IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION THREE

BENEDICT COSENTINO, Plaintiff and Appellant, v. STELLA FULLER, JOHN R. MAGEE, JASON P. MALDONADO, WILLIAM R. RAMOS, ROBERT B VARGAS, Defendants and Respondents.	Court of Appeal Case No. G050923 Superior Court Case No. MCC1300396

Appeal from an Order of Dismissal of the Superior Court,
County of Riverside
Hon. Richard J. Oberholzer
Hon. Philip J. Argento

[Service on the California Solicitor General required by Civil Code § 51.1]

PETITION FOR REHEARING

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I. INTRODUCTION

The Pechanga Tribal Gaming Commissioners respectfully petition this Court for rehearing to correct fundamental misstatements of law in the Panel's May 28, 2015 corrected Opinion ("Opinion"). The Commissioners are sued in their official capacities for a licensing determination they alone were expressly authorized to make under federal, state and tribal law, and in the exercise of the Tribe's inherent sovereign authority.[1]

Rehearing must be granted because the Opinion was based on an issue not raised or briefed by any party, namely the applicability of Public Law 83-280, codified in relevant part at 28 U.S.C. § 1360 (hereinafter "P.L. 280"), to the Commissioners' and Commission's actions. The Opinion's legal errors flow from that flaw, and they are compounded by the Panel's apparent unfamiliarity with the law governing inherent tribal sovereignty generally and gaming regulation in particular. Those mistakes, together with what the Panel Opinion plainly viewed as "bad facts," drove the Panel to make fundamental misstatements of law with

[1] Plaintiff sued the Commissioners here in their individual capacities in name only, as he concedes – and the federal court found – in the parallel federal district court action. *See infra* part II(B)(6) of this petition.

respect to P.L. 280, tribal sovereignty, the Pechanga Gaming Commission's regulatory authority, and tribal official immunity.

The Opinion effectively holds that the Tribe's Gaming Commission lacks authority to revoke a gaming license unless it cites to reasons for its actions that are expressly and affirmatively authorized to do so by codified law. That is incorrect as a matter of law. The Opinion also wrongly asserts that tribal sovereign immunity can be overcome by alleging that a tribal official acted in excess of his or her authority and that, upon such allegation, tribal official immunity is subject to an evidentiary weighing and balancing that involves shifting burdens of production and persuasion, similar to California's law of *qualified* immunity. Tribal official immunity, however, is an *absolute* privilege, like the absolute immunity enjoyed by the Justices of this Court.

The Tribe and its Gaming Commission have inherent sovereign authority to regulate the Tribe's gaming enterprise, including making licensing determinations. No applicable law requires the Commission to provide a license applicant, or California's courts, with its reasons for revoking a gaming license. Unless expressly prohibited by the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § § 2701-21, or the Tribal-State Compact Between the State of California and the

Pechanga Band of Luiseño Mission Indians ("Compact"), the Commission may revoke a license for any reason or no reason at all. The Panel's assumption, presumably motivated by due process concerns, that it is authorized to ask the Commission to provide a reason for its determination is simply not the law.[2]

The Commission and its members have absolute official immunity for licensing determinations. For these reasons, the Commissioners respectfully request that the Court grant rehearing in this matter and affirm the Superior Court's order. *See* Cal. R. Ct. 8.268.

II. DISCUSSION

A. Rehearing Must Be Granted Because the Opinion Was Based on an Issue Not Raised or Briefed by Any Party

California Government Code section 68081 requires rehearing. It provides in relevant part that:

[2] The Panel's Opinion seems entirely unaware that the Constitution's due process requirement does not apply to the Tribe or its Commission. Because Indian Tribes were not parties to the constitutional convention and did not ratify the Constitution, "it has been understood for more than a century that the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes." *Nevada v. Hicks*, 533 U.S. 353, 383-84 (2001) (*citing Talton v. Mayes*, 163 U.S. 376, 382-385 (1896); *see also* F. Cohen, Handbook of Federal Indian Law 664-665 (1982 ed.) ("Indian tribes are not states of the union within the meaning of the Constitution, and the constitutional limitations on states do not apply to tribes").

> [b]efore ... a court of appeal ... renders a decision in a proceeding ... based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party.

Cal. Govt. Code § 68081.[3]

Rehearing must be granted because the Panel based its Opinion on an issue not raised or briefed by any party and failed to give the parties an opportunity to present supplemental briefs on that issue. Cal. Gov. Code § 68081; *People v. Alice,* 41 Cal. 4th 668, 674-679 (2007). Specifically, the Opinion's substantive analysis begins with, and rests upon, a faulty understanding of P.L. 280, which the Opinion cites for the incorrect proposition that California civil law applies to the Commission's revocation of plaintiff's license. It does not.

The Opinion's discussion of the central issue, the "Sovereign Immunity for Indian Tribes and Their Officials," Opinion at 10, begins with a fundamental misunderstanding of P.L. 280. It states that:

> [u]nder Public Law 280 ... Congress has extended to California ... "jurisdiction over civil causes of action ... to which Indians are parties which arise in the areas of Indian country" in those states, and further that the "civil laws of such State that are of general application to private persons or

[3] The Opinion was filed on May 28, 2015, and is timely under Cal. R. Ct. 8.268(b)(1)(A).

> private property shall have the same force and effect within such Indian country as they have elsewhere within the State." ***Sovereign immunity, however, may limit the reach of state law, including state tort law***.

Opinion at 10 (*quoting* 28 U.S.C. § 1360(a)) (emphasis added).

Thus the Opinion states that P.L. 280 makes California law applicable to the Commission, but that sovereign immunity may limit that application. This fundamentally misstates the law of P.L. 280 as established by the United States Supreme Court nearly four decades ago and recognized by both the California Supreme Court and prior decisions of this Court. This fundamental error led the Opinion to turn upside down the established law of inherent tribal sovereignty generally, tribal regulatory authority over gaming license determinations specifically, and ultimately tribal official immunity.

1. P.L. 280 Does Not Apply California Law to the Tribe or its Gaming Commission

In *Bryan v. Itasca County*, 426 U.S. 373 (1976), the Supreme Court held that while P.L. 280 grants states jurisdiction over private civil litigation involving individual Indians in state court, it does *not* grant states civil regulatory authority

over Tribes: "[T]here is notably absent any conferral of jurisdiction over the tribes themselves ...." *Id.* at 389; *see also id*. at 385.

The Court noted that nothing in P.L. 280 or its legislative history "remotely suggests that Congress meant the Act[] ... should result in the undermining ... of ... tribal governments .... [,]" which it recognized could be the result "if tribal governments and reservation Indians were subordinated to the full panoply of civil regulatory powers ... of state and local governments." *Id.* Thus P.L. 280 "contemplates the continuing vitality of tribal government[,]" *id*. at 389, and does not authorize or permit State courts to apply State civil laws to tribal government institutions.

California courts have followed this well-established law. Indeed, this Court repeated *Bryan's* statement that "'there is notably absent any conferral of jurisdiction over the tribes themselves ....'" when holding that "***[i]t is very clear*** that Public law 280 does not provide jurisdiction over disputes involving a tribe." *Lamere v. Superior Court*, 131 Cal. App. 4th 1059, 1064 (2005) (*quoting Bryan*, 426 U.S. at 389) (emphasis added); *see also Ackerman v. Edwards*, 121 Cal. App. 4th 946, 954 (2004) (P.L. 280 does not confer state jurisdiction over tribes); *Long v. Chemehuevi Indian Reservation,* 115 Cal. App.3d 853, 857 (1981) (same).

As the discussion below demonstrates, the Opinion's fundamental misunderstanding of P.L. 280 led it to misconstrue inherent tribal sovereignty and misstate the law of tribal official immunity. But P.L. 280 was not discussed in any brief by any party in this appeal. Nor was it mentioned at oral argument. Thus California Government Code section 68081 requires that rehearing be granted to afford the parties an opportunity to address P.L. 280 and its implications for this case.

B. The Opinion's Fundamental Misunderstanding of P.L. 280 Led it to Misstate the Law of Tribal Sovereignty and Tribal Official Immunity

The Opinion's misunderstanding of P.L. 280 led it to misstate the law regarding inherent tribal sovereignty, the inherent authority of tribes to regulate gaming on their reservations, including making licensing determinations, and tribal official immunity.

1. Tribes Retain Inherent Sovereignty Unless Expressly Diminished by Congress

The Opinion fundamentally misstates perhaps the most fundamental tenant of federal Indian law: namely, that Tribes retain and exercise inherent sovereign

authority unless Congress acts to diminish that authority. The Opinion wrongly imposes a burden on the Commission(ers) to show that "Cosentino no longer qualified for a gaming license or that he had engaged in any inappropriate conduct warranting suspension or revocation of his license[]" and to "present ... authority showing they had the power to revoke Cosentino's license without case." *Id*. at 14, 15. That approach ignores the Tribe's (and its Commission's) inherent sovereign authority over both the substance and process of licensing determinations.

As the U.S. Supreme Court has repeatedly recognized, Indian tribes, as "separate sovereigns pre-existing the Constitution," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978), exercise "***inherent sovereign authority***."[4] *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla*., 498 U.S. 505, 509 (1991) ("*Potawatomi*") (*quoting Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed. 25 (1831)) (emphasis added).

And, as the U.S. Supreme Court recently reiterated, "unless and 'until Congress acts, the tribes retain' their historic sovereign authority." *Michigan v.*

[4] Black's defines an inherent power as "[a]n authority possessed without its being derived from another. A right, ability, or faculty of doing a thing, without receiving that right, ability or faculty from another. Powers originating from the nature of government or sovereignty, *i.e.*, powers over and beyond those explicitly granted in the Constitution or reasonably to be implied from express grants." Black's Law Dictionary, at 703 (West 5th ed. 1979).

Bay Mills Indian Cmty., __, U.S. __, 134 S. Ct. 2024, 2030 (2014) (*quoting United States v. Wheeler*, 435 U.S. 313, 323 (1978)). *See also New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332-33 (1983) ("our cases establish that 'absent governing Acts of Congress,' a State may not act in a manner that 'infringed on the right of reservation Indians to make their own laws and be ruled by them.'") *(citations omitted*); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153 (1980) (Tribes retain any aspect of their historical sovereignty not "inconsistent with the overriding interests of the National Government").

Congress expressly recognized this fundamental principle when it passed IGRA, stating that "Indian tribes have the exclusive right to regulate gaming activity on Indian land if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such activity." 25 U.S.C. § 2701(5).[5] Congress further recognized "and affirm[ed] the principle that by virtue of their original tribal sovereignty, tribes reserved certain rights when entering into treaties with the

[5] *Cabazon* also found that "[i]n light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular." *Cabazon*, 480 U.S. at 211.

United States, and that today, tribal governments retain all rights that were not expressly relinquished." S. Rep. No. 100-446, at 5 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3076). Consistent with that understanding, IGRA provides that "[n]othing in this chapter precludes an Indian tribe from exercising regulatory authority provided under tribal law over a gaming establishment within the Indian tribe's jurisdiction if such regulation is not inconsistent with this chapter or with any rules or regulations adopted by the" National Indian Gaming Commission ("NIGC"), the federal regulatory agency Congress created to enforce IGRA. 25 U.S.C. § 2713(d).

Congress passed IGRA following a 1987 U.S. Supreme Court decision which held that P.L. 280 did not give California jurisdiction to regulate Tribes' gaming activities and thus that California law did not apply to gaming conducted and regulated by Tribes. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). But the Opinion here fails to understand the retained inherent sovereign power the Tribe has to make and enforce its own law -- *see Bay Mills*, 134 S. Ct. at 2030; *Potawatomi,* 498 U.S. at 509, *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed. 25 (1831)) -- and wrongfully engages in a search for affirmative

authorization for the Commission to revoke Mr. Cosentino's gaming license without a "cause" requirement. *See* Opinion at 10, 15-17, 19.

It states that the Commissioners "failed to present any authority showing they had the power to revoke Cosentino's license without cause." Opinion at 15. That statement reflects a fundamental failure to understand that the Tribe does not need affirmative authorization to revoke a license without stated cause. As noted, the Tribe and its Commission retain sovereign authority unless diminished by Congress, and nothing in IGRA removes the Tribe's power -- or that of its Commission -- to revoke a gaming licensing without cause. Indeed, IGRA expressly recognized that the Tribe's authority to regulate gaming is broader than IGRA, so long as that tribal authority does not violate IGRA's express terms.

a. The Opinion Errs By Ignoring the Commission's Exercise of the Tribe's Inherent Sovereignty Over the Tribal Gaming Licensing Process

The Tribe's Gaming Commission is the primary regulator of the Tribe's casino under IGRA, the Compact, and the Pechanga Gaming Act of 1992 ("Tribal Ordinance"), all of which apply to the Commission and its licensing actions. But none of those laws revoke the inherent authority of the Tribe and its Commission

to act in the absence of express limitations in one of those applicable laws. None of those laws require the Commission to provide applicants, or California's courts, an explanation for adverse licensing determinations. The Opinion errs as a matter of law when it implies such an obligation. *See* Opinion at 14-15.

IGRA's implementing regulations provide that "[u]nless a tribal-state compact assigns responsibility to an entity other than a tribe, the licensing authority for class II or class III gaming is a tribal authority." 25 C.F.R. § 558.1. *See also* NIGC Bulletin 94-4 (April 20, 1994) (published by the NIGC at http://www.nigc.gov/Reading_Room/Bulletins/Bulletin_No._1994-4.aspx). The Compact provides that the Tribe's Gaming Commission is "primarily responsible for carrying out the Tribe's regulatory responsibilities under IGRA and the Tribal Gaming Ordinance." Appellant's Request for Judicial Notice at 11 (Compact § 2.20). The Compact's licensing suitability standards exist "in addition to any standards set forth in the Tribal Gaming Ordinance ...." *Id.* at 19 (Compact § 6.4.3). And the Compact expressly defers to tribal law with respect to license revocations; Compact section 6.5.1, regarding "Denial, Suspension, or Revocation

of Licenses" provides that "[a]ll rights to notice and hearing shall be governed by tribal law." *Id.* at 24 (Compact § 6.5.1). *See also id.* at 25 (Compact sect. 6.5.5).[6]

As noted above, "inherent authority" means that the sovereign has authority beyond that which is expressly stated in a statute or ordinance. *See* n. 4 *supra*. Thus, for example, the inherent authority of federal courts to issue sanctions is not limited by the express rules authorizing sanctions. The Supreme Court observed that:

> nothing in the other sanctioning mechanisms or prior cases interpreting them ... warrants a conclusion that a federal court may not, as a matter of law, resort to its inherent power to impose attorney's fees as a sanction for bad-faith conduct. This is plainly the case where the conduct at issue is not covered by one of the other sanctioning provisions. But neither is a federal court forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the Rules.

Chambers v. NASCO, Inc., 501 U.S. 32, 50 (1991).

Similarly here, the Commission retains inherent tribal authority to make an adverse licensing determination where the "conduct at issue is not covered by one

[6]The Compact further provides that "[i]t is the responsibility of the Tribal Gaming Agency to conduct on-site gaming regulation and control in order to enforce the terms of this Gaming Compact, IGRA, and the Tribal Gaming Ordinance with respect to Gaming Operation and facility compliance, and to protect the integrity of the Gaming Activities, the reputation of the Tribe and the Gaming Operation for honesty and fairness, and the confidence of patrons that tribal government gaming in California meets the highest standards of regulation and internal controls." *Id.* at 27 (Compact § 7.1).

of the other" licensing provisions. *Id*. The presence of statutory or rule authorizing a license revocation does not "forbid[]" the Commission from revoking a license "by means of [its] inherent power ...." *Id.*

2. The Opinion Misstates the Law in its Attempt to Catalog and Limit the Grounds for Adverse Licensing Determinations

The Opinion also misstates the law and the record in its attempt to catalog and limit the allegedly valid reasons that can support the Commission's revocation decision. The Opinion states categorically that:

> [d]efendants could suspend or revoke Cosentino's gaming license only if they received reliable information that (1) his licensure posed a threat to the public interest or the effective regulation of gaming; (2) his licensure created or enhanced dangers of unsuitable, unfair, or illegal practices, methods and activities in the conduct of gaming; or (3) he failed conducted [sic] himself with honesty, integrity, and with such decorum and manners as necessary to reflect positively on the Pechanga Band, its members, and its gaming activities.

Opinion at 16 (*citing* 25 U.S.C. § 2710 subds. (b)(2)(F) & (d)(1)(A)(ii); Compact at § 6.4.3; Pechanga Gaming Act of 1992 ("Tribal Ordinance") at § 10, subds. (j) & (m)).

This statement not only ignores the Tribe's inherent authority beyond the express terms of the Ordinance, Compact and IGRA, it ignores additional reasons

for adverse licencing determinations that are expressed therein. For example, the Tribe's gaming ordinance expressly provides that "[a]ll persons applying for a license shall agree to release all information necessary in order for the Gaming Commission to achieve its goals under this Section ...." Appellant's Appendix pp. 60-61 (Tribal Ordinance § 10(d)). Disclosure of information sought by the Commission in the conduct of its duties is thus a condition of licensing under the Ordinance, and "[a]ny failure to abide by ... the terms or conditions of the license may be grounds for immediate suspension or revocation of any license issued hereunder." Appellant's Appendix at 63 (Tribal Ordinance § 10(j)).

The Opinion also misstates the law regarding tribal official immunity, as discussed below.

3. Tribal Sovereign Immunity is an Absolute Privilege, Not Subject to Diminishment by the State

a. Tribal Sovereign Immunity May Not be Diminished by Implication or Equitable Considerations

"Indian tribes have long been recognized as possessing 'the common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Great Western Casinos v. Morongo Band of Mission Indians*, 74 Cal. App. 4th 1407, 1419 (1999).

"[T]ribal immunity is a matter of federal law and is *not subject to diminution by the States*." *Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc.*, 523 U.S. 751, 756 (1998) (emphasis added). "It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Great Western Casinos*, 74 Cal. App. 4th at 1419; *see also Santa Clara Pueblo*, 436 U.S. at 58-59 (tribal immunity may not be defeated by implication but rather "'must be unequivocally expressed.'") (citations omitted); *Big Valley Band of Pomo Indians v. Superior Court*, 133 Cal. App. 4th 1185, 1193 (2005).

"Absent [Congressional] authorization or consent, the courts do not have subject matter jurisdiction over suits against a tribe." *Lawrence v. Barona Valley Ranch Resort and Casino,* 153 Cal. App. 4th 1364, 1368 (2007); *see also Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) ("Suits against Indian tribes are barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation"). *See Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) ("Suits against Indian tribes are barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation."). "Thus, absent an effective waiver or consent, a state

court may not exercise jurisdiction over a recognized Indian tribe." *Puyallup Tribe. Inc. v. Dep't of Game*, 433 U.S. 165, 172 (1977)).[7]

Sovereign immunity is a jurisdictional bar *irrespective of the merits* of the claim. *See Chemehuevi Tribe v. California Bd. of Equalization*, 757 F.2d 1047, 1051 (9th Cir. 1985), *rev'd on other grounds*, 474 U.S. 9 (1985)*; California ex rel. Dep't of Fish and Game v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979). Importantly for present purposes, tribal "sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation.... Rather it presents a pure jurisdictional question." *Ameriloan v. Superior Court*, 169 Cal. App. 4th 81, 93 (2008), *as modified* (Jan. 14, 2009) (*quoting Warburton/Buttner v. Superior Court*, 103 Cal. App. 4th 1170, 1182

[7] While tribal sovereign immunity may not be abrogated by implication, even express waivers of tribal sovereign immunity (and any limitations included in such waivers) "are to be strictly construed in favor of the Tribe." *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1245 (8th Cir. 1995); *see also Ramey Construction v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 320 (10th Cir. 1982); *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 90 (2d Cir. 2001) (Katzman, C.J., concurring in part and concurring in judgment in part). This rule comports with the general principle that waivers of sovereign immunity "will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Peña*, 518 U.S. 187, 192 (1996); *see also Block v. North Dakota*, 461 U.S. 273, 287 (1983); *General Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1386 (8th Cir. 1993); *Fed. Nat'l Mortg. Ass'n v. LeCrone*, 868 F.2d 190, 193 (6th Cir. 1989); *Terrell v. United States*, 783 F.2d 1562, 1565 (11th Cir. 1986); *McDonald v. Illinois*, 557 F.2d 596, 601 (7th Cir. 1977). Thus, a court may only exercise jurisdiction over a tribe pursuant to a clear statement from the tribal government "waiving [its] sovereign immunity ? together with a claim falling within the terms of the waiver." *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003).

(2002)) (internal quotations omitted); *see also Puyallup Tribe*, 433 U.S. at 172-73 (because sovereign immunity is jurisdictional in nature, its recognition by the Court is not discretionary); *Chemehuevi Tribe*, 757 F.2d at 1052 n.6 (same). Sovereign immunity bars tort as well as contract and tort actions. *See Pit River Home and Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1100 (9th Cir. 1994) (*citing Quechan Tribe*, 595 F.2d at 1155); *see also Kiowa*, 523 U.S. at 751 (sovereign immunity bars contract actions); *Great Western Casinos*, 74 Cal. App. 4th at 1421 (sovereign immunity bars tort claims); *Long v. Chemehuevi Indian Reservation*, 115 Cal. App.3d 853 (1981) (immunity bars wrongful death actions).

Tribal sovereign immunity extends to tribal agencies and subdivisions. *See Kiowa*, 523 U.S. at 755 ("governmental and commercial activities of a tribe" share immunity); *Marceau v. Blackfeet Hous. Auth.*, 455 F.3d 974 (9th Cir. 2006) (sovereign immunity extends to agencies and subdivisions of a tribe). As a tribal governmental agency, a tribal gaming commission shares the tribe's sovereign immunity. *See, e.g., Barker v. Menominee Nation Casino*, 897 F. Supp. 389, 393-94 (E.D. Wis. 1995) ("The [tribe's gaming] Commission ... [was chartered] through a tribal ordinance .... [T]he Commission ... [is] likewise immune from suit

unless Congress or the Legislature has waived its sovereignty for purposes of this type of action").

And as the Opinion recognizes, "tribal immunity extends to tribal officials acting in their representative capacity and within the scope of their authority." *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1321 (9th Cir. 1983) (*citing U.S. v. Oregon*, 657 F.2d 1009, 1012 n. 8 (9th Cir. 1981)*; see also Marceau*, 455 F.3d at 974; *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479-80 (9th Cir. 1985); *Davis v. Littell*, 398 F.2d 83, 84-84 (9th Cir. 1968); *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991). *See* Opinion at 2, 11.

b. The Opinion Misstates the Law Regarding Tribal Official Immunity and the "Scope of Authority" Element

The Opinion misstates the law regarding tribal official immunity and the "scope of authority" element. It also errs by treating the Commissioners' absolute immunity as if it were qualified. It is not.

The Opinion contends that if the plaintiff alleges that the Commissioners committed an intentional tort while acting in their official capacity, they cannot

have been acting within the scope of their authority and therefore are not protected by sovereign immunity. *See* Opinion at 3 (claiming that tribal official immunity "does not prevent [the Panel's] inquiry into whether Defendants exceeded their authority by using their official position to intentionally harm Cosentino"). But that is not the law.

Sovereign immunity is a policy doctrine that protects tribal officials from liability for acts that would clearly be actionable if undertaken by other actors.

In *Boisclair v. Superior Court*, 51 Cal. 3d 1140 (1990), the California Supreme Court noted that the "commission of a tortious act" may be protected by immunity. 51 Cal. 3d at 1157. Thus, the inquiry into the "scope of authority" does not turn on plaintiff's allegations of intentional wrongdoing, as the Opinion incorrectly states. *See* Opinion at 19.[8] Instead, the California Supreme Court explained that "'if the actions of an officer do not conflict with the ***terms of his valid statutory authority***, then they are actions of the sovereign, whether or not they are tortious under general law ....'" *Boisclair*, 51 Cal. 3d at 1157 (*quoting Larson*, 337 U.S. at 695) (emphasis added).

[8] The Opinion states that "Cosentino alleges Defendants engaged in ***intentional misconduct*** and revoked his license without cause to retaliate against him. Defendants presented no authority, and we have found none, that extends tribal sovereign immunity to an intentional abuse of authority." Opinion at 19 (emphasis added).

This law is also plainly asserted in *Great Western Casinos,* which explained that "[t]he tribal council members' ***alleged motivations*** for these actions were ***plainly illegal*** **and** ***not expressly authorized under applicable law***." *Great Western Casinos,* 74 Cal. App. 4th at 1422 (emphasis added). Under the Opinion here, that would have been determinative. But not so. The *Great Western Casinos* opinion continued, finding that:

> [w]ithout more it is difficult to view the suit against the tribal officials as anything other than a suit against the tribe itself. The individual council members' votes on these different matters may have independent significance, but ***it was the collective action by the tribal council after the votes which caused GWC's alleged injuries***. In other words, the allegations of the complaint do not suggest any individual council member acted beyond his or her official authority in so voting. On the contrary, the complaint acknowledges each acted in his or her representative capacity, as a member of the tribal council, and on behalf of the tribe. In this case ***it was clearly the tribe which authorized canceling the management agreement*** with GWC.

Great Western Casinos, 74 Cal. App. 4th at 1422 (emphasis added).

The Opinion incorrectly claims that *Great Western Casinos* is distinguishable because it "does not address" a "factual scenario" in which "tribal officials" are alleged to have "exceeded the scope of their authority ..." Opinion at 19. That is simply wrong. The plaintiffs in *Great Western Casinos* sued "individual tribal council members" among other defendants, alleging claims

including "bad faith breach of contract, fraud, breach of fiduciary duty, constructive fraud, conversion, interference with business relations, abuse of process, civil violation of the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. § 1961 *et seq*. (RICO)). *Great Western Casinos*, 74 Cal. App. 4th at 1411. There was no showing that applicable law authorized the individual members of the tribal council to engage in "fraud", "conversion" or any other of those alleged intentional torts. The court did not require the tribal council members to present evidence demonstrating that their reasons for terminating plaintiff's contract were undertaken pursuant to express authorization in tribal law, as the Opinion here would obligate the Commissioners to do.

Indeed, as noted above, *Great Western Casinos* clearly states that the tribal council members' ***alleged*** motivations for terminating plaintiff's contract were both "***plainly illegal***" and "***not expressly authorized under applicable law***." *Great Western Casinos,* 74 Cal. App. 4th at 1422. Yet those allegations did ***not*** defeat the individual tribal council members' immunity, because the plaintiff alleged harm caused by the official actions of the tribal council: "it was the collective action by the tribal council after the votes which caused GWC's alleged injuries." *Id.* Like in *Great Western Casinos*, plaintiff's alleged injury here stemmed from

the Commission's official action in revoking his gaming license. *See, e.g.*, Appellant's Appendix at 23 (Complaint ¶ 129).

The Ninth Circuit has also endorsed this principle. In *Linneer v. Gila River Indian Community*, 276 F.3d 489 (9th Cir. 2002), the court affirmed the sovereign immunity dismissal of claims against a tribal official stemming from his "alleged misconduct during his official duties as a tribal ranger on the Community's land" that included, literally, holding "a gun to their [plaintiffs'] heads" for allegedly unlawful reasons. 276 F.3d at 491-92. The court found no inconsistency between claims of tortious conduct and the fact that the tribal ranger was acting within the scope of his governmental authority.

The same is true regarding the Pechanga Gaming Commissioners in this case. While it is alleged that they committed torts against the plaintiff, it is beyond doubt that in revoking plaintiff's tribal gaming license they acted within the broad scope of their authority under tribal law. Tribal law authorizes and requires the Commissioners "to monitor gaming activities, investigate wrongdoing, conduct background investigations, issue and revoke gaming licenses" and makes the Commission "the sole and final authority on all licensing decisions." Appellant's Appendix at 47-48. *See id.* at 53. Indeed, the record here is undisputedly that the

"[r]evocation of gaming licenses can only occur as an official act of the Gaming Commission." *Id.* at 48.

In order to be acting within the scope of one's official authority "[i]t is only necessary that the action bear some ***reasonable relation to and connection with the duties and responsibilities of the official***." *Little v. City of Seattle*, 863 F.2d 681, 683 (9th Cir. 1989) (emphasis added). In other words, to be within the scope of an official's authority "it is only necessary that the action bear some reasonable relation to and connection with the duties and responsibilities of the official." *Clifton v. Cox*, 549 F.2d 722, 726 (9th Cir. 1977) (emphasis added).

Under this standard, it is evident that plaintiff's claims relate to actions that the Pechanga Gaming Commissioners took within the scope of their tribal authority. As a result, the Commissioners are protected by the Tribe's sovereign immunity.

4. The Scope of Tribal Official Authority is Determined by Applicable Law, Not Subjective Individual Reasons for Official Action

Both this Court and the Ninth Circuit have long held that federally recognized Indian Tribes enjoy "'sufficient independent status and control over

[their] own laws ... to be able to accord ***absolute privilege*** to its officers within the areas of tribal control.'" *Great Western Casinos, Inc. v. Morongo Band of Mission Indians*, 74 Cal. App. 4th 1407, 1424 (*quoting Davis v. Littell*, 398 F. 2d 83, 84 (9th Cir. 1968)) (emphasis added). Tribal officials enjoy "absolute" immunity for actions in their official capacities and within the scope of their authority. *Id.*

Absolute immunity – which the Justices of this Court enjoy -- shields government officials from all actions in their official capacity and within the scope of their authority, not just when they are wrong or mistaken, but also when they are ***intentionally*** malicious and corrupt. *See Tagliavia v. County of Los Angeles*, 112 Cal. App. 3rd 759, 761 (1981) (absolute immunity shields a judge "even if the acts are in excess of the jurisdiction of the judge and are alleged to have been done maliciously and corruptly"). "[W]hen exercising judicial functions, a judge who has a duty, breaches that duty, and causes injury – ***however intentionally***, maliciously, and corruptly – ***is immune from civil suit***." *Falls v. Superior Court*, 42 Cal. App. 4th 1031, 1037 (1996) (emphasis in original and added). Thus, for example, absolute immunity protects judges even when they knowingly ***falsely imprison*** a party who appears before them or "sign[] an ex parte order which

authorize[s] and result[s] in sterilization of a minor." *Id.* at 761 (*citing Stump v. Sparkman,* 435 U.S. 349 (1978)).

The Opinion misstates the law when it says that the "absolute privilege" of tribal officials, *Great Western Casinos*, 74 Cal. App. 4th at 1424, does not extend to "an intentional abuse of authority." Opinion at 19. Just like the Justices of this Court, the Tribe's Gaming Commissioners posses absolute immunity that protects them for licensing determinations, even when they are alleged to have intended to harm plaintiff in their exercise of that tribal authority.

5. The Opinion Wrongly Borrows From the California Law of Qualified Immunity

The Opinion's misreading of P.L. 280 and failure to understand inherent tribal sovereignty appear to have led it to erroneously apply an analysis and standards derived from California's law of qualified immunity to the Tribe's Commission.

Under California law, qualified immunity "protects government officials performing discretionary functions ... from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights

of which a reasonable person would have known." *Bradley v. Med. Bd.*, 56 Cal. App. 4th 445, 456-57 (1997) (internal quotations omitted). Assertions of qualified immunity are adjudicated under a two-step analysis that asks, first, if the law governing the official's conduct was clearly established and, second, if under that law, a reasonable officer could have believed the conduct was lawful. *See id.* at 456-57. While the two steps ask questions of law, "the latter one may require factual determinations as well," which involve a burden shifting inquiry. *Id.* at n. 10.

The Opinion erroneously imports the essence of California's qualified immunity test. It correctly found that "there is no dispute Defendants' positions as Gaming Commission members made them tribal officials for sovereign immunity purposes, and that they had the authority to suspend and revoke Cosentino's gaming license ...." Opinion at 14. That much is true. But the Opinion misstates the law by then conditioning the Commissioners' right to revoke plaintiff's license on the question of whether "they received reliable information he no longer satisfied the standards for obtaining a license or had conducted himself in a manner that did not reflect positive on the Pechanga Band or its gaming activities." Opinion at 14. Thus the Opinion asks not just whether the Commissioners had

authority to revoke the license, but adds an element by requiring that the Commissioner's have had a reason – presumably acceptable to the Panel – for revoking the license. That additional requirement is not found anywhere in the Tribal Ordinance, Compact or IGRA, and it is not the law.

In *Boisclair*, the California Supreme Court explained that the "scope of authority" inquiry focuses solely on whether the applicable law gives the tribal official the power to take the action in question. *Boisclair*, 51 Cal. 3d at 1157. As the Opinion concedes in discussing *Boisclair*, "[t]he Supreme Court explained any tribal official action to block the plaintiff's access that occurred where the road crossed tribal property would come ***within the scope of the officials' authority*** because the tribal officials ***had the power*** to control the boundaries to tribal property and exclude those seeking access." Opinion at 14 (emphasis added).

Thus the "scope of authority" inquiry asks what power the government official has to act. In *Boisclair*, because tribal officials have power to control access to tribal land, if they acted on tribal land, they would have been within the scope of their authority. *See Boisclair*, 51 Cal. 3d at 1157-58. On the other hand, if they committed "tortious acts the primary situs of which was outside Indian

territorial boundaries, they have acted beyond their sovereign authority and are not protected by sovereign immunity." *Boisclair,* 51 Cal. 3d at 1158.

As noted above, this understanding is plainly reflected in *Great Western Casinos,* which explained that "it was the collective action by the tribal council after the votes which caused GWC's alleged injuries." Great Western Casinos, 74 Cal. App. 4th at 1422. The court explained that "the allegations of the complaint" – which as noted above included claims of ***intentional*** wrongdoing aimed at harming plaintiff -- "do not suggest any individual council member acted beyond his or her official authority .... On the contrary, the complaint acknowledges each acted in his or her representative capacity, as a member of the tribal council, and on behalf of the tribe. In this case ***it was clearly the tribe which authorized canceling the management agreement*** with GWC." *Great Western Casinos,* 74 Cal. App. 4th at 1422 (emphasis added).

Thus the court acknowledged that tribal law authorized the tribal council to make contracting decisions, and thus when sued for cancelling a contract, the individual members of the council were immune, even against allegations that they acted intentionally and unlawfully to harm plaintiff. Their motivations were irrelevant; the "scope of authority" issue was analyzed not based on the tribal

officials' motivations or intent, but rather by looking at tribal law and determining whether the tribal council was authorized to make contracting decisions for the tribe.

And in *Turner v. Martire*, the court remanded because "the record does not indicate whether defendants were authorized to use force or to detain or arrest visitors, and, if so, under what circumstances." 82 Cal. App. 4th at 1055.[9] Again, the focus for purposes of the "scope of authority" element was on what the tribal law provided by way of authority to the tribal officers.

Here, it is undisputed that the Commissioners were doing the Tribe's business, namely taking disciplinary action against plaintiff's tribal gaming license. *See, e.g.,* Appellant's Appendix at 60-67 (Tribal Ordinance § 10); *id.* at 14, 17 (Complaint ¶¶ 75, 78, 97). Plaintiff's allegations that the Commissioners had

[9] The Opinion's statement that the Commissioners "fail to discuss or even cite *Turner*" v. *Martire*, 82 Cal. App. 4th 1042 (2000) is a misstatement of fact. The Commissioners' counsel did "discuss" *Turner* with the Court, and "cite[d]" to the *Turner* opinion. Specifically, counsel cited to *Turner,* 82 Cal. App 4th at 1055, for this point: "the record does not indicate whether defendants were authorized to use force or to detain or arrest visitors, and, if so, under what circumstances." *Id.* Counsel explained that, in contrast to *Turner,* the record in this case does contain the tribal law that gives the Commissioners authority to take the action at issue, namely to revoke a tribal gaming license. A member of Panel expressed surprise at this quote from *Turner*, and commented the he would have to go back and read *Turner*.

improper ***motivations*** for revoking his license do not effect whether their action was "empowered" by tribal law. *Cf.* Opinion at 10.

Here, the record is clear that the Commissioners have authority to make adverse licensing determinations: they have the power to take the action plaintiff complains of and that allegedly harmed him, namely revoking his a tribal gaming license. *See* Appellant's Appendix at 47-48. *See id.* at 53 (Tribal Ordinance § 2(d)); *id*. at 63 (Tribal Ordinance § 10(j)-(k)). *id*. at 66-67 (Tribal Ordinance § 10(p)). While plaintiff alleges that the Commissioners acted tortiously, it is beyond doubt that in revoking his license they were acting within the broad scope of their authority under tribal law. That law authorizes and requires the Commission "to monitor gaming activities, investigate wrongdoing, conduct background investigations, issue and revoke gaming licenses" and makes the Commission "the sole and final authority on all licensing decisions." Appellant's Appendix at 47-48. *See id.* at 53. Indeed, the record here is undisputed that "[r]evocation of gaming licenses ***can only occur as an official act of the Gaming Commission***." *Id.* at 48 (emphasis added).

The Opinion's misreading of P.L. 280 and disregard for inherent tribal sovereignty led it to erroneously apply an analysis and standards derived from

California's law of qualified immunity to the Tribe's Commissioners. But that law does not apply. The Gaming Commissioners have *absolute* tribal sovereign immunity under federal law, not California's *qualified* immunity.

6. The Opinion Directly Conflicts with a Prior Holding of the United States District Court for the Central District of California in Plaintiff's Parallel Lawsuit Against the Tribe and Gaming Commission

The Opinion assumes that the Gaming Commission's revocation of Cosentino's license was not an act of the Tribe. It takes at face value the uncorroborated, self-serving statements by Cosentino that his license was revoked for illegal reasons, and on that basis reversed the Superior Court's order granting the Commissioner's motion to quash and dismiss based on sovereign immunity. But in Cosentino's parallel lawsuit against the Tribe and Gaming Commission, the federal court found that Cosentino had "concede[d], and conclusively establish[ed]," that the "facts and causes of action stated against the Defendants [Gaming Commissioners] in the state civil action [this case] *are the same facts and causes of action* that Mr. Cosentino seeks to arbitrate against Respondents Pechanga Band and Gaming Commission in this federal case." *Cosentino v.*

Pechanga Band of Luiseño Mission Indians; Pechanga Gaming Commission, Case No. 5:13-cv-00912, Amended Order Granting Motion to Dismiss Petition to Compel Arbitration, Docket Document No. 20 (filed November 25, 2014), *appeal pending*, Case No. 13-57113 (9th Cir.) (emphasis added).

Thus Cosentino has admitted, in the parallel case, that his claims in this case are effectively against the Tribe and Gaming Commission, contrary to his representations to the Panel, and contrary to the Opinion's conclusion.[10]

C. Policy Considerations Favor Granting Rehearing

1. The Opinion Undermines Congress' Policies in IGRA

The Opinion omits entirely Congress' primary purpose in enacting IGRA, which was "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency and strong tribal governments." 25 U.S.C. § 2702(1). *Cf.* Opinion at 7 (quoting only §

[10] The Opinion also incorrectly states that "Cosentino did not name the Gaming Commission or the Pechanga Band as defendants in this action because the Tribal-State Compact requires arbitration of any claims against the Pechanga Band." Opinion at 7 n. 1. That is both a misstatement of law and directly contrary to the federal court's holding in the parallel action, as discussed in the text of this petition, *supra*. What claims are or are not subject to arbitration under the Compact have not been raised by the Complaint here and have not been briefed or argued by the parties. *See* Cal. Govt. Code § 68081.

2702(2)). By going out of its way to seek to diminish tribal official immunity, forcing Tribes and tribal officials to expend additional tribal resources defending artfully pled personal liability suits such as this one that are in reality suits against tribal governments arising out of governmental action, the Opinion directly undermines Congress' primary purpose in IGRA.

2. The Commissioners' Absolute Immunity from Private Actions for Damages for Licensing Determinations Does Not Mean They Have Unfettered Discretion to Violate Applicable Law

The Opinion appears to have been driven at least in part by a policy concern that affirming the Superior Court's order would effectively condone lawless behavior. The Panel's questioning at argument suggested this concern as well. But that is not the case.

If, as Mr. Cosentino alleges, the Commission's revocation of his license violated standards in IGRA, the Compact, or the Tribe's Gaming Ordinance, each of those legal structures contain remedies. Violations of IGRA are subject to the NIGC's investigatory and subpoena authority, and punishable by civil fines and closure orders. *See* 25 U.S.C. §§ 2713 (fines, hearings and appeals, temporary and

permanent closure orders), 2715 (subpoena and deposition authority), 2716 (investigative powers).

Violations of the Compact are remediable by the State of California under the Compact's dispute resolution mechanisms, which include tribal consent to judicial enforcement under a limited mutual sovereign immunity waiver. *See* Appellant's RJN pp. 33-35 (Compact § 9). However, the Tribe's limited immunity waiver in the Compact *precludes* actions by third parties such as Cosentino here, *see id.* at 35 (Compact § 9.4(3)), and does not apply if either "side makes any claim for monetary damages" among other limitations. *Id.* (Compact § 9.4(2)).

Finally, a violation of Tribe's Gaming Ordinance is subject to enforcement and remedial action by both the NIGC and the State, as noted above. In addition, such a violation is remediable by the tribal government under its inherent sovereign authority discussed above. None of the applicable laws, however, affords plaintiff a private right of action for damages arising out of his license revocation.

D. The Opinion Should Be Depublished

The Commissioners request that the Court depublish the Opinion.

Taken at face value, the Opinion does not meet the standards for publication. *See* Cal. R. Ct. 8.1105(c). It does not purport to establish a new rule of law. It does not purport to apply an existing rule of law to significantly different set of facts than in existing published opinions. Indeed, the Opinion calls *Turner* an "analogous factual situation ...." Opinion at 19.

The Opinion does not purport to modify, explain or criticize an existing rule of law. It does not purport to advance a new interpretation, clarification, criticism, or construction of a provision of any California or United States constitution, statute, ordinance, or court rule. It does not purport to address or create an apparent conflict in the law. It does not purport to involve a legal issue of continuing public interest. It does not purport to makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law. It does not purport to invoke a previously overlooked rule of law, or reaffirm a principle of law not applied in a recently reported decision. It is not accompanied by a separate opinion concurring or dissenting on a legal issue. *See* Cal. R. Ct. 8.1105(c).

Instead, the Opinion purports to simply restate well-settled law of tribal official immunity, namely the two-step analysis requiring that the defendants acted in their official capacity and within the scope of their authority. If that is what the Opinion stands for, then it does not meet the standards for publication.

It has been suggested to the Commissioners that the Opinion may have stemmed in part from a perception – based on plaintiff's unanswered allegations – that plaintiff did not receive fair treatment by the Commission or the Superior Court. If that impulse has in fact induced the Opinion, that concern may be addressed without publication and the Opinion's ensuing misstatements of law added to the official reporter. The Court may address that issue by reversing and remanding as the Opinion does, but it should not let the unanswered – for now – "bad facts" in the record below burden the Fourth District Court of Appeal with "bad law". Below a decision was made by defendants prior counsel to not refute plaintiff's allegations. On remand, the Commission will make a record refuting plaintiff's allegations that will more than satisfy the improper standards set forth in the Opinion, even if they are not amended after rehearing. Plaintiff's criminal record, prior adverse licensing determinations by other regulatory entities, financial irresponsibility and instability, failure to abide by the terms of his license, and

refusal to provide information lawfully required by the Commission directly related to the operation of the casino for which it is the primary governmental regulatory agency will more than support his license revocation and the Commissioner's immunity for their decision to revoke that license.

III. CONCLUSION

For the foregoing reasons, the Commissioners respectfully request that this Court grant rehearing and affirm the Superior Court's decision. This Court should affirm the trial court's ruling because plaintiff's allegations that the Commission revoked his license are expressly within the scope of its authority under applicable law.

Plaintiff has not and cannot cite to any applicable law – in IGRA, the Compact, or the Tribal Ordinance – that prohibits a license revocation based on plaintiff's allegations that he refused to provide the Commission with information about his actions and the acts of others occurring in and in relation to the casino. The Commission is the tribal casino's primary regulator. California's only rights and authorities with respect to the casino are set out in the Compact. Nothing there

prohibits the Commission from insisting that applicants comply with Commission requests for information about facts and events taking place in the case.

Alternatively, if the Court believes -- despite the well-settled Supreme Court, California Supreme Court, and Fourth District case law provided above -- that existing law already dictates the Opinion's outcome, it should not certify the Opinion for publication.

Dated: June 11, 2014

Respectfully Submitted
PECHANGA OFFICE OF THE GENERAL COUNSEL, OF COUNSEL

_____
Frank Lawrence

CERTIFICATE OF WORD COUNT

Cal. Rule of Court 8.204(c)(1)

The text of this petition consists of 8351 words as counted by the Corel WordPerfect version X6 word-processing program used to generate the brief.

Dated: June 11, 2015

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