Case Nos. 05-1392, 05-1432

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

San Manuel Indian Bingo and Casino,
San Manuel Band of Serrano Mission Indians,

Petitioners,

v.

National Labor Relations Board, *et al.*,

Respondents/Cross Petitioners.

On Petition for Review of the Order of the
National Labor Relations Board

PETITIONERS' OPENING BRIEF

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ORAL ARGUMENT NOT YET SCHEDULED

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1) and the October 7, 2005 Order in this action, petitioners San Manuel Band of Serrano Mission Indians and San Manuel Indian Bingo and Casino hereby state as follows:

A. Parties and *Amici*

The following is a listing of all parties, intervenors, and *amici* who have appeared before the agency and all persons who are to date either parties, intervenors, or *amici* in this Court:

1. San Manuel Band of Serrano Mission Indians
2. San Manuel Indian Bingo and Casino
3. National Labor Relations Board
4. Hotel Employees & Restaurant Employees International Union
5. Unite-Here International Union
6. Communication Workers of America ("CWA")
7. CWA District 9
8. CWA Local 9400
9. State of Connecticut
10. National Indian Gaming Association
11. Mashantucket Pequot Nation
12. Norton Sound Health Corporation
13. Jamestown S'Kallam Tribe
14. Habematolel Pomo of Upper Lake
15. Metlakatla Indian Community
16. Miccosukee Tribe of Indians of Florida
17. Mississippi Band of Chocktaw Indians
18. Seminole Tribe of Florida
19. St. Regis Mohawk Tribe
20. Duckwater Shoshone Tribe of Nevada
21. Ely Shoshone Tribe of Nevada

22. Pueblo of Jemez
23. National Congress of American Indians, Inc.
24. Bristol Bay Area Health Corporation
25. Norton Sound Health Corporation
26. National Indian Gaming Association
27. Menominee Indian Tribe of Wisconsin
28. Shakopee Mdwekanton Sioux (Dakota) Community
29. Meshantucket Pequot Tribal Nation
30. Mohegan Tribe of Connecticut
31. Pascua Yaui Tribe of Arizona

B. Rulings Under Review

The following rulings are at issue in this Court:

1. Order of National Labor Relations Board entered on May 28, 2004 in N.L.R.B. Case No. 31-CA-23673; Joint Appendix at pages 0311 through 0031;[1] and

2. Order of National Labor Relations Board entered on September 30, 2005 in N.L.R.B. Case No. 31-CA-23803. JA0387-89.

C. Related Cases

The case on review was not previously before this Court or any other court.

[1] Citations to the Joint Appendix hereinafter take the form "JA0311-31."

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TABLE OF AUTHORITIES

FEDERAL CASES

*Note per Circuit Rule 28(a)(2): Authorities upon which we chiefly rely are marked with asterisks.

FEDERAL CONSTITUTION, STATUTES & REGULATIONS

CALIFORNIA CONSTITUTION AND STATUTES

OTHER AUTHORITIES

GLOSSARY

Act	National Labor Relations Act
Board	National Labor Relations Board
Cohen	*Handbook of Federal Indian Law* (2005 LexisNexis)
Compact	Tribal-State Gaming Compact between the San Manuel Band of Mission Indians and the State of California
FDA	Food and Drug Administration
FDCA	Food, Drug and Cosmetics Act
FLSA	Fair Labor Standards Act
HERE	Hotel Employees & Restaurant Employees International Union
IGRA	Indian Gaming Regulatory Act
IRA	Indian Reorganization Act
ISDA	Indian Self-Determination and Education Assistance Act
Meriam	*The Problem of Indian Administration* (L. Meriam Ed., Johns Hopkins Press 1928)
NLRB	National Labor Relations Board
Project	San Manuel Indian Bingo and Casino
San Manuel	San Manuel Band of Serrano Mission Indians
TLRO	Tribal Labor Relations Ordinance
Tribe	San Manuel Band of Serrano Mission Indians

JURISDICTIONAL STATEMENT

The National Labor Relations Board ("Board") claimed subject-matter jurisdiction under the National Labor Relations Act ("Act"), 29 U.S.C. § 160. Whether the Board has jurisdiction over Petitioner San Manuel Band of Serrano Mission Indians ("San Manuel" or "Tribe"), a federally recognized Indian tribal government acting on its trust Reservation land, is the fundamental issue in this case. This Court has jurisdiction over this petition pursuant to 29 U.S.C. § 160(f).

The Board issued a final Order on September 30, 2005, JA0387-89, granting the Board's motion for summary judgment and adopting the reasoning of its Order of May 28, 2004, JA0311-31, denying San Manuel's jurisdictional motion to dismiss. San Manuel petitioned this Court for review on October 6, 2005, JA0390-91, appealing from a final order that disposed of all parties' claims.

STATEMENT OF ISSUES

Did the Board err in holding that the Act applies to, and grants the Board jurisdiction over, a federally recognized Indian tribal government acting as the sole owner, operator and employer at a governmental gaming

project located on the Tribe's trust Reservation land under the Indian Gaming Regulatory Act?

STATUTES AND REGULATIONS

The pertinent provisions of the following statutes are set forth in the Addendum: the National Labor Relations Act ("Act"), 29 U.S.C. §§ 151-169; the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721; the Tribal-State Gaming Compact; the Tribal Labor Relations Ordinance; and 25 C.F.R. Parts 556, 558.

STATEMENT OF THE CASE

This case arose from charges filed by the Hotel Employees and Restaurant Employees International Union ("HERE") in 1998 and 1999. JA0001-08. The General Counsel subsequently issued a Complaint alleging that San Manuel violated §8(a)(1) and (2) of the Act by allegedly giving preferential access to its facility to the Communications Workers of America. JA0009-17. San Manuel moved to dismiss on the jurisdictional grounds raised herein. JA0023-108. Four years later, on May 28, 2004, the Board denied the Tribe's motion to dismiss. JA0311-31.

In denying San Manuel's motion, the Board reversed 30 years of precedent and held – for the first time since the Act became law in 1935 – that the Act applied to a tribe's on-reservation governmental activities. The Board reversed based on its rebalancing of federal Indian and labor policies, in light of the growth in tribal economic activity. JA0312 ("this case requires the Board to accommodate Federal labor policy and Federal Indian policy"); JA0319 (the Board's new approach "will allow the Board to better serve both interests in effectuating the policies of the Act and in according proper respect to the unique status of Indian tribes.").

The Board reversed its long-settled conclusion that tribes are entitled to the same exemption from the Act as federal and state governmental entities, commonwealths and territories. It concluded that tribes were not among the governments expressly exempted from the Act's definition of "employer," that the statutory exemptions must be narrowly construed, that it could not imply exemptions for governments not expressly listed, and that its prior decisions impliedly exempting tribes were wrong. JA0313-15.

The Board claimed that applying the Act to tribal governments on trust lands would not violate federal Indian policy. JA0315-18. It abandoned its prior holding that federal statutes do not apply to tribes on trust land unless Congress expressly so states. *See Fort Apache Timber Co.*,

226 N.L.R.B. 503, 506 (1976). Instead, it relied on *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), as interpreted in *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115-16 (9th Cir. 1985), for the premise that statutes of general application apply to Indian tribal governments acting on trust lands, absent certain exceptions.

Applying this new analysis, the Board held that the Act is a statute of general applicability and that none of the *Coeur d'Alene* exceptions applied. It first concluded that its jurisdiction would not "touch exclusive rights of self-governance in purely intramural matters," which it narrowly limited to "tribal membership, inheritance rules, and domestic relations." JA0319. Mistakenly characterizing the Project as "a typical commercial enterprise," the Board noted that it affects interstate commerce and includes employees who are not tribal members. *Id.* The Board concluded that "the tribe's operation of the casino is not an exercise of self-governance," and therefore did not satisfy *Coeur d'Alene's* first exception. *Id.* The Board also found that the Act implicated no treaty rights and that there was no indication in the Act's text or legislative history that it should not apply to tribes. *Id.* The Board concluded that it would determine, on a case by case basis, whether exercising jurisdiction would interfere too much with tribal sovereignty. JA0318-20.

In dissent, Member Schaumber asserted that the Act did not apply here because the "Board may not expand the reach of the Act beyond the limits set by its authors." JA0320. He noted that Indian tribes retain sovereign powers not affirmatively diminished by the federal government. JA0321. He found that the Act does not apply to a tribally owned and operated enterprise located on trust lands because asserting Board jurisdiction would impair tribal sovereignty. JA0323-24. Diminishing tribal sovereignty, he noted, requires a clearly expressed congressional intent to do so. JA0324-26.

Member Schaumber criticized the majority's reliance on *Tuscarora* for the contrary principle that congressional silence means the Act applies, because the *Tuscarora* principle was questionable *dictum* lacking any foundation in Indian law, has been abandoned, if not overruled, by the Supreme Court, and because the analysis trivializes Indian sovereignty. JA0326-30.

Member Schaumber concluded that "the rebalancing of competing policy interests involving Indian sovereignty is a task for Congress to undertake," explaining:

> Well-established principles of Federal Indian law and statutory construction compel the Board to determine, in the first instance, whether Congress has affirmatively addressed the potential effects of legislation on tribal rights and to err in favor

> of Federal noninterference where regulatory statutes, such as the Act, are silent or ambiguous as to coverage of Indian tribes.

JA0321. He concluded that "the assertion of jurisdiction in this case would offend those principles and conflict with both Board and Supreme Court precedent." *Id.*

Following remand, the General Counsel moved for summary judgment, which the Tribe opposed on jurisdictional grounds. JA0344-80. The Board granted the motion on September 30, 2005, adopting its reasoning from the Order denying the motion to dismiss. JA0387-89. San Manuel petitioned for review on October 6, 2005, and the Board filed a cross-application for enforcement on November 21, 2005. JA0390-92.

STATEMENT OF FACTS

A. The Tribe And Its Trust Lands

San Manuel is a federally-recognized Indian Tribe. JA0311-12. The Tribe is governed by a General Council consisting of all adult tribal members. JA0311. The Tribe elects a Business Committee consisting of a Chairman, a Vice-Chairman, a Secretary-Treasurer, and two committee members, all of whom must be tribal members. JA0054-55. The Tribe's governing document is its federally-approved Articles of Association, JA0054, 0062-71, which provides that "the jurisdiction of the Band shall

extend to the land now and hereafter comprised within the San Manuel Reservation." JA0062.

The Tribe's Reservation consists of approximately one square mile of land, held in trust by the United States, and located within San Bernardino County, California. JA0054. The Reservation is Indian land over which the Tribe exercises governmental authority and which is eligible for tribal government gaming under IGRA. JA0054; 25 U.S.C. § 2703(4).

B. The Tribe's Economic Development Project

San Manuel Indian Bingo & Casino ("Project") is a tribal government economic development project wholly owned and operated by the Tribe pursuant to IGRA, the federally-approved San Manuel Gaming Act ("Gaming Act"), JA0073-92, 67 Fed. Reg. 54823, 54824 (Aug. 26, 2002) (listing federally-approved tribal gaming ordinances), and the Tribe's gaming Compact with the State of California. JA0239-89.

The Tribe makes all significant Project policy decisions. It establishes budgets, salaries, wages, raises, bonuses, fringe benefits, vacation and leave policies and determines employees' general working conditions. JA0312. It also closely oversees the Project's operations, receiving bi-weekly reports from the Project General Manager. JA0056, 0073, 0082.

The Project is and has been operated by tribal members in key positions. Tribal members are involved in every facet of the Project, including the tribal government's security forces. JA0057, 0312. Every Project employee must undergo an extensive background investigation and obtain a gaming license. JA0056, 0083-91, 0252-60.

C. Project Revenues Exclusively Serve Governmental Purposes

For almost the first hundred years of the Reservation's existence, the Tribe had virtually no resources. A majority of tribal members received non-tribal public assistance. Few tribal members completed high school. Alcoholism, drug abuse, and various health problems were prevalent among members. The Tribe had an extremely high rate of unemployment, at times reaching 75 percent or more. The Tribe's housing stock, water supply, sewage disposal, and road infrastructure were all grossly substandard. JA0058. The Tribe had no assets to address these problems. *Id.*

The Tribe uses the net revenues from the Project exclusively for tribal governmental and public purposes, as IGRA mandates. *See* 25 U.S.C. § 2710(b)(2)(B). The federally-approved San Manuel Tribal Gaming Revenue Allocation Act determines how the Tribe must use Project revenues. JA0057, 0093-98.

Because of the Project, the Tribe no longer requires any public assistance. Alcohol and substance abuse is at an all-time low and declining each year. There is no unemployment among tribal members. All tribal members and their families have complete medical coverage. Education, including college attendance, is now the norm among tribal members. JA0058-59.

Gaming revenues have allowed the Tribe to dramatically improve Reservation sewer and water systems. The Project has funded the Tribe's construction and improvement of reservation roads. It pays educational costs for tribal members and funds a scholarship program for all Project employees (tribal and non-tribal) and their families. Project revenues have also paid for new housing for tribal members and their families. The Tribe is planning additional housing, a health care clinic, governmental offices, and a child care center, all of which will be exclusively funded by and dependent on revenues from the Project. In addition, gaming revenues are helping the Tribe diversify into new areas of development, including a project to create a repository for American Indian artifacts at the former Norton Air Force Base. JA0059.

Project revenues are virtually the exclusive source of funding for the Tribe's governmental programs. Without such revenues these governmental

programs could not exist. JA0057. Thus the Project's significance to the Tribe's governmental programs cannot be overstated.

D. The Indian Gaming Regulatory Act

In 1988, Congress enacted IGRA as "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). Congress found that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands," if certain conditions are met. *Id.* at § 2701(5). Congress further provided 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 ...." *Id.* at § 2713(d).

Congress determined that Tribes and States shall negotiate a "Tribal-State compact" to regulate tribal government casino gaming on Indian land. *Id.* § 2710(d). IGRA provides that "[a]ny Tribal-State compact ... may include provisions relating to – (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity; [and] (ii) the allocation of criminal and civil jurisdiction between the State and the

Indian tribe necessary for the enforcement of such laws and regulations ...." *Id.* § 2710(d)(3)(C)(i)-(ii). Congress expressly intended IGRA to "preempt the field in the governance of gaming activities on Indian lands." S. Rep. No. 446, 100th Cong., 2d Sess., 6 (1988). *See also Casino Resource Corp. v. Harrah's Entertainment, Inc.*, 243 F.3d 435, 437 (8th Cir. 2001).

E. The Tribal-State Gaming Compact

In 1999, California's Governor and approximately sixty tribes, including San Manuel, negotiated the Compact at issue here. The Compact was signed by California's Governor, ratified by the State Legislature, Cal. Govt. Code § 12012.25(a)(39), approved by the voters in a constitutional initiative, *see* Cal. Const. Art. 4, § 19, and took effect upon approval by the United States Department of the Interior, *see* 65 Fed. Reg. 31189 (May 16, 2000), all as authorized and required by Congress. *See* 25 U.S.C. § 2710(d). San Manuel's Compact mandates that its Project "shall be owned solely by the Tribe." JA0250.

F. The Tribal Labor Relations Ordinance

The Compact requires that the Tribe provide "an agreement or other procedure acceptable to the State for addressing organizational and

representational rights of Class III Gaming Employees ...." JA0272.[2] San Manuel adopted as tribal law the Tribal Labor Relations Ordinance ("TLRO") satisfying this Compact obligation. JA0060, 0099-108.[3] The TLRO grants eligible Project employees the right to organize and bargain collectively, defines unfair labor practices, provides unions on-premises access to eligible employees, guarantees free speech, authorizes secret ballot elections and establishes a binding dispute resolution mechanism. *See generally* JA0099-108.

The TLRO differs from the Act in important ways. For example, the TLRO provides for dispute resolution through a three-step process, with tribal jurisdiction at the first level, Tribal Labor Panel arbitration at the second level, and federal district (or state) court jurisdiction at the final level. *See* JA0106-08. The Act, on the other hand, gives the Board

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[2] The Compact also comprehensively regulates employment-related issues. *See* Compact §§ 10.2(e) (occupational health and safety); 10.2(g) (employment discrimination standards, permitting Indian preferences); 10.3(a) (workers' compensation); 10.3(b) (unemployment compensation, disability benefits); 10.3(c) (payroll tax withholding); 10.1 (public health and safety). JA0269-72.

[3] The TLRO, and the composition of the Tribal Labor Panel it created, were negotiated directly between representatives of compacting tribes and organized labor in California, as facilitated by State officials. *See In re Indian Gaming Related Cases*, 331 F.3d 1094, 1116 (9th Cir. 2003). The State has funded the implementation and administration of the TLRO from monies paid by gaming tribes under the Compact. Cal. Gov't Code § 12012.85(e).

jurisdiction to resolve disputes, with enforcement left to the federal circuit courts of appeal. *See generally* 29 U.S.C. §§ 160-161.

The TLRO expressly addresses the Tribe's governmental regulatory and security interests:

> Operation of this Ordinance shall not interfere in any way with the duty of the Tribal Gaming Commission to regulate the gaming operation.... Furthermore, the exercise of rights hereunder shall in no way interfere with the tribal casino's surveillance/security systems, or any other internal controls system designed to protect the integrity of the tribe's gaming operations.

JA0101. Because casinos are cash operations, these governmental regulatory concerns are significant. *See* 25 U.S.C. § 2702(2) (IGRA's purposes include regulating gaming to prevent crime).[4] Thus, the TLRO exempts employees of the tribal gaming commission, security and surveillance departments, cash cages, and dealers. JA0100-01. The Act's categorical employee exemptions do not address these regulatory and security concerns. *See* 29 U.S.C. § 152(3).

The TLRO expressly recognizes the Tribe's right to adopt an Indian preference in employment matters, JA0104, while the Act is silent on this

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[4] *See, e.g., United States v. Hotel Employees and Restaurant Employees, Int'l Union*, 974 F. Supp. 411, 412 (D.N.J. 1997) (RICO action).

issue. The TLRO allows strikes only when the parties reach impasse and have exhausted specified dispute resolution procedures and prohibits strike-related picketing on the Tribe's Indian lands, JA0105, whereas the Act is again silent.

The Ninth Circuit has affirmed that IGRA-authorized compacts may address labor relations. "We hold that [Compact section 10.7] is 'directly related to the operation of gaming activities' and thus permissible pursuant to 25 U.S.C. § 2710(d)(3)(C)(vii)." *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1116 (9th Cir. 2002). The court observed that "[w]ithout the 'operation of gaming activities,' the jobs this provision covers would not exist; nor, conversely, could Indian gaming activities operate without someone performing these jobs." *Id.*

The Board acknowledged the TLRO in its first order but failed to address its significance. JA0312; *see* JA0321.

SUMMARY OF ARGUMENT

For seventy years since the Act's passage, neither Congress, nor the Board, nor the courts ever suggested that the Act applied to a tribal government on its trust lands. Indeed, for nearly 30 years the Board had consistently held tribal governments acting on their trust lands exempt from

the Act, as are virtually all other governments. Nothing in the Act or its legislative history hints that Congress intended the Act to apply to tribes. Nonetheless, the Board embarked on the quintessentially legislative task of re-balancing federal Indian policy and labor policy in applying the Act to the Tribe.

The Board's decision to assert jurisdiction over a tribal government acting on its trust lands should be reversed for several reasons.

First, the Board failed to respect the fundamental principles of federal Indian law that form the backdrop against which the question presented must be adjudicated. In particular, the Board ignored the Supreme Court's repeated admonition that Congress must speak clearly if it intends to diminish tribal sovereign rights, and that any ambiguity in statutes affecting tribal rights must be interpreted liberally in the tribes' favor. Nothing in the Act's text or legislative history even approaches the requisite clear statement of congressional intent.

Second, the Board's decision fails to recognize, and undermines, fundamental inherent tribal governmental powers and core tribal rights including: jurisdiction over tribal trust lands; the right to regulate economic activity on tribal trust lands; the right to exclude non-members from tribal trust lands and the lesser included right to condition entry on conformance

with tribal laws; jurisdiction over non-tribal members who voluntarily come onto the Reservation and enter into consensual economic relationships, such as employment, with the Tribe; and jurisdiction over non-members whose actions threaten the tribe's political integrity, economic security or health and welfare.

Third, the Act does not apply to tribally owned and operated enterprises located on trust lands because neither the Act nor its legislative history address its applicability to Indian tribes. At most, the Act's silence concerning tribes renders it ambiguous. Given this ambiguity, that the Act must be liberally interpreted in the Tribe's favor, and that Congress did not clearly intend to apply Act to tribes, the Board erred in so applying it. Furthermore, the Board's claim that its precedents precluded it from continuing to imply an exemption for on-reservation tribal activities is unsupported. The courts have applied the Act's governmental exemption to governments not expressly exempted, and the Board and the courts have implied exemptions from the Act's definition of "employer" where policy concerns demonstrate Congress would have spoken directly if it intended the Act to apply. These decisions show that the Board's refusal to imply an exemption for tribes is without support and warrant application of the Indian

law canons to require a clear statement of congressional intent to apply the Act to tribes on their trust lands.

Fourth, the Board erred by relying on *dictum* in *Tuscarora* to claim that statutes of general application apply to tribes. This *dictum* conflicts with all other Supreme Court decisions concerning the application of statutes to Indian tribes and has never since been endorsed by the Supreme Court. Moreover, even if *Tuscarora* were the law, this case fits within the Ninth Circuit's exceptions for matters that interfere with exclusive rights of self-government in intramural matters, and for matters that conflict with treaties.

Fifth, IGRA and the Compact with its TLRO are later enacted federal laws that are more specifically tailored to the activity here, and thus must be harmonized with, and inform the Court's interpretation of, the Act. The TLRO and the Act are incompatible and cannot be simultaneously applied, as they use different dispute resolution forums and provide different rights and remedies.

Sixth, the Board overstepped its statutory authority by rebalancing the relative merits and requirements of federal Indian and labor policies. JA0312, 0320. That is Congress' job. The Board lacks expertise in federal Indian law and, more importantly, lacks a statutory delegation of authority to forge a sea change in national Indian and labor policies. *See, e.g., American*

Ship Bldg. Co. v. NLRB, 380 U.S. 300, 316-18 (1965) (rejecting Board's "unauthorized assumption ... of major policy decisions properly made by Congress"); *NLRB v. Brown*, 380 U.S. 278, 292 (1965); *McCulloch v. Sociedad National de Marineros de Honduras*, 372 U.S. 10, 22 (1963) ("'important policy decision[s]' ... should be directed to the Congress").

The Board's rebalancing of federal priorities undermines Congress' policy of encouraging Indian tribal self-determination, economic development and strong tribal governments. Congressional policy has been, and is today, resolutely committed to supporting and strengthening tribal governments, politically and economically. *See, e.g.,* 25 U.S.C. §§ 450-458, 461-479, 1451-1544, and 2701-2721. The decision below would unilaterally expand the Board's jurisdiction, while correspondingly diminishing tribal sovereign jurisdiction, and thus would directly subvert Congress' Indian policy.

Finally, the Board's case-by-case approach is both inappropriate and unworkable because it violates fundamental tenets of federal Indian law and creates uncertainty and ambiguity in the law.

For all of these reasons, San Manuel respectfully requests that the Court reverse the Board's decision below.

I. ARGUMENT

A. Standard Of Review

This appeal presents a legal question warranting *de novo* review. Courts generally review the Board's resolution of questions of labor law to determine whether they are "rational and consistent with the Act," *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 576 (1994), or satisfy the requirements of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

Here, however, the Board did not merely construe the Act, but instead determined, as a legal matter, that extending its jurisdiction to a federally recognized Indian tribal government acting on its trust land does not violate settled federal Indian law policies or principles – an area in which it has no expertise. Because the Board's decision rests upon its construction of statutes, and its determination of legal questions, outside its sphere of competence, no *Chevron* deference is due, and this Court should review the Board's decision *de novo*. *See, e.g., Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137, 143-44, 151 n.5 (2002) (no deference to Board's interpretation of the Immigration Reform and Control Act of 1986); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 529 n.9 (1984) (no deference to Board order conflicting with Bankruptcy Code); *Southern S.S. Co.* v. *NLRB,* 316

U.S. 31, 46-47 (1942) (no deference to Board's interpretation of maritime law); *United Food and Commercial Workers Int'l Union Local 400 v. NLRB*, 222 F.3d 1030, 1035 (D.C. Cir. 2000); *cf. Gonzales v. Oregon*, __ U.S. __, 126 S. Ct. 904, 914-15 (2006). The Board's interpretation of a legal regime "so far removed from its expertise [is] entitled to no deference from this Court." *Hoffman,* 535 U.S. at 143-44.

The Board's decision is also not entitled to deference because it occurred 70 years after the Act's passage and reversed nearly 30 years of contrary Board precedent that Congress never questioned. In determining whether to defer, the Court considers the passage of time between statutory enactment and the agency's interpretation and the interpretation's consistency. *See General Electric Co. v. Gilbert*, 429 U.S. 125, 142-43 (1976). A changed agency interpretation is "entitled to considerably less deference" than one consistently held, *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987), particularly when Congress knew about the original interpretation and did not change it. Congress knew about the Board's *Fort Apache* decision, and has not changed it. *Forty-Second Annual Report of N.L.R.B.* at 32 (1977).

In sum, *de novo* review is the appropriate standard.

B. The Board's Decision Should Be Reversed Because It Violates Established Principles Of Federal Indian Law

1. The Board Fails To Adequately Analyze The Question Presented Against The Backdrop Of Tribal Sovereignty, The Trust Relationship And Federal Indian Policy

The Supreme Court has long recognized Indian tribes as "distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). Indian tribes' "claim to sovereignty long predates that of our own Government." *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 172 (1973). "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory.... [They] are a good deal more than private, voluntary organizations." *United Sates v. Wheeler*, 435 U.S. 313, 323 (1978) (internal quotations omitted).

The "Indian sovereignty doctrine ... provide[s] a backdrop against which the applicable treaties and federal statutes must be read." *Oklahoma Tax Com'n v. Sac and Fox Nation*, 508 U.S. 114, 123-24 (1993) (internal quotations omitted); *see also New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978).

The Supreme Court has repeatedly held that "while Congress retains the authority to abrogate tribal sovereignty as it sees fit, tribal sovereignty is not implicitly divested except in those limited circumstances principally involving external powers of sovereignty where the exercise of tribal authority is *necessarily* inconsistent with the tribes' dependent status." *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 451-52 (1989) (emphasis in original).[5]

The Board failed to articulate, much less apply, fundamental principles of tribal sovereignty, as the discussion below demonstrates. *See* Wenona T. Singel, *Labor Relations and Tribal Self Governance*, 80 N.D. L. Rev. 691, 697-702 (2004).

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[5] The Supreme Court has identified three areas in which tribal sovereignty has been withdrawn as a necessary consequence of tribes' dependant status: alienating title to Indian lands without federal approval, *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-68 (1974); exercising criminal jurisdiction over non-Indians, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978); and conducting foreign policy relations with foreign nations, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153-54 (1980) (noting all three areas); *cf. Montana v. United States*, 450 U.S. 544 (1981). None of these cases involve regulation of non-members who voluntarily enter into relationships, such as employment, with a tribe.

2. The Question Presented Must Be Adjudicated In Accordance With The Indian Canons Of Construction Which The Board Failed To Apply: Ambiguities Must Be Resolved In Favor Of The Tribe, And Congress Must Clearly Express An Intent To Diminish Tribal Sovereignty

The "theory and practice of interpretation in federal Indian law differs from that of other fields of law." Cohen, *Handbook of Federal Indian Law*, 119 (2005 LexisNexis) ("*Cohen*"). The Supreme Court has stated: "[T]he standard principles of statutory construction do not have their usual force in cases involving Indian law." *Montana v. Blackfeet Tribe,* 471 U.S. 759, 766 (1985). Accordingly, the Court has developed Indian law canons of construction.

The Indian law canons require that federal statutes be liberally construed in favor of the Indians, *see e.g., Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943), and all ambiguities are to be resolved in favor of the Indians. *See, e.g., McClanahan,* 411 U.S. at 174; *Cohen*, 119. In addition, agreements are to be construed as the Indians would have understood them, *see e.g. Choctaw Nation*, 318 U.S. at 432, and tribal sovereignty is preserved unless Congress's intent to the contrary is clear and unambiguous. *See United States v. Dion,* 476 U.S. 734, 738-39 (1986); *Cohen*, 119-20.

The canons thus require that judicial interpretation of federal laws affecting tribal rights defer to retained tribal authority and respect the trust relationship between the United States and Indian tribes. "The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985); *see Cobell v. Norton*, 240 F.3d 1081, 1086 (D.C. Cir. 2001) ("The federal government has substantial trust responsibilities toward Native Americans").

The first canon provides that when a court is "faced with ... two possible [statutory] constructions, our choice between them must be dictated by a principle deeply rooted in [the Supreme] Court's Indian jurisprudence: '[s]tatues are to be construed liberally in favor of Indians, with ambiguous provisions interpreted to their benefit.'" *County of Yakima v. Confederated Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (*quoting Blackfeet Tribe*, 471 U.S. at 766); *see City of Roseville v. Norton*, 348 F.3d 1020, 1032 (D.C. Cir. 2003) ("ambiguities in federal statues are to be read liberally in favor of the Indians").

The second canon provides that absent clear congressional intent to diminish tribal sovereignty, tribes retain their governmental authority. Inherent tribal sovereignty exists "at the sufferance of Congress and is

subject to complete defeasance. ***But until Congress acts, the tribes retain their existing sovereign powers.***" *Wheeler*, 435 U.S. at 323 (emphasis added) (*citing Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)). If a tribe's sovereign authority on its reservation "is to be taken away from them, it is for Congress to do it." *Williams v. Lee,* 358 U.S. 217, 223 (1959).

The Board erred in this case by failing to apply these settled Indian law canons.

C. The Board's Decision Ignores And Undermines Important Retained Tribal Sovereign Rights

The Board's decision fails to recognize, and undermines, fundamental inherent tribal governmental powers. These retained sovereign powers include: jurisdiction over tribal trust lands; the right to regulate economic activity on tribal trust lands; the right to exclude non-members from tribal trust lands and the lesser included right to condition entry on conformance with tribal laws; jurisdiction over non-tribal members who voluntarily come onto the Reservation and enter into consensual economic relationships, such as employment, with the Tribe; and jurisdiction over non-members whose actions threaten the tribe's political integrity, economic security or health and welfare. These retained powers demonstrate that the Tribe has the authority to operate the Project and regulate its relationships with is

employees, including non-members, and that applying the Act interferes with these sovereign powers

In order to understand precisely how the Act interferes with tribal sovereign rights, however, it is first necessary to briefly review the comprehensive nature of the Act's regulation of the employment relationship.

1. The Act Interferes With Tribal Sovereignty By Comprehensively Regulating The Relationship Between The Tribe And Its Employees

The Board concluded that applying the Act will not interfere with tribal sovereignty because the Act "does not dictate any terms of any agreement or even that an agreement be reached," and does not pervasively regulate the employment relationship or interfere with intramural matters. JA0319-20. The Board is wrong.

The Act fundamentally and pervasively regulates the process by which the Tribe relates to and makes decisions regarding its employees – individuals whom it clearly has a sovereign right to regulate.

The Act grants employees the rights "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted

activities for the purpose of collective bargaining or other mutual aid or protection," and also the right "to refrain from any or all of such activities." 29 U.S.C. § 157. It makes it illegal for an employer to "interfere with, restrain, or coerce employees in the exercise of the[se] rights," *id.* § 158(a)(1); "dominate or interfere with the formation or administration of any labor organization," *id.* § 158(a)(2); or "to encourage or discourage membership in any labor organization," by discrimination with respect to hire, tenure or other terms and conditions of employment. *Id.* § 158(a)(3).

Once selected by a majority vote of employees, a union becomes "the exclusive representatives of all the employees" in a designated bargaining unit "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." *Id.* § 159(a); *see id.* § 158(a)(3) (Act permits union to bargain with employer to make union membership a condition of employment); *St. John's Mercy Health Systems v. NLRB*, 436 F.3d 843 (8th Cir. 2006) (directing employer to terminate employees who would not pay union dues). The union's role as collective bargaining agent means that employers cannot deal directly with employees regarding their terms and conditions of employment. *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975) (employer could not bargain with group of represented employees over

discrimination issues). Similarly, the employer must bargain with the union in good faith over all terms and conditions of employment and may not unilaterally implement or alter those terms and conditions before bargaining to impasse over all terms and conditions of employment. *NLRB v. Katz*, 369 U.S. 736, 741-46 (1962). Finally, the Act grants employees the right to strike.

The Board has authority to find that unfair labor practices have been committed, make remedial orders reinstating employees and awarding back pay and ordering the employer to rescind changes to terms and conditions of employment and bargain with the union in good faith. *See id.* at 737 n.3 (order to rescind unilateral changes to terms and conditions of employment); *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969) (order to bargain).

Thus, the Act would require the tribe to bargain to retain its sovereign rights, preclude it from regulating those it has a sovereign right to regulate, and open it to the risk of strikes simply for exercising its sovereign prerogatives. The Board's unilateral application of the Act to the Tribe thus violates established, inherent tribal sovereign rights, as the following discussion demonstrates.

2. The Act Undermines Numerous Core Tribal Rights

The Board's decision should be reversed because it undermines a host of core, retained tribal rights.

First, the Supreme Court has consistently recognized that tribal sovereignty includes jurisdiction over tribal trust lands. *See, e.g., Atkinson Trading Co., v. Shirley*, 532 U.S. 645, 653 (2001); *Colville*, 447 U.S. at 152; *United States v. Mazurie*, 419 U.S. 544, 557 (1975). The Tribe's Project at issue here is located on trust reservation land. JA0311. Given that Congress has not stated its intention to diminish the Tribe's jurisdiction over its trust lands, the Board's decision to seek to apply the Act to the Tribe's Project intrudes on that retained tribal right.

Second, in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982), the Court recognized that a tribe has "general authority, as sovereign, to control economic activity within its jurisdiction...." Yet the Board's decision uses the fact of economic activity to justify its effort to impose the Act on the Tribe's Project. JA0319. Congress, through IGRA, certainly imposed some restraints on this tribal right. But IGRA's limitations do not impose the Act as well. Indeed, as discussed below, IGRA (together with the Compact and TLRO), precludes application of the Act. The Board's decision undermines the Tribe's right to regulate economic activity on its

trust lands, and interferes with the Tribe's laws that expressly govern labor relations at its Project. JA0272, 0100-08.

Third, the Court has recognized that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty...." *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987). In *Montana v. United States*, 450 U.S. 544 (1981), the Court explained that "[t]o be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *Id.* at 565. Here the Board simply failed to acknowledge that the Tribe has an interest in exercising civil jurisdiction over non-member employees at its Project. The Court, on the other hand, has consistently recognized that tribes retain authority over non-members who voluntarily subject themselves to tribal jurisdiction through their actions. *See Williams*, 358 U.S. at 223.

Fourth, tribes have authority to exclude non-members from trust land: "A tribe's power to exclude nonmembers entirely or to condition their presence on the reservation is ... well established." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983). *Merrion* held that the power to exclude nonmembers from the reservation "necessarily includes the lesser power to place conditions on entry, on continued presence, or on

reservation conduct." 455 U.S. at 144. Thus, when "a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its *ultimate* power to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry." *Id.* (emphasis in original). "[T]he exclusionary power is a fundamental sovereign attribute intimately tied to a tribe's ability to protect the integrity and order of its territory and the welfare of its members...." *Cohen*, 220.[6]

Here, the non-tribal member employees the Board purports to protect by applying the Act have voluntarily subjected themselves to the Tribe's civil laws, including its TLRO, by choosing to come onto the Tribe's trust lands. *See Colville*, 447 U.S. at 152; *Williams*, 358 U.S. at 223. The Board again simply ignored an important tribal right, and its decision below effectively abolishes that right as to the labor issues involved here.

Fifth, *Montana* stated that tribes have jurisdiction over non-members even on non-Indian fee land (as opposed to the tribal trust lands at issue here)[7] under some circumstances: "A tribe may regulate, through taxation,

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[6] *But see Nevada v. Hicks*, 533 U.S. 353 (2001) (tribal court did not have jurisdiction to adjudicate tort claims arising from state officials execution of process on reservation lands for evidence of an off-reservation crime).

[7] Where, as here, the Tribe acts on tribal trust lands, its retained sovereignty is stronger still, for "there is a significant territorial component to tribal power...." *Merrion*, 455 U.S. at 142; *see also Colville*, 447 U.S. at

licensing, or other means, the activities of nonmembers who enter ***consensual relationships*** with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565 (emphasis added).

By voluntarily entering into employment directly with San Manuel, Project employees have entered into precisely the type of consensual relationship that falls within tribal civil jurisdiction under the *Montana* standard. *See Atkinson Trading Co.*, 532 U.S. at 656 ("*Montana's* consensual relationship exception requires that the ... regulation imposed by the Indian tribe have a nexus to the consensual relationship itself"). *See, e.g.*, *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314-15 (9th Cir. 1990) (affirming tribal jurisdiction and employment ordinance regulating nonmember employer *on non-Indian land* within reservation where employer had entered into employment agreement with the tribe); *MacArthur v. San Juan County*, 391 F. Supp. 2d 895, 902-03 (D. Utah 2005) ("employment ... was a 'consensual relationship with the tribe' ... entered into 'through ... contracts, ... or other arrangements,'" under *Montana*); *Montana v. Bremner*, 971 F. Supp. 436, 439 (D. Mont. 1997) (employment

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166-67 (1980) (Brennan, J., concurring in part and dissenting in part); *Williams*, 358 U.S. at 223.

on reservation met *Montana* standard for consensual relationship: "[D]efendant voluntarily entered an employment contract with the plaintiff ... [t]hey chose to do business on the Blackfeet Reservation").

Employment at a tribal government's gaming facility constitutes the type of "economic activity" over which tribes retained inherent governmental authority even prior to IGRA's passage. *Merrion*, 455 U.S. at 137. *See generally California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). Post-IGRA, the Tribe has authority to regulate its government gaming project, specifically including labor relations, under IGRA, the Compact and the TLRO. *See generally* JA0272, 0100-08. The Board's decision ignores the important tribal right to regulate the on-reservation conduct of non-members who voluntarily enter into consensual economic relationships with the Tribe.

Sixth, tribes also "retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within [their] reservation[s] when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. As noted above, the Project's net revenues are the sole source of funding for the Tribe's government and its programs. Thus the Tribe's "economic security" plainly is "direct[ly] affect[ed]" by the

Project's operations. *Id.* *See also MacArthur*, 391 F. Supp. 2d at 902-03 ("employment relationships 'ha[ve] some direct effect on ... the economic security, or the health or welfare of the tribe,'" under *Montana*). Given that the activity at issue in this case is on tribal trust lands, rather than non-Indian fee lands, the Tribe's governmental interests are even stronger. *See* footnote 7 *supra*.

In sum, the Board erred by ignoring the Indian canons of statutory construction, ignoring well-established retained tribal rights, and attempting to force application of the Act on San Manuel in derogation of those inherent sovereign rights. The Board's error is compounded by the absence of any congressional intent or authorization to do so, as the following discussion shows.

D. The Act Does Not Apply To A Tribally Owned And Operated Enterprise Located On Trust Land

1. The Act's Text And Legislative History Provide No Evidence That Congress Intended The Act To Apply To Tribes

Neither the Act nor its legislative history address its applicability to Indian tribes; at most, the Act's silence concerning tribes renders it ambiguous. *See NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1196 (10th Cir. 2002) ("the correct presumption is that silence does not work a

divestiture of tribal power"). Under the Indian canons discussed above, any ambiguity in the Act must be liberally interpreted in the Tribe's favor, *see Yakima Indian Nation*, 502 U.S. at 269, and the Act may not be read to diminish tribal sovereignty unless Congress clearly expresses that intent. *See Wheeler*, 435 U.S. at 323; *Williams*, 358 U.S. at 223. Because applying the Act to tribes would diminish tribal sovereignty, the absence of any statutory text or legislative history suggesting that Congress intended the Act to apply to Indian tribes should end the inquiry.

In fact, the available evidence demonstrates that Congress did not intend the Act to apply to Indian tribes. Congress was not focusing on the problems of Indian tribes as employers when it passed the Act in 1935.[8] Although "Congress defined the Board's jurisdiction in very broad terms," congressional attention "focused on employment in *private industry* and on industrial recovery." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 504 (1979) (*emphasis added*) (*citing* 79 Cong. Rec. 7573 (1935) (remarks of Sen. Wagner).

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[8] Indeed, in 1935 Indian reservations were in such a depressed economic state, *see The Problem of Indian Administration*, 1, 15 (L. Meriam Ed., Johns Hopkins Press 1928) ("*Meriam*"), that undoubtedly there was a notable lack of reservation employers. Clearly under such circumstances Congress did not think about the Act's application to tribes and would not have intended the Act to apply had it considered the matter.

There is no evidence that in 1935, Congress believed that Indian tribes raised the concerns it intended the Act to address. That the Act references only interstate and foreign commerce, and not Indian commerce, suggests that Congress did not contemplate the Act's application to tribes. 29 U.S.C. § 152(6).

Congressional Indian policy in the 1930s similarly undermines the notion that Congress intended the Act to apply to Tribes. Just one year before the Act, Congress enacted the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 ("IRA"). "The IRA was key to the New Deal's attempt to encourage economic development, self-determination, cultural pluralism, and the revival of tribalism." *Cohen,* 86. Congress was concerned with rebuilding tribal governments and promoting tribal sovereignty. *See Meriam*, 1, 15. Congress sought to empower tribes, not burden them with regulation, and there is absolutely no evidence that the 1935 Congress that passed the Act intended the Act to cover Indian tribes. *Cf. Reich v. Great Lakes Indian Fish and Wildlife Commission,* 4 F.3d 490, 493-94 (7th Cir. 1993) (Congress was not concerned with Indian issues when it passed the Fair Labor Standards Act ("FLSA") in 1938: Congress's failure to extend the law enforcement exemption to Indian police was simply an "oversight").

Finally, even if Congress had focused on the question in 1935, it would have understood its silence regarding the Act's applicability to Indian tribes to leave tribes unaffected by the Act, not the other way around. In 1935, the rule against which Congress legislated was that general federal statutes did not apply to Tribes. *See generally Elk v. Wilkins*, 112 U.S. 94, 99-100 (1884) ("Under the Constitution of the United States ... General Acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them").

In sum, Congress's silence regarding tribes suggests that it did not intend the Act to cover tribes.

2. The Board Erred In Withdrawing The Well-Established Implied Tribal Governmental Exemption Without Any Direction From Congress

For nearly 30 years, the Board had consistently held that it lacks jurisdiction over Indian tribes and their self-directed on-reservation enterprises. *See Southern Indian Health Council,* 290 NLRB 436, 437 (1988); *Fort Apache,* 226 N.L.R.B. at 506.

In *Fort Apache*, the Board initially recognized the tribe's sovereign status and applied the presumption that "Indian tribal governments, at least on reservation lands, are generally free from state or even in most instances

Federal intervention, unless Congress has specifically provided to the contrary." *Id.* at 506. It noted that there was no express statement of congressional intent that the Act apply to Indian tribes acting on their reservations and held that the tribe's business was analogous to political subdivisions of governments exempt from the Board's jurisdiction as "an entity administered by individuals directly responsible to the Tribal Council." *Id.* at 506 n.22.

In *Southern Indian Health Council,* the Board extended its *Fort Apache* holding to a health care clinic operated on a reservation by a tribal consortium. Again, the Board based its decision on the fact that the business was located on the reservation and all important employment decisions were made by the tribes. *See* 290 N.L.R.B. at 436-37. Prior to the present case, the Board had only asserted jurisdiction over an off-reservation tribal enterprise, *see Yukon Kuskokwim Health Corp.,* 328 N.L.R.B. 761 (1999); *Sac & Fox Industries,* 307 N.L.R.B. 241 (1992), or one neither wholly owned nor completely controlled by the tribe. *See Devil's Lake Sioux Mfg. Corp.,* 243 N.L.R.B. 163 (1979).

Under the Board's precedents, the Project here was clearly exempt. It is located on the Tribe's reservation trust lands, wholly owned and operated by the Tribe as governmental activity, all significant decisions relating to its

operation and the wages, benefits and working conditions of employees are made by the Tribe, and the net revenues are virtually the exclusive source of funding for the tribal government. JA0057.

The Board nevertheless ruled that Indian tribes are not exempt from the Act's definition of "employer" because they do not fit within the literal terms of the Act's exemption for governments and because, it claimed, it is precluded from implying an exemption for tribes. The Board's position contradicts its own decisions and those of the federal courts and should be rejected.

First, the Board's statement that it is precluded from implying exemptions contradicts numerous precedents, discussed below, holding that United States Commonwealths and Territories are "governments" exempted from the Act even though they are not expressly listed in the "governmental" exemption. *See* 29 U.S.C. § 152(2). The same factors on which these precedents relied apply equally to tribal governments and demonstrate that tribes should similarly be exempt from the Act because they too are governments. Second, the Board's position is inconsistent with both its own decisions and decisions of the Supreme Court implying exemptions from the Act's definition of "employer" where there is no statement of intent and

where policy considerations demonstrate that Congress would not have intended to cover the entity.

The text and purpose of the Act's governmental exemption, and its application by the courts, demonstrates that tribes share that exemption. The Act excludes a broad range of governments: The term "employer" does "not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof...." 29 U.S.C. § 152(2). Interpreting the exemption for political subdivisions, the Supreme Court held that Congress intended to exempt "from Board cognizance the labor relations of federal, state, and municipal governments, *since governmental employees did not usually enjoy the right to strike.*" *NLRB v. Natural Gas Util. Dist. of Hawkins County,* 402 U.S. 600, 604 (1971) ("*Hawkins*") (emphasis added). It therefore extended the Act's "political subdivisions" exemption to all entities that are "either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate." *Id.* at 604-05. Courts have further recognized that "[u]ndoubtedly, notions of states' rights and state sovereign immunity were instrumental" in the decision to exempt states and

their political subdivisions from the Act. *Crilly v. Southeastern Pennsylvania Transp. Auth.* 529 F.2d 1355, 1360 (3d Cir. 1976).

The courts have consistently found other governments, not expressly listed in Section 152(2), to be exempt from the Act, including the Commonwealth of Puerto Rico, the Virgin Islands, and their subdivisions. *Chaparro-Febus v. Int'l Longshoremen Ass'n*, 983 F.2d 325, 329-30 (1st Cir. 1993); *Compton v. Nat'l Mar. Union*, 533 F.2d 1270, 1274 (1st Cir. 1976); *Virgin Islands Port Auth. v. SIU de Puerto Rico*, 354 F. Supp. 312, 312-13 (D.V.I. 1973).

The Seventh and Tenth Circuits have also correctly treated tribes as governments. In *Reich*, the court held that under principles of comity and the Indian law canons, tribal police officers should be granted the same governmental exemption from the FLSA as all other police officers. 4 F.3d at 494. In *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1192 (10th Cir. 2002), the court concluded that although the tribe was neither a State nor a Territory, it was entitled to rely on the Act's exemption authorizing States and Territories to enact right-to-work laws: "it retains the sovereign power to enact its right-to-work ordinance ... because Congress has not made a clear retrenchment of such tribal power as is required to do so validly." *Id.* at 1191.

In short, the courts and the Board have interpreted Congress' intent in excluding governments from the Act's scope in light of the Act's intention to regulate management and labor in private industry and to avoid interference with the internal affairs of governments. It is impossible to reconcile the courts' broad, implied exemptions for territorial and commonwealth governments from the Act with the Board's unprecedented refusal here to continue to extend comparable treatment to an Indian tribal government acting on its trust land.

Tribes qualify under the *Hawkins* test in the same manner as other governments. The Project at issue here is exclusively owned and operated by the Tribe in its governmental capacity. JA0311.[9] The Tribe and its economic development activities are "administered by individuals who are responsible to public officials or to the general electorate" of the Tribe, just as the territorial subdivisions are responsible to public officials or the general electorate of the territories. *Hawkins*, 402 U.S. at 604-05; JA0312. Furthermore, the Tribe uses Project revenues to provide a wide variety of

[9] In its first decision, the Board recognized that the Project is "wholly owned and operated by the Tribe." JA0311. In its second decision, the Board inexplicably "found" that the Project is a "California corporation." JA0388. This "finding" is wholly unsupported and must be rejected. The Project is *not* a corporation. The Tribe expressly denied that the Project is a corporation, JA0019, 0333, and there is no evidence in the record to support the Board's "finding" that the Project is a corporation.

governmental services to tribal members, JA0057-58, and, like other exempt governments, its ability to provide these needed services could be crippled by strikes. And, just as with States, applying the Act to tribes interferes with tribal sovereignty. Refusing to exempt tribes while exempting other governments "would create a senseless distinction between Indian [governmental employees] and all other public [employees]." *Reich,* 4 F.3d at 494.[10]

Furthermore, contrary to the Board's statement that it has always strictly construed the exemptions from the Act's definition of "employer," JA0313-15, the Board has in fact refused to assert jurisdiction over some employers that are not expressly exempted. For example, in *Herbert Harvey, Inc.,* 171 N.L.R.B. 238 (1968), the Board held that the World Bank was outside the Board's jurisdiction even though it is not expressly exempted. Because the Bank is an international organization generally enjoying immunity, and given the impact asserting jurisdiction could have on international relations, the Board held it would need "the affirmative intention of the Congress clearly expressed" to subject the World Bank to Board jurisdiction. *Id.* at 238. Since "nothing in the language of the statute

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[10] IGRA makes tribal control of gaming as much a fundamental aspect of tribal self-governance as was tribal regulation of wildlife management under *Reich*. *See* 25 U.S.C. § 2702(1).

or in its legislative history ... would lead us to conclude that Congress intended the Board to exercise its jurisdiction over the operations of the World Bank," the Board held that the World Bank is impliedly exempt from the Act. *Id.* at 238-39.

The Supreme Court also has implicitly limited the scope of the Act's definition of "employer." In *Catholic Bishop of Chicago*, the Court held that even though the Act's definition of "employer" does not exclude church operated schools, it would imply such an exemption to avoid the constitutional questions that such an exercise of jurisdiction would involve. Because "the statute and its legislative history indicates that Congress simply gave no consideration to church-operated schools," the "absence of an 'affirmative intention of the Congress clearly expressed' fortifies our conclusion that Congress did not contemplate that the Board would require church-operated schools to grant recognition to unions as bargaining agents for their teachers." 440 U.S. at 507.

Similarly, in *McCulloch*, the Court reasoned that asserting jurisdiction over the maritime operations of foreign-flag ships employing alien seamen, even though they literally satisfied the Act's definition of an "employer," would have implicated sensitive issues of Executive authority over foreign relations and raised separation of powers issues. The Court therefore held

that before sanctioning the Board's exercise of jurisdiction "there must be present the affirmative intention of the Congress clearly expressed." 372 U.S. at 21-22 (internal quotation omitted).

These decisions demonstrate that policy considerations warrant implied exemptions from the Act. They also demonstrate that the Board lacked a reasoned basis for abandoning its 30-year precedent – never questioned by Congress – that the Act does not apply to tribes' on-reservation activities.

The concerns that animated the Court in *McCulloch* and *Catholic Bishop* are present here. The policy considerations at issue here are Congress' directives in IGRA and the Supreme Court's precedents protecting tribal self-determination and control of reservation affairs. The Supreme Court has recognized that issues of Indian affairs involve fundamental policy issues committed to Congress. *See, e.g., South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) ("Congress possesses plenary power over Indian affairs"). Even Congress will not be found to have diminished Indian sovereignty unless it clearly states such an intention. *See Wheeler*, 435 U.S. at 323. In light of these principles, the Board's refusal to read the Act as exempting tribal governments on trust lands not only ignores and contradicts

the Act, but intrudes on Congress's plenary authority in setting Indian policy.

Indeed, the Supreme Court's holdings in *McCulloch* and *Catholic Bishop* demonstrate that applying the Indian canon to require a clear statement of congressional intent to diminish tribal sovereignty is entirely consistent with the Supreme Court's interpretations of the Act. Both cases demonstrate that when countervailing policy concerns are present, the Court will require a clear statement of congressional intent before it concludes that the Act applies. Because there is no clear statement of congressional intent to apply the Act to San Manuel's on-reservation governmental gaming Project, the Act does not apply.

3. The Board Erred In Holding That The Act Could Not Sustain A Distinction Between On-Reservation And Off-Reservation Tribal Activities

The Board's claim that the Act's language cannot support basing the jurisdictional determination on the location of tribal activity is simply wrong. *See* JA0313. The Board's prior reliance on the trust/fee distinction is entirely consistent with governing federal Indian law principles. Tribal sovereignty is at its strongest when a Tribe acts on its Reservation. *See* footnote 7 *supra.* Thus, when, as here, the Tribe is acting on its reservation,

there is a significant basis for applying the Indian law canons to limit the Act to avoid intruding on tribal sovereignty.

The canons operate in this manner because it is within the Reservation that the Tribe exercises its inherent self-governing authority. IGRA mandates this with respect to gaming. *See* 25 U.S.C. § 2710(d)(1). *Merrion* and *Montana* establish this more generally with respect to the Tribe's authority to manage its territory and resources.

Furthermore, the Board's conclusion contradicts the position it recently took in this Court. Just five years ago, the Board argued that its jurisdiction over tribal activities depended on whether the tribal activities occurred on or off the reservation, and this Court squarely held that "[w]e can hardly say that position is unreasonable." *Yukon-Kuskokwim Health Corp. v. NLRB*, 234 F.3d 714, 717 (D.C. Cir. 2000). As the Act has not changed, the Board's contention that the very argument this Court accepted is prohibited by the Act's plain language is unreasoned and should be rejected.

E. The Board Erred By Relying On *Tuscarora Dictum*

Having nothing else to support its abrupt change in position, the Board majority relied heavily on a statement from *Tuscarora*. That

statement was *dictum* in a decision involving a statute that, unlike the Act here, specifically addressed Indian lands. *See* 362 U.S. at 111; 16 U.S.C. § 796(2). For the reasons we have explained, *see* § I(B)-(C) *supra*, and the dissent discusses, JA-0326-30, that *dictum* conflicts with the Supreme Court's consistent holding that ambiguities in federal statutes must be construed to benefit tribes and statutes will not be read to limit tribal sovereignty unless Congress expressly so states. Certainly it does not reflect the principles of construction the Court had articulated as of 1935, against which Congress legislated when it passed the Act. *See Elk*, 112 U.S. at 99-100. *See also North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995) (Congress legislates against the backdrop of the statutory construction principles the Court has articulated at the time Congress is acting). The *Tuscarora dictum* has never been followed by the subsequent nearly half-century of Supreme Court Indian law decisions. JA0326-30. The *Tuscarora dictum* cannot support the Board's about-face.[11]

Moreover, even the Board and those lower courts that have sought to apply *Tuscarora* have recognized that its "rule" must be subject to a number

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[11] Although this Court once applied Tuscarora, with little discussion, to support Board jurisdiction over a non-Indian employer on reservation lands, it has not, to our knowledge, applied it to tribes. *Navajo Tribe v. NLRB*, 288 F.2d 162, 164-65 (D.C. Cir. 1961). It should not do so here.

of exceptions in a strained effort to make it even arguably consistent with all other Supreme Court precedent. The effort to define these exceptions only demonstrates that the *Tuscarora* "test" cannot be reconciled with basic principles of Indian law.

F. Even If *Tuscarora* Were The Law, The Board's Decision Would Nevertheless Still Be Wrong

Even if *Tuscarora* applied, the Board erred in applying *Coeur d'Alene's* statement of the Ninth Circuit's three exceptions to the *Tuscarora* "rule": a federal statute does not apply to tribes if (1) the law touches "exclusive rights of self-governance in purely intramural matters;" (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties;" or (3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations...." 751 F.2d at 1116.[12]

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[12] Neither the Supreme Court not this Court ever adopted the *Coeur d'Alene* exceptions. The exceptions are not based on Supreme Court Indian law doctrine but rather were created, out of whole cloth, by the Ninth Circuit, and flatly conflict with controlling Supreme Court principles regarding tribal sovereignty and the construction of statutes applying to Indians.

Coeur d'Alene holds that only when one of its three exceptions apply will a clear statement of congressional intent to subject tribes to a federal law be required. The Supreme Court, however, has repeatedly applied the

Applying the Act here would violate the first exception even as narrowly construed by the Board. IGRA demonstrates that the operation of a tribal casino *is* a matter of self governance because it implements a congressional policy decision that Indian gaming is central to Congress' express policy of "promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). The nexus between gaming and internal self-governance is further shown by IGRA's

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clear statement requirement to *all* statutes that diminish tribal sovereign rights, not merely to situations that meet the *Coeur d'Alene* exceptions. *See, e.g., Merrion,* 455 U.S. at 149, 152.

Furthermore, the Board's conclusion that the first *Coeur d'Alene* exception excludes tribal relations with non-members or tribal economic projects, JA0316-17, flatly conflicts with controlling federal Indian law, including Supreme Court decisions and Congress' expressed will. Numerous Supreme Court decisions recognize that tribal sovereignty extends to both economic activity and non-members under circumstances applicable here. *See Merrion*, 455 U.S. at 145-47; *Montana,* 450 U.S. at 566; *Colville,* 447 U.S. at 152; *Williams,* 358 U.S. at 223. Likewise, Congress passed IGRA, which expressly authorizes tribal gaming, to achieve the federal policy of "promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1).

Finally, the third *Coeur d'Alene* exception is a non-sequitur and confirms the folly of the whole analysis: If there is evidence "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations," then "Congress must *expressly* apply a statute to Indians before we will hold that it reaches them." 751 F.2d at 1116. Requiring evidence that Congress intended a law not to apply to Indians on their reservation as a precondition to requiring a clear statement that Congress did intend the law to apply to Indians on their reservations is, of course, nonsense.

requirement that gaming occur on "Indian lands" over which "an Indian tribe exercises governmental power," *id.* § 2703(4), and its mandate that net revenues from tribal gaming projects be used exclusively for governmental purposes. *Id.* § 2710(b)(2)(B).

San Manuel's operation of the Project confirms that it involves internal matters of self-governance. All significant decisions regarding the project – including employment and labor relations decisions – are made by the Tribe, and all revenues are used exclusively to fund crucial governmental projects and services. JA0056-57. Applying the Act here would interfere with these internal matters of self-governance.

For instance, if the Act applies, it must apply to tribal member and non-member employees alike. The Board establishes bargaining units based on employees' community of interest by assessing factors such as employees' skills and duties; terms and conditions of employment; employee interchange; functional integration; and geographic proximity. *See Laboratory Corp. of Amer. Holdings*, 341 N.L.R.B. No. 140, 2004 NLRB Lexis 288, *15 (2004). Given these factors, the Board would not create a separate unit composed of tribal members if they otherwise share a community of interest with non-members.

Employment disputes between a tribe and its members, however, involve purely internal matters and require an express statement before federal employment laws will apply. *See EEOC v. Fond du Lac Heavy Equipment and Const. Co.*, 986 F.2d 246, 249-50 (8th Cir. 1993) (dispute between tribal employer and tribal member is internal matter under *Coeur d'Alene* to which Age Discrimination in Employment Act may not apply). Applying the Act to the Tribe would not only require the Tribe to negotiate with a third party in dealing with its own member employees, but also preclude it from setting or changing the terms and conditions of employment for those member employees without bargaining to impasse and facing a strike that would preclude the Tribe from funding crucial government services. Because applying the Act to tribal members involves a purely internal matter, the first *Coeur d'Alene* exception applies.

Additionally, applying the Act here interferes with the effective equivalent of a treaty right; therefore, *Coeur d'Alene's* second exception applies. The Compact, like a treaty, is a sovereign-to-sovereign agreement authorized by federal law, ratified by the State Legislature, and approved by the Secretary of Interior.[13] The Compact requires the Tribe to enact the

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[13] "A treaty signifies 'a compact made between two or more independent nations, with a view to the public welfare.'" *United States v. Belmont*, 301 U.S. 324, 330 (1937) (citations omitted). *See New Jersey v. New York*, 523

TLRO and confirms the Tribe's inherent authority to regulate the same subjects as the Act. Thus, applying the Act to the Project abrogates the Tribe's right to regulate the very subjects covered by the Act.

G. The Board's Decision Contravenes Congress' Intent In IGRA To Grant Tribes And States The Right To Comprehensively Regulate Gaming Activities, Including Labor Relations

The Board recognized that it had an obligation to harmonize the Act with IGRA. It then concluded that application of the Act to the Project would not conflict with IGRA because "the Act does not regulate gaming" and "IGRA does not address labor relations." JA0320. The decision, however, misconstrues IGRA's scope and impact and ignores the effect of the Compact-mandated TLRO.

The Supreme Court has recognized that a statute's scope and meaning may be affected by later-enacted or more specific statutes, even if they do not purport to amend the earlier statute, and that courts have a duty to harmonize disparate federal statutory schemes. "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton v. Mancari*,

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U.S. 767, 831 (1988) ("the compact here is of course a treaty") (Scalia, J., dissenting on other grounds).

417 U.S. 535, 550-51 (1974). That is particularly true in addressing the scope of regulatory jurisdiction under ambiguous statutes such as the Act. Where an agency's assertion of jurisdiction under an earlier statute is inconsistent with congressional intent expressed in subsequently-enacted legislation, the agency's assertion of jurisdiction is impermissible. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 126 (2000).

In *Brown & Williamson*, the Supreme Court ruled that the FDA lacked jurisdiction to regulate tobacco products under the Food, Drug and Cosmetic Act ("FDCA"). The Court initially noted that the FDCA was ambiguous as to whether it covered tobacco. In addressing the jurisdictional question, the Court it could not "confine itself to examining a particular statutory provision in isolation," *id.* at 132, but also had to consider the effect of later-enacted statutes:

> The classic judicial task of reconciling many laws enacted over time, and getting them to make sense in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.... [A] specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended.

Id. at 143 (internal quotations and citations omitted). The Court found that in enacting later statutes, Congress had acted against the backdrop of the

FDA's "consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco." *Id.* at 144. The Court held:

> Under these circumstances, it is evident that Congress' tobacco-specific statutes have effectively ratified the FDA's long-held position that it lacks jurisdiction under the FDCA to regulate tobacco products. Congress has created a distinct regulatory scheme to address the problem of tobacco and health, and that scheme, as presently constructed, precludes any role for the FDA.

Id.

The Supreme Court's analysis applies equally to the relationship between the Act and IGRA. The Act, like the FDCA, does not explicitly grant the Board jurisdiction over Indian tribes acting on their reservations; there is a later-enacted federal statute, IGRA, that specifically and comprehensively regulates Indian gaming; and, at the time Congress enacted IGRA, the Board had squarely held that it lacked jurisdiction over on-reservation tribal governmental activities – the exact kind of activities IGRA covers. Thus, because IGRA authorizes Compacts to comprehensively regulate Indian gaming operations, it controls the "construction of the [Act], even though [the Act] ha[s] not been expressly amended." *Id.* at 143. *See* 25 U.S.C. §§ 2701(5), 2710(b)(2)A), 2710(d)(3)(C)(i)-(ii), (vii), and 2713(d).

The Tribe and the State of California acted pursuant to IGRA's grants of authority to require the Tribe to adopt the TLRO, which comprehensively governs labor relations at the Project. Both the Secretary of Interior and the Ninth Circuit have concluded that labor relations in general and the TLRO in particular are valid subjects for regulation under IGRA and the Compact. The Secretary, who may disapprove any compact that violates (1) IGRA; (2) "any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands;" or (3) the United States' "trust obligations ... to Indians," approved the compact, including the TLRO. 25 U.S.C. § 2710(d)(8). *See* 65 Fed. Reg. 31189; *In re Indian Gaming Related Cases*, 331 F.3d. at 1116 (TLRO involved here is a valid subject of the Compact authorized by IGRA).[14] *See also* U.S. Const. Art. 1, § 10, cl. 3.

[14] That IGRA governs labor relations is further shown by federal regulations providing for tribal regulatory authority over numerous employment matters. For example, the licensing authority for key casino employees "is a tribal authority." 25 C.F.R. § 558.1. *See also* 25 C.F.R. §§ 556.4 (background investigations); 558.1(b) (tribal authority over licensing procedures for all casino employees); 558.2 (eligibility determinations for casino employment); NIGC Bulletin 94-3 (available at http://www.nigc.gov/nigc/documents/bulletins/NIGC-94-3.jsp, last visited March 15, 2006).

Thus, the Board's conclusion that IGRA does not regulate labor relations is simply wrong. IGRA, the Compact and TLRO must inform the interpretation of the Act, and this Court must attempt to harmonize the Act with those laws.[15]

There is, however, no way to harmonize the Act with IGRA, the Compact and TLRO. The TLRO's structure and language demonstrate that the State and the Tribe intended the TLRO to be the sole labor relations statute for the tribal government gaming operations subject to the Compact. JA0100. The TLRO addresses the same subjects as the Act, grants employees substantially similar rights as the Act, and defines unfair labor practices similarly to the Act. JA0101-02. It creates a full-scale election and decertification process, including secret ballot elections. JA0103-05.

As shown above, however, the TLRO also differs significantly from the Act by recognizing and protecting tribal sovereignty and the Tribe's regulatory and security needs. Thus, the TLRO expressly grants tribes the right to engage in Indian employment preferences and to apply tribal laws and customs, and exempts employees with cash-handling or security

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[15] Indeed, the Supreme Court has taken particular care to protect the attributes of tribal self-governance where, as here, Congress has demonstrated its desire to promote them. *See, e.g., Oklahoma Tax Com'n*, 498 U.S. at 510; *Cabazon*, 480 U.S. at 217-18.

responsibilities. JA1010-04. Under the Act, the Tribe would have to bargain, and face strikes, to keep these sovereign rights. Importantly, Board jurisdiction under the Act cannot be reconciled with the TLRO's exclusive, binding dispute resolution mechanism. *See* JA0106-08. Applying the Act will abrogate the Tribe's negotiated right to a dispute resolution mechanism that is sensitive to tribal sovereignty and gaming regulatory issues.

Furthermore, federal law concerning the Act's preemptive scope demonstrates that IGRA and the Act cannot be harmonized. The Supreme Court has repeatedly held that where the Act applies, it is the sole source of law regarding the subjects it covers, displacing all other regulation. *See Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Emp. Relations Comm'n,* 427 U.S. 132 (1976) (Act preempts regulation of matters it neither expressly permits nor prohibits); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244-46 (1959). Finally, applying the Act would also interfere with the States' role in regulating gaming through the compacting process that Congress intended under IGRA.

Because the Act and the TLRO cannot both apply, and because IGRA, a more specific and later enacted statute, authorizes comprehensive regulation of tribal gaming, including labor relations, under the Compact and TLRO, the Act does not apply to the Tribe's Project.

H. Congress, Not The Board, Is The Proper Entity To Make Important Policy Decisions

The Board majority expressly based its decision on a re-balancing of federal Indian and labor policy. Such a readjustment of long-settled law implicating fundamental policy decisions in diverse subject areas is quintessentially a task for Congress. Even if the Board were competent to undertake such an adjustment, its balance of policies flatly conflicts with Congress' Indian policy and must be rejected.

1. The Board Lacks Both The Authority And The Expertise To Balance Federal Labor And Indian Policies

Numerous Supreme Court decisions regarding both Indian law and labor law demonstrate that major policy decisions in both fields must be left to Congress. By requiring an express statement of congressional intent to find that a statute limits tribal sovereignty, the Supreme Court has recognized the importance of allowing Congress to balance tribal interests with other federal interests. In *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751, 757-58 (1998), the Supreme Court refused to change the scope of tribal sovereign immunity in light of "modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs." Rather, the Court recognized that "*Congress is in a position to weigh and*

accommodate the competing policy concerns and reliance interests," and decided to "*defer to the role Congress may wish to exercise in this important judgment*." *Id.* at 758-59 (emphasis added).

The Court has similarly held that Congress must make fundamental policy decisions regarding labor law. *See, e.g., McCulloch,* 372 U.S. at 22 (Congress "alone has the facilities necessary to make fairly such an important policy decision"). In *American Ship Building*, the Court stated: "[W]e think that the Board construes its functions too expansively when it claims general authority to define national labor policy by balancing the competing interests of labor and management." 380 U.S. at 316. "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in *unauthorized assumption by an agency of major policy decisions properly made by Congress*." *Id.* at 318 (emphasis added); *Brown*, 380 U.S. at 292 (same).

Finally, the Supreme Court's numerous other decisions refusing to uphold Board decisions that impact or interpret legal regimes outside of labor law, *see* § I(A) *supra*, further demonstrate that the Board is not authorized to balance the policy issues raised by competing legal regimes.

Supreme Court decisions further prohibit an agency from radically changing its jurisdiction in the shadow of congressional silence and

ambiguity. Thus, in *Brown & Williamson*, the Court stated: "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." 529 U.S. at 160. Similarly, in *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994), the Court stated that: "It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements." *Id.* at 231.[16] *See also Gonzales*, 126 S. Ct. at 917-20 (Congress did not delegate "just by implication" to the Attorney General the authority to declare illegitimate a medical practice allowed under state law).

The Court has also stated that when an administrative interpretation invokes the outer limits of congressional power or would permit federal encroachment upon a traditional state power, it expects a clear indication that Congress intended such a result. *See Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 172 (2001).

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[16] Congress reversed *MCI* by amending the Communications Act, thereby providing statutory authorization that the Court noted was lacking. *See* 42 U.S.C. § 206.

The same principles apply to the Board's attempt to "strike a balance" between the policies of the Act, tribal governmental authority and federal Indian policy. JA0313. The decision to extend Board jurisdiction to federally recognized Indian tribes on trust lands is a "major policy decision," *American Ship Bldg,* 380 U.S. at 318, of great "economic and political significance," *Brown & Williamson*, 529 U.S. at 133, that is based on no evidence of congressional intent, and encroaches upon a field entirely outside of the Board's competence. The Board has not been given express authority to extend its jurisdiction to tribal governmental activity on trust lands or to Indian casinos, in contravention of a tribal regulatory scheme authorized by IGRA. Thus, the decision about how to balance labor and Indian policy must be left to Congress.

2. The Board's Decision Impermissibly Undermines Federal Indian Policy

Even if the Board had authority to balance labor and Indian policy, its decision should be rejected because it is flatly inconsistent with and wholly undermines federal Indian policy, both in 1935 and today. The IRA, discussed above, enacted one year before the Act, was one of the most significant measures in defense of Indian tribal sovereignty in 60 years. A decision to apply the Act to tribes, and thus impede tribal sovereignty, is

entirely inconsistent with the IRA's focus on strengthening tribal sovereignty and promoting tribal economic development. There is no basis to conclude that the 1935 Congress would have intended its failure to mention tribes in a statute enacted only one year later to mean that the statute would apply to the tribes acting in their sovereign capacity on their reservations.

The Board's decision is equally inconsistent with current expressions of congressional Indian policy favoring strong tribal governments and economic development. The Indian Self-Determination and Education Assistance Act ("ISDA") committed to "the establishment of a meaningful Indian self-determination policy ...." 25 U.S.C. § 450a(b). *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991) (ISDA "reflects Congress's desire to promote the 'goal of Indian self-government'"). Furthermore, IGRA demonstrates Congress' clear intent that tribes regulate gaming under tribal-state compacts, expressly providing that tribes have the exclusive right to regulate gaming activity that does not violate federal law. *See* 25 U.S.C. § 2701(5).

The Board's decision also undermines federal Indian policy by using increased tribal economic activity to justify extending the Act to tribal governmental activities on trust lands. JA0311-12, 0319. Both the Supreme

Court and Congress have flatly rejected the Board's premise that tribal governmental economic activity is not an essential attribute of tribal sovereignty. In *Oklahoma Tax Comm'n,* the Court refused "to modify the long-established principle of sovereign immunity" simply because the tribe was involved in a commercial venture on Indian lands. 498 U.S. at 510. Likewise, in *Kiowa Tribe*, the Court again refused to modify current federal Indian law in light of "modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs." 523 U.S. at 757-58.

Congress has similarly demonstrated that tribal commercial activity is sovereign, governmental activity. This Court recently recognized that Congress enacted IGRA "in large part 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.'" *Taxpayers of Michigan Against Casinos v. Norton*, 433 F.3d 852, 865 (D.C. Cir. 2006) (*quoting* 25 U.S.C. § 2702(1)). *See City of Roseville*, 348 F.3d at 1027 ("Congress' purpose in enacting IGRA includes the promotion of tribal economic self-sufficiency"); *id* at 1030 (refusing to read IGRA in a manner that "would appear inconsistent with Congress' general goal under IGRA of 'promoting tribal economic development' and 'self-sufficiency'"). *See* 25 U.S.C. § 2701(1) and (4). The nexus between gaming activity and tribal

government is also embodied in IGRA's limitation of the use of gaming revenue to governmental and public purposes. *See* 25 U.S.C. § 2710(b)(2)(B).

Congress obviously knew that gaming was an economic activity patronized by non-tribal members, but nonetheless directly linked gaming activity and the revenues derived therefrom to tribal self-sufficiency and strong tribal government. Thus, Congress itself has stated that tribal gaming is vital to tribes' ability to govern themselves. A clearer rejection of the Board's conclusion that the commercial nature of gaming means it is not vital to tribal governmental interests would be hard to find.

More generally, IGRA's findings and declaration of policy demonstrate that Congress views all tribal revenue-generating activities, not just gaming, as essential to tribal self-sufficiency and self-government. The Board's conclusion that tribal commercial activities do not implicate the Tribe's sovereign, governmental status flatly contradicts Congress' expressed will.

In sum, the Board's unprecedented decision here profoundly undermines Congress' policy of encouraging Indian tribal self-determination, economic development and strong tribal governments. From the Indian Reorganization Act, 25 U.S.C. §§ 461-479, to the Indian Financing Act, 25

U.S.C. §§ 1451-1544, to the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450-458, through IGRA's express policy goal of "promoting tribal economic development," 25 U.S.C. § 2702(1), congressional policy was in 1935, and remains today, resolutely committed to supporting and strengthening tribal governments politically and economically. The Board's approach should thus be reversed.

I. The Board's New Case-By-Case Approach Is Inappropriate And Unworkable

Finally, the Board's statement that it will decline to exercise jurisdiction in circumstances where it decides, after litigation, that exercising jurisdiction would trample too much on tribal rights is both inappropriate and unworkable. The Board recognized that "[d]etermining whether to assert jurisdiction will require careful balancing by the Board." JA0319. The problem is that although the Board is an expert in labor relations, it is not an expert in Indian relations. For the Board to determine on a case-by-case basis whether exercising its jurisdiction is too great an intrusion on Indian rights – an area in which it has no expertise – itself violates fundamental tenets of federal Indian law and impermissibly intrudes on tribal sovereignty.

The Board's proposed case-by-case jurisdictional determination is also unworkable. Tribes must plan their conduct to comply with the Act, and thus need clear rules defining when the Act applies. However, the Board itself recognizes that its case-by-case approach "lacks the predictability provided by the former on-reservation/off-reservation approach." JA0319.

The Board's suggestions that "the process of litigation will mark the contours [of its jurisdiction] in due time" and that "there is already a body of law differentiating governmental functions and proprietary ones," *id.*, do not solve the problem. The Board does not even attempt to predict how long "due time" is. Until "due time" passes and those "contours" become clear, tribes will be forced to assume the Act applies, to structure their conduct to comply with the Act, and face derogation of their sovereignty as a result. Furthermore, the Board does not define the "body of law differentiating governmental functions and proprietary ones" to which it refers, compounding the ambiguity tribes face. *Id.*

More significantly, the Supreme Court and Congress have not differentiated between "governmental functions and proprietary ones" in determining the scope of tribal sovereignty. *Id.* Rather, both have recognized that engaging in commercial transactions to raise governmental

revenue is a fundamental expression of tribal sovereignty. *See, e.g.*, 25 U.S.C. § 2701-2721.

CONCLUSION

For these reasons, San Manuel respectfully requests that the Court reverse the Board's decisions below, hold that the Tribe shares the Act's governmental exception, and order the Board to dismiss the case for lack of jurisdiction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,961 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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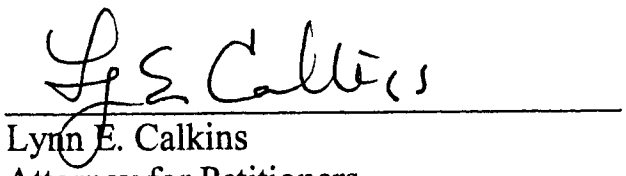

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