements.

Business entities such as the defendants in this case are not themselves Indian tribes and thus have "no inherent immunity of their own." *American Property*, 206 Cal.App.4th at p. 500. Rather, they are entitled to share in tribal immunity only when they are "act[ing] as an arm of the tribe so that [their] activities are properly deemed to be those of the tribe." *Allen*, 464 F.3d at p. 1046. When, on the other hand, the activities of a business are "so far removed from tribal interests that [it] no longer can legitimately be seen as an extension of the tribe itself," the business "should not be immune, notwithstanding the fact that it is organized and owned by the tribe." (*Trudgeon v. Fantasy Springs Casino* (1999) 71 Cal.App.4th 632, 639.)

While the U.S. Supreme Court has not yet ruled on the proper test by which courts should determine whether a tribally-affiliated business may share in the tribe's immunity from suit, the Court has instructed that tribal immunity "is a matter of federal law." (*Kiowa Tribe*, 523 U.S. at p. 756.) The only federal appellate decision setting out the proper analytical framework for assessing arm-of-the-tribe immunity is the Tenth Circuit's recent decision in *Breakthrough*, 629 F.3d 1173. *Breakthrough* identifies six factors as bearing on the arm-of-the-tribe inquiry:

> (1) the method of creation of the [entities claiming arm-of-the-tribe immunity]; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe's intent with respect to the sharing of its sovereign immunity; [] (5) the financial relationship between the tribe and the entities; . . . [and] a sixth factor: the policies underlying tribal sovereign immunity and its connection to tribal economic

> development, and whether those policies are served by granting immunity to the [] entities.

(*Id.* at p. 1181.) These factors do not constitute an exhaustive list of information courts can consider when deciding whether an entity is entitled to arm-of-the-tribe immunity, nor do plaintiffs have to prove all six factors to defeat an entity's immunity claim. (*Id.* at p. 1187 n.10.) Rather, the *Breakthrough* approach is aimed at determining whether an entity is truly "analogous to a governmental agency, which should benefit from the defense of sovereign immunity, or whether [it is] more like . . . [a] commercial business enterprise[], instituted solely for the purpose of generating profits for [its] private owners." (*Id.* at p. 1184, citation omitted).

In *American Property*, the Fourth District Court of Appeal applied the *Breakthrough* factors, explaining that *Breakthrough* "accurately reflect[s] the general focus of the applicable federal and state law." (206 Cal.App.4th at p. 501; *see* Petition at p. 9-10.) The significance of the *Breakthrough/American Property* factors is that they enable courts to conduct a fact-based analysis of how a business is actually being run, *i.e.*, whether the tribe or a third party is making all the money, taking all the risk, and doing all the work—and thereby to distinguish between a legitimate tribal business and one that is merely cloaking itself in tribal garb for the purpose of borrowing tribal immunity.

In contrast, the court below adopted a toothless test under which, absent "extraordinary circumstances," any company can qualify as an "arm of the tribe" simply by producing: (1) a tribal resolution showing that the company was "formed . . . according to tribal law"; and (2) a tribal resolution containing language indicating that the intended "purpose" of the business will be "tribal economic development," that the tribe wishes for the business to share its tribal immunity, and that the "governing structure" of the business are to be appointed and overseen by the tribe. (Opinion at p. 24; Reply in Support of Petition at p. 5.) Under this test, a business that is overseen and controlled by non-Indians for the primary purpose of enriching non-Indians can violate the rights of California consumers with impunity so long as its formation documents indicate that it is affiliated with a tribe.

No one disputes that a tribe may control and direct a business enterprise but leave lower-level management duties to non-Indians without waiving arm-of-the-tribe immunity. But in cases where the reverse is true—where non-Indians overwhelmingly control and direct the business enterprise, and tribal involvement is minimal—courts can and should question whether the business is acting as an arm of the tribe. As Professors Martin and Schwartz point out:

> [I]t is common sense that if an entity provides a miniscule percentage of its revenue to the tribe, and the tribe is barely involved, the entity cannot be said to stand in the place of the tribe. Moreover, if a tribe retains only a minimal percentage of the profits from the enterprise, it would appear that the enterprise may not truly be "controlled" by the tribe.

(Martin & Schwartz, *supra*, at p. 784.) This Court should grant review to clarify that to determine whether a business is an arm of the tribe, California courts should examine the factors articulated in the *Breakthrough/American Property* test.

* * *

For all the above reasons, the Petition for Review should be granted.

Sincerely,

s/Leslie A. Bailey
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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the content and form of brief specifications in California Rule of Appellate Procedure 8.200(c) and 8.204. The brief contains 4,063 words, prepared in a 13-point font proportionately-spaced typeface using Microsoft Word.

DATE: April 14, 2014

/s/ Leslie A. Bailey

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CERTIFICATE OF SERVICE

People v. Miami Nation Enterprises, et al.
Case No. S216878

I declare that I am at least 18 years of age and not a party to this action. My principal business address is 555 12th Street, Suite 1230, Oakland, California 94607. On April 14, 2014, I served the following document(s) as indicated below:

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The documents were MAILED on April 14, 2014.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 14th day of April, 2014, at Oakland, California.

/s/ Kathleen Morris
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