Nos. 05-1392 and 05-1432 (Consolidated)

IN THE

United States Court of Appeals for the District of Columbia Circuit

SAN MANUEL INDIAN BINGO AND CASINO AND
SAN MANUEL BAND OF SERRANO MISSION INDIANS,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

CORRECTED BRIEF OF AMICI INDIAN TRIBES AND TRIBAL ORGANIZATIONS IN SUPPORT OF PETITIONERS AND REVERSAL OF THE NLRB'S JUDGMENT

JOHN H. DOSSETT
GENERAL COUNSEL
NATIONAL CONGRESS OF AMERICAN INDIANS
1301 Connecticut Avenue, N.W., Suite 200
Washington, DC 20036
(202) 466-7767

Counsel for the National Congress of American Indians

CHARLES A. HOBBS
ELLIOTT A. MILHOLLIN
HOBBS, STRAUS, DEAN & WALKER LLP
2120 L Street, N.W., Suite 700
Washington, DC 20037
(202) 822-8282

Counsel for the Metlakatla Indian Community, the Eastern Band of Cherokee Indians of North Carolina, and the Seminole Tribe of Florida

SETH P. WAXMAN
EDWARD C. DUMONT
RYAN P. PHAIR
WILMER CUTLER PICKERING HALE AND DORR LLP
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

Counsel for the National Indian Gaming Association

[*Additional Counsel Listed on Inside Cover*]

RICHARD GUEST
NATIVE AMERICAN RIGHTS FUND
1712 N Street, N.W.
Washington, DC 20036
(202) 785-4166

Counsel for the National Congress of American Indians and the Grand Traverse Band of Ottawa and Chippewa Indians

GEORGE FORMAN
FORMAN & ASSOCIATES
4340 Redwood Highway, Suite F228
San Rafael, CA 94903
(415) 491-2310

Counsel for the Morongo Band of Mission Indians, the Sycuan Band of the Kumeyaay Nation, and the Soboba Band of Luiseño Indians

MATTHEW L.M. FLETCHER
UNIVERSITY OF NORTH DAKOTA
SCHOOL OF LAW
P.O. Box 9003
Grand Forks, ND 58202-9003
(701) 777-2264

Counsel for the Grand Traverse Band of Ottawa and Chippewa Indians

DALE T. WHITE
GENERAL COUNSEL
MOHEGAN TRIBE OF INDIANS
5 Crow Hill Road
Uncasville, CT 06382
(860) 862-6245

Counsel for the Mohegan Tribe of Indians

KAIGHN SMITH, JR.
DRUMMOND, WOODSUM & MACMAHON
245 Commercial Street
Portland, ME 04104-5031
(207) 253-0559

Counsel for the Little River Band of Ottawa Indians and the Pokagon Band of Potawatomi Indians

C. BRYANT ROGERS
VANAMBERG, ROGERS, YEPA & ABEITA, LLP
Post Office Box 1447
Santa Fe, NM 87504-14471
(505) 988-8979

Counsel for the Mississippi Band of Choctaw Indians

JOHN F. PETOSKEY
GRAND TRAVERSE BAND OF OTTAWA
AND CHIPPEWA INDIANS
2605 N. West Bayshore Drive
Peshawbestown, MI 49682
231) 534-7279

Counsel for the Grand Traverse Band of Ottawa and Chippewa Indians

ORAL ARGUMENT NOT YET SCHEDULED

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the amici Tribes and tribal organizations hereby state as follows:

A. Parties and Amici

Except for the Eastern Band of Cherokee Indians of North Carolina, the Morongo Band of Mission Indians, the Sycuan Band of the Kumeyaay Nation, the Soboba Band of Luiseño Indians, the Little River Band of Ottawa Indians, the Pokagon Band of Potawatomi Indians, and the Grand Traverse Band of Ottawa and Chippewa Indians, all parties, intervenors, and amici appearing before the National Labor Relations Board and in this court are listed in the Petitioners' Opening Brief filed on March 21, 2006. The amici Tribes and tribal organizations previously filed the requisite Rule 26.1 corporate disclosure statements, but reproduce them below pursuant to Fed. R. App. P. 26.1(b).

The National Congress of American Indians was founded in 1944, and is the nation's oldest and largest association of Indian tribal governments. NCAI represents 252 Indian tribal governments and a large number of individual Indian members and non-voting associate members. NCAI is a social welfare organization operated for the purpose of protecting tribal sovereignty and treaty rights, strengthening the federal-tribal trust relationship, promoting the health and

welfare of Indian communities, and enlightening the public toward a better understanding of the Indian people. NCAI is an association within the meaning of Circuit Rule 26.1, operated for the purpose of promoting the general commercial, professional, legislative, and other interests of its membership. NCAI's members do not have ownership interests in the organization.

The National Indian Gaming Association is a non-profit organization of 184 Indian Nations and other non-voting associate members representing organizations, Tribes, and businesses engaged in tribal gaming enterprises from around the country. NIGA is a trade association within the meaning of Circuit Rule 26.1, operated for the purpose of promoting the general commercial, professional, legislative, and other interests of its membership. NIGA's members do not have ownership interests in the organization.

The Mohegan Tribe of Connecticut is a federally recognized American Indian tribe located in the State of Connecticut.

The Seminole Tribe of Florida is a federally recognized American Indian tribe located in the State of Florida.

The Metlakatla Indian Community is a federally recognized American Indian tribe located in the State of Alaska.

The Eastern Band of Cherokee Indians of North Carolina is a federally recognized American Indian tribe located in the State of North Carolina.

The Morongo Band of Mission Indians is a federally recognized American Indian tribe located in the State of California.

The Sycuan Band of the Kumeyaay Nation is a federally recognized American Indian tribe located in the State of California.

The Soboba Band of Luiseño Indians is a federally recognized American Indian tribe located in the State of California.

The Mississippi Band of Choctaw Indians is a federally recognized American Indian tribe located in the State of Mississippi.

The Little River Band of Ottawa Indians is a federally recognized American Indian tribe located in the State of Michigan.

The Pokagon Band of Potawatomi Indians is a federally recognized American Indian tribe located in the State of Michigan.

The Grand Traverse Band of Ottawa and Chippewa Indians is a federally recognized American Indian tribe located in the State of Michigan.

B. Rulings Under Review

All references to the rulings at issue appear in the Petitioners' Opening Brief filed on March 21, 2006.

C. Related Cases

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

CASES

* Authorities on which amici chiefly rely are marked with asterisks.

STATUTES AND REGULATIONS

TRIBAL CODES & ORDINANCES

EXECUTIVE AND LEGISLATIVE MATERIALS

OTHER AUTHORITIES

GLOSSARY

CERCLA ..... Comprehensive Environmental Response, Compensation, and Liability Act

IGRA ..... Indian Gaming Regulatory Act

IRA ..... Indian Reorganization Act

NCAI ..... National Congress of American Indians

NIGA ..... National Indian Gaming Association

NLRA ..... National Labor Relations Act

NLRB ..... National Labor Relations Board

INTERESTS OF AMICI

The National Congress of American Indians was founded in 1944 and is the nation's oldest and largest association of Indian tribal governments, representing 252 governments and many individuals. It works to protect tribal sovereignty, strengthen the federal-tribal trust relationship, promote the welfare of Indian communities, and foster public understanding.

The National Indian Gaming Association is a non-profit organization of 184 Indian Nations and associate organizations and businesses engaged in tribal gaming around the country. NIGA works to promote the welfare of Tribes striving for self-sufficiency through gaming and to protect tribal governmental authority in Indian Country.

The Mohegan Tribe of Connecticut, the Seminole Tribe of Florida, the Eastern Band of Cherokee Indians of North Carolina, the Metlakatla Indian Community of Alaska, the Morongo Band of Mission Indians, the Sycuan Band of the Kumeyaay Nation, the Soboba Band of Lusieño Indians, the Mississippi Band of Choctaw Indians, the Little River Band of Ottawa Indians, the Pokagon Band of Potawatomi Indians, and the Grand Traverse Band of Ottawa and Chippewa Indians represent a cross-section of Tribes from around the country. Their situations vary greatly as to land and economic bases, populations, and histories, but all engage in on-reservation enterprises to generate funds to support govern-

mental services and provide employment. For years amici have regulated labor and employment relations within their reservations, particularly as to their own enterprises, under tribal law.

All amici have a strong interest in protecting tribal sovereignty in its own right and as a vital means of funding governmental activities and achieving tribal economic self-sufficiency.

SUMMARY OF ARGUMENT

The NLRB has reversed longstanding precedent and asserted, for the first time since the passage of the NLRA in 1935, that the NLRA applies to an enterprise carried on by an Indian Tribe on land over which it exercises governmental authority. Given the unique status of Tribes under federal law, the historical context in which the NLRA was enacted, and the central role of tribal enterprises in federal Indian law and policy—confirmed in statutes such as the Indian Gaming Regulatory Act—the Board's new interpretation cannot be sustained.

First, the NLRA's silence about Tribes must be read against the backdrop of federal law respecting Tribes' governmental status in the absence of a clear expression of contrary congressional intent. The NLRA was enacted at a time when a half-century of misguided federal policies had undermined tribal governments, removed millions of acres of land from Indian ownership, and reduced many Indians and Tribes to abject poverty. Only a year before Congress had enacted the landmark Indian Reorganization Act of 1934, which aimed to promote tribal recovery by renewing the federal government's commitment to dealing with Tribes as self-governing communities. It is inconceivable that in 1935 Congress thought of tribal governments as within the class of private commercial employers to be regulated under the NLRA.

Second, the NLRB is wrong when it contends that applying the NLRA to tribal enterprises is consistent with protecting tribal self-government. The Board's premise that "the special attributes of [tribal] sovereignty are not implicated" in this case is wrong as matter of law. The Board's assertion of jurisdiction will preempt tribal laws and regulations, upset settled expectations, and interfere directly with Tribes' governmental authority to regulate their relations with tribal members and non-members on tribal land.

ARGUMENT

I. THE BOARD'S NEW INTERPRETATION IS INCONSISTENT WITH THE HISTORICAL CONTEXT OF THE NLRA AND WITH ESTABLISHED LAW PROTECTING TRIBAL SELF-GOVERNMENT

A. Federal Law Protects The Role Of Tribes As Governments Absent A Clear Directive From Congress To The Contrary

Indian Tribes are governments. The Supreme Court has long recognized that "tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." *United States v. Mazurie*, 419 U.S. 544, 557 (1975). While their legal status is "an anomalous one and of complex character," it is clear that "despite their partial assimilation into American culture, the tribes [retain] a semi-independent position ... as a separate people, with the power of regulating their internal and social relations." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980) (internal quotation marks omitted); *see also, e.g., Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S.

505, 509 (1991) (Tribes are "'domestic dependent nations' that exercise inherent sovereign authority over their members and territories"); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982).

Among the governmental prerogatives Tribes normally retain are "the power to manage the use of their territory and resources by both members and nonmembers," and "to undertake and regulate economic activity within the reservation." *Mescalero*, 462 U.S. at 335; *see also Merrion*, 455 U.S. at 137-148. Tribes have the "power to make their own substantive law in internal matters, and to enforce that law in their own forums." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978). They have the power, even where reservation lands have passed to non-Indians, to "regulate, through taxation, 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." *Montana v. United States*, 450 U.S. 544, 564 (1981).[1] And they enjoy sovereign immunity

---

[1] *Montana* held that Tribes presumptively retain jurisdiction to regulate activities of non-Indians on tribal lands, 450 U.S. at 557, but may exercise that jurisdiction with respect to non-Indian fee land only if the non-Indian has entered into a "consensual relationship" with a Tribe or its members or the conduct "threatens or has some direct effect on the political integrity, the economic security or the health or welfare of the tribe," *id.* at 564-566. This distinction between tribally-owned and non-Indian-owned reservation lands for purposes of a Tribe's civil regulatory jurisdiction has been confirmed in later cases. *See, e.g., El Paso*

from suit—even as to commercial matters arising on non-Indian land. *Kiowa Tribe of Okla. v. Manufacturing Techs., Inc.*, 523 U.S. 751, 754 (1998).

While all these aspects of self-government are "subject to the superior and plenary control of Congress," *Santa Clara Pueblo*, 436 U.S. at 58, in the absence of clear congressional direction the Supreme Court has "consistently guarded the authority of Indian governments over their reservations." *Mazurie*, 419 U.S. at 558 (quoting *Williams v. Lee*, 358 U.S. 217, 223 (1959)). The Court has "reiterate[d] ... [its] admonition ... [that] 'a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area *cautions that we tread lightly in the absence of clear indications of legislative intent.*'" *Merrion*, 455 U.S. at 149 (emphasis added); *see also Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987); *Bracker*, 448 U.S. at 143-144 ("Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence."); *Bryan v. Itasca County*, 426 U.S. 373, 393 (1976) ("'A congressional determination to terminate [a tribal tax immunity] must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history.'"). "Until

---

Natural Gas Co. v. Neztsosie, 526 U.S. 473, 484-485 & nn. 6-7 (1999); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 651-656 (2001).

Congress acts," the Supreme Court has said, "the tribes retain their existing sovereign powers." *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

B. At The Time It Enacted The NLRA Congress Would Not Have Intended It To Apply To Tribes

In construing the NLRA it is also important to have some sense of the historical development of federal Indian law, and in particular how Congress would have understood the state of the law—and the status of Tribes—in 1935. While the legal principles just described have remained stable, federal policy has sometimes veered toward "termination" of tribal governments. In 1935, when it enacted the NLRA, Congress had just abandoned such an experiment and reaffirmed the model of Indian self-government—with emphasis on tribal enterprises as a means of funding tribal governments. That context is critical in determining the significance of Congress's failure to mention Tribes in the NLRA. *See Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 337 (1988) (emphasizing importance of considering "Congress's silence ... in the appropriate historical context").

1. Before 1934, Federal Policies Sought The Destruction Of Tribal Governments

The United States originally conducted its legal relations with Tribes as a matter of treaties with independent Nations. *See, e.g., Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 542-548 (1832); Felix Cohen, *Federal Indian Law* 22-26 (3d ed.

2005). Eventually, however, it "began to consider the Indians less as foreign nations and more as part of our country." *Organized Village of Kake v. Egan*, 369 U.S. 60, 72 (1962). In 1871, Congress ended the practice of dealing with Tribes by treaty. 25 U.S.C. §71. Moreover, contrary to the government's many existing promises of protection, officials "tried to substitute federal power for the Indians' own institutions by imposing changes in every aspect of native life." S. Rep. No. 101-216, at 3 (1989) (report of special investigative committee on federal mismanagement of Indian affairs).

One key attack on tribal governments was the General Allotment Act of 1887, 24 Stat. 388, which formally implemented policies of "allotment and assimilation" and envisioned "elimination of tribal institutions, sale of tribal lands, and assimilation of Indians as individuals into the dominant culture." *Duro v. Reina*, 495 U.S. 676, 691 (1990). An avowed goal was "the dissolution of tribal affairs and jurisdiction" and "the ultimate destruction of tribal government." *Montana v. United States*, 450 U.S. at 559 n.9. These policies "proved to be a disastrous failure." *Hagen v. Utah*, 510 U.S. 399, 425 (1994).

2. In 1934, Congress Enacted The Indian Reorganization Act To Revitalize Tribal Governments And Invigorate Tribal Economies

"Many Indian leaders and others fought to preserve tribal integrity." *Duro*, 495 U.S. at 691. Eventually federal policy began to shift back toward respect for

Tribes as distinct communities and the promotion of tribal self-government. Cohen, *supra*, at 84.

A critical turning point was the 1928 Meriam Report, which described the deplorable conditions created by the assimilation policy and quickly became a "primary catalyst for change." Cohen, *supra*, at 84; Institute for Government Research, *The Problem of Indian Administration* (L. Meriam *et al.* eds. 1928). It detailed how "[a]n overwhelming majority of the Indians [were] poor" and "living below any reasonable standard of health and decency." Meriam Rep. 1, 433-434. Indians "generally eke[d] out an existence," largely "through unearned income from leases of land, the sale of land, per capita payments from tribal funds, or in exceptional cases through rations given by the government." *Id.* at 5. "Little [was] done on the reservations," and many Indians had "no resources but their labor," which was mostly "temporary" and "unskilled." *Id.* at 15, 519. They were "not adjusted to the economic and social system of the dominant white civilization," *id.* at 1, and experience as business owners and employers was "almost entirely wanting" *id.* at 430.

After the 1932 election, Congress determined that proper fulfillment of the Nation's trust obligations "required turning over to the Indians a greater control of their own destinies." *Morton v. Mancari*, 417 U.S. 535, 553 (1974). "The overly paternalistic approach of prior years had proved both exploitative and destructive

of Indian interests," and Congress embraced "the belief that institutional changes were required." *Id.*

This renewed commitment to tribal communities led, in 1934, to the "sweeping" statutory changes embodied in the Indian Reorganization Act, 25 U.S.C. §§461 *et seq.* The IRA's "overriding purpose" was "to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton*, 417 U.S. at 542. It aimed to restore stability to Indian communities and promote economic development. *See Iowa Mutual*, 480 U.S. at 14 n.5; *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151-152 (1973). The IRA encouraged Tribes to "reorganize"—to "revitalize their self-government" (*Jones*, 411 U.S. at 152) through the adoption of tribal constitutions (IRA §16, 25 U.S.C. §476) and to invigorate their economies through the creation of federally chartered corporations (IRA §17, 25 U.S.C. §477). These changes emphasized "the expression of retained tribal sovereignty." *Duro*, 495 U.S. at 690-92 (1990); *see Merrion*, 455 U.S. at 164-165 (IRA "confirmed ... the inherent sovereign powers of the Indian tribes"); 78 Cong. Rec. 11125 (co-sponsor Sen. Wheeler) (IRA sought "to give the Indians the control of their own affairs and of their own property"). Instead of "forcing the assimilation of individual Indians, the IRA was intended to enable the tribe to

interact with and adapt to modern society as a governmental unit." Cohen, *supra,* at 86.

Thus, focusing specifically on its power and responsibilities with respect to Indian affairs, Congress fundamentally changed federal policy in an effort to achieve two distinct but inseparable objectives: tribal self-governance and tribal economic self-sufficiency. By promoting both, the Act sought to "'rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" *Jones*, 411 U.S. at 152 (quoting H.R. Rep. No. 73-1804, at 6 (1934)). Congress's renewed support for tribal governments was closely linked to its policy of promoting economic development through which a Tribe could "generate substantial revenues for the education and the social and economic welfare of its people." *Id.* at 151.

3. In 1935, Congress Enacted The National Labor Relations Act To Govern Labor Relations In The Private Sector

One year after the IRA watershed Congress enacted the NLRA, which provides an elaborate legal structure to govern the relationship between employers and employees in the private sector. The Act expressly exempts federal, state and local governments from its definition of "employer." 29 U.S.C. §152(2). Neither the Act nor its extensive legislative history makes even a passing reference to Indian Tribes. *E.g.*, *Sac & Fox Indus.*, 307 N.L.R.B. 241, 245 (1991).

That is not surprising. Given Congress's focus on the deplorable economic condition of Indians the year before, it is inconceivable that Congress would have thought of Tribes as part of the class of private-sector employers it intended to regulate under the NLRA. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 504 (1979) (Congress was "focused on employment *in private industry*") (emphasis added). On the contrary, Congress had just addressed the status of Tribes in the IRA, which sought to protect tribal self-governance and to encourage economic development in part through enterprises operated directly by Tribes. As discussed below, that policy has been repeatedly reaffirmed and strengthened in later years, with no hint of intent that tribal enterprises should be covered by the NLRA. With the Merriam Report's description of Indian country, and the IRA's response fresh in its mind, the Congress that framed the NLRA surely did not intend to include Tribes in the Act's general definition of "employer," much less to exclude them from its governmental exemption.

In *Navajo Tribe v. NLRB*, 288 F.2d 162 (D.C. Cir. 1961), this Court held that the NLRA applied to a private, non-Indian employer operating a mill on leased tribal land. That is entirely different from saying, as the Board now does, that the Act extends to enterprises operated by Tribes themselves on tribal land, and preempts a Tribe's ability to regulate relations with its own employees in those enterprises. *Navajo Tribe* holds only that an otherwise covered private employer

remains subject to the Act when operating on tribal land. It does not speak to the question of tribal employers.[2]

If Congress had addressed Tribes in the NLRA, its adoption of policies promoting tribal self-government the year before leaves no doubt it would have included Tribes in the exemption created for other governments. The IRA aimed specifically to reverse failed policies of tribal dissolution and restore the policy of recognizing Tribes as self-governing communities. *See, e.g.*, *Morton*, 417 U.S. at 553. It is not credible to contend that the following year Congress intended to impose on recently revived tribal governments new, complex, and burdensome labor-relations obligations from which all other governments were exempted.

Congress exempted governments from the NLRA in part because their employees provided essential services. *See NLRB v. Natural Gas Util. Dist. of Hawkins County*, 402 U.S. 600, 604 & n.3 (1971). Giving government employees

---

[2] *Navajo Tribe* cited *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960), on which the Board now relies (JA 315-318). There is reason to doubt the original meaning or continuing force of the *Tuscarora* language relied on by the Board. *See* Pet. Br. 47-49; *EEOC v. Cherokee Nation*, 871 F.2d 937, 938-939 & n.3 (10th Cir. 1989); *EEOC v. Fond du Lac Heavy Equipment and Construction Co.*, 986 F.2d 246, 248-249 (8th Cir. 1993); Wermuth, *Union's Gamble Pays Off*, 21 Lab. Law. 81, 94-102 (2005) (criticizing Board's analysis). In any event, that 1960 language could not have influenced Congress in 1935. Congress acted against the backdrop of the fundamental principles of Indian law described above, which require clear congressional intent before a law will be read to interfere with tribal self-government.

federal bargaining rights, including the right to strike, not only would have interfered with local policy and regulatory authority but also could have inflicted unique harms on entire communities. Those considerations would have applied with *at least* as much force in the case of the Indian tribal governments that Congress had just once again begun to encourage. *Cf. El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 487 (1999) (concluding that Tribes should be treated like States under the Price-Anderson Act because the Act's silence as to Tribes was probably due to inadvertence); *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1196 (10th Cir. 2002) (*en banc*) (citing same).

C. Contemporary Law Confirms That The Board May Not Adopt Its New Interpretation Absent Clear Direction From Congress

Unsurprisingly, the NLRB did not even consider jurisdiction over Tribes during the first several decades under the Act. When it did issue a full opinion addressing the issue, it recognized that for purposes of the Act's governmental exemption it was "clear beyond peradventure that a tribal council ... is a government both in the usual meaning of the word, and as interpreted and applied by Congress, the Executive, and the Courts." *Fort Apache Timber Co.*, 226 N.L.R.B. 503, 506 (1976) (holding Tribes exempt from NLRA) (internal footnote omitted).[3]

---

[3] Seven years before *Fort Apache* the Board affirmed without opinion a district director's decision finding no jurisdiction over a hydroelectric facility owned by the Metlakatla Indian Community, because the Tribe was implicitly

That initial administrative construction was correct. The Board's about-face in this case is contrary not only to the history of the NLRA but to contemporary federal Indian law and policy, which have become even more protective of tribal self-government.

Since 1934 the Political Branches have strengthened the policies of tribal self-determination and economic development reflected in the IRA. *See McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973) (recounting history); W. Canby, *American Indian Law* 29-32 (1998).[4] "Both the tribes and the Federal Government are now firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes." *Three Affiliated Tribes v. Wold Eng'g*, 476 U.S. 877, 890 (1986). That observation is supported by numerous congressional declarations. *See, e.g.*, Indian Tribal Justice Act, 25 U.S.C. §3601 ("there is a government-to-government relationship between the United States and each Indian tribe"; "the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal

---

included in the government exemption. *Metlakatla Indian Community v. Local Union No. 1547*, No. 19-RC-5180 (Regional Director Oct. 7, 1969), *review denied* (Nov. 13, 1969). Similar opinions were later issued with respect to amici Mississippi Band of Choctaw Indians (Aug. 13, 1998) and Eastern Band of Cherokee Indians (Mar. 8, 2002).

[4] A temporary post-war revival of termination policies was later "repudiated by the President and Congress." *City of Roseville v. Norton*, 348 F.3d 1020, 1032 (D.C. Cir. 2003).

government"; "Congress ... has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes"); Indian Gaming Regulatory Act, 25 U.S.C. §2701 ("to provide a statutory basis for the operating of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments"); Tribal Self-Governance Act of 1994, 25 U.S.C. §§450a, 458aa *et seq.*; Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§450 *et seq.* Contemporary federal statutes consistently treat Indian Tribes as governments. *See, e.g.*, 26 U.S.C. §7871 (Indian Tribal Government Tax Status Act of 1982); 33 U.S.C. §1377 (Clean Water Act); 42 U.S.C. §300j-11 (Safe Drinking Water Act); 42 U.S.C. §7601(d) (Clean Air Act); 42 U.S.C. §9626 (CERCLA). And through the Indian Financing Act, 25 U.S.C. §1451, Congress has sought to facilitate, among other things, the development of tribal enterprises on reservations as a means of improving the economic circumstances and stability of tribal communities. *See* 25 C.F.R. §§101.1 (defining revolving loan fund), 101.2(b)(1) (authorizing loans "[t]o eligible tribes ... to finance economic enterprises operated for profit, the operation of which will contribute to the improvement of the economy of a reservation and/or the members thereon.").

The Executive Branch has likewise strongly supported tribal self-government. Presidential Orders expressly acknowledge the government-to-government

relationship between the United States and the Tribes and require federal agencies to "consult and coordinate" with Tribes on matters affecting them. *See, e.g.*, Memorandum for the Heads of Executive Departments and Agencies: Government-to-Government Relationship with Tribal Governments, 40 Weekly Comp. Pres. Doc. 2106 (Sept. 23, 2004); Exec. Order 13084 ("Consultation and Coordination with Tribal Governments"), 63 Fed. Reg. 27655 (May 14, 1998). And the Supreme Court has consistently recognized the "traditional understanding" that each Tribe is "a distinct political society, separated from others, capable of managing its own affairs and governing itself." *United States v. Lara*, 541 U.S. 193, 204-205 (2004); *see also, e.g.*, *Kiowa Tribe*, *supra*; *Merrion*, *supra*; *Santa Clara Pueblo*, *supra*; *Fisher v. District Ct.*, 424 U.S. 382, 386-391 (1976); *Williams v. Lee*, *supra*.[5]

Particularly in light of the fact that the "tradition of Indian sovereignty" is now "reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development," the Supreme Court applies the rule that "[a]mbiguities in federal

---

[5] In *Duro v. Reina*, *supra*, the Court held that when Tribes came under the superior jurisdiction of the United States they lost their inherent criminal jurisdiction over visiting members of other Tribes. Notably, Congress disagreed and expressly reaffirmed that Tribes inherently have that jurisdiction. 25 U.S.C. §1301(2). The Court upheld that congressional affirmation of tribal governmental power in *Lara*, 541 U.S. at 199-207.

law [are] construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *Bracker*, 448 U.S. at 143-144; *see also, e.g.*, *Wagnon v. Prairie Band Potawatomi Nation*, 126 S. Ct. 676, 687 (2005) ("[T]he doctrine of tribal sovereignty ... requires us to reverse the general rule that exemptions from tax laws should ... be clearly expressed." (internal citations omitted)); *Oklahoma Tax Comm'n*, 498 U.S. at 510 (declining to modify established respect for tribal sovereignty given "Congress' desire to promote the 'goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development"). Where the values of tribal self-governance are at stake, Congress must speak clearly before external authority may be imposed on a Tribe in a manner that would undermine its regulatory authority over its own affairs.[6]

In this case, the Board erred as a matter of law in concluding (JA 318) that "the special attributes of [tribal] sovereignty are not implicated" by its new assertion of jurisdiction. As discussed below, applying the NLRA would interfere

---

[6] *See Santa Clara Pueblo*, 436 U.S. at 60, 72 (claims under Indian Civil Rights Act must be brought in tribal forums absent clear congressional intent to create federal-court action); *Bryan*, 426 U.S. at 388 (statute construed not to allow imposition of state regulatory authority within reservations absent clear expression of congressional intent); *Morton*, 417 U.S. at 548 (general federal non-discrimination provisions construed not to work implied repeal of Indian employment preferences).

directly with tribal government. Indeed, that is particularly clear in the case of a gaming enterprise operated by a Tribe in accordance with IGRA. In IGRA, Congress responded to the Supreme Court's holding that "the congressional goal of Indian self-government" supported Tribes' operation of gaming enterprises. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987); *see id.* at 219 ("The tribal games at present provide the sole source of revenues for the operation of the tribal governments and the provision of tribal services. ... Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members. The Tribes' interests obviously parallel the federal interests."). The Act specifically recognizes Tribes' gaming enterprises—which it requires be owned directly by tribal governments, 25 U.S.C. §2710(b)(2)(a)(7)—as "a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. §2702(1). Such an operation is *not*, as the Board would have it, a "typical commercial enterprise." JA 319. It is "an exercise of self-governance." *Id.*

In light of the rules of law protecting tribal self-government absent a clear expression from Congress; Congress's pointed renewal of its respect for tribal governments the year before it enacted the NLRA; and Congress' efforts since 1934, including in the gaming context, to promote tribal self-government *by means of* tribal enterprises, Congress's silence about Tribes in the NLRA cannot be read

to subject tribal governments to regulation by implication. As we discuss in Part II, the Board's new assertion of jurisdiction over a Tribe's relations with its own employees on tribal land within its reservation would interfere directly with tribal self-government. It therefore rests on an unsustainable construction of the Act.

II. THE BOARD'S NEW CONSTRUCTION WOULD INTERFERE WITH IMPORTANT ATTRIBUTES OF TRIBAL SOVEREIGNTY IN WAYS NOT AUTHORIZED BY CONGRESS

In adopting its new approach to tribal enterprises located on Indian reservations, the Board concluded that such enterprises "are commercial in nature—not governmental"; that asserting jurisdiction under the NLRA would not "implicate ... critical self-governance issues"; that it was appropriate for the Board to treat a tribal enterprise such as San Manuel "just as it treats any other private sector employer"; and that whether particular tribal enterprises were carrying out "governmental" or "proprietary" functions which might "militate ... against assertion of the Board's ... jurisdiction" would be addressed on a "case-by-case basis." JA 317-320.

The Board's conclusions are wrong and its proposed approach is unworkable and unfair. Application of the NLRA to tribal enterprises would abrogate important sovereign rights retained by the Tribes under federal law and materially curtail their ability to function as the effective community governments envisioned by Congress.

As shown in Part I, the law presumes Congress does not intend to interfere with tribal self-government unless it makes such an intention unmistakably clear. We recognize, in that respect, that this Court's *Navajo Tribe* decision holds that the NLRA applies to private (non-tribal) employers operating on tribal land, and thus displaces some of the Tribes' governmental power. In this case, however, the Board has taken the fundamentally different and much more intrusive step of asserting jurisdiction over Tribes' relations with their own employees on tribal land, thus treating tribal governments on a par with private employers. That interpretation of the NLRA cannot be squared with the critical principle, recently reaffirmed by the Tenth Circuit sitting *en banc*, that the "correct presumption is that [congressional] silence does not work a divestiture of tribal power." *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1196 (10th Cir. 2002).

A. Guaranteeing Tribal Employees The Right To Strike Would Preempt Tribal Law And Threaten Tribal Governmental Services

Extending NLRB jurisdiction over Tribes and treating them as private employers would subject them to the threat of strikes—sometimes in contravention of their own no-strike laws. The NLRA recognizes employees' right to strike and generally forbids interference with that right. Thus, 29 U.S.C. §157 provides:

> Employees shall have the right to self-organization, ... to bargain collectively ... and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. ...

More specifically, 29 U.S.C. §163 provides:

> **Right to strike preserved.** Nothing in this Act except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations and qualifications of that right.

But government employees are often barred from striking, because governments' needs and incentives are materially different from those of private employers. Such strikes were barred at common law, *Virgin Islands Port Auth. v. SIU de Puerto Rico,* 354 F. Supp. 312, 313 (D.V.I. 1973), aff'd, 494 F.2d 452 (3d Cir. 1974), and even today federal employees and most state employees generally do not have the right to strike. *See* 5 U.S.C. §§7116(b)(7), 7311; DiSabatino, *Who Are Employees Forbidden to Strike Under State Enactments or State Common-Law Rules Prohibiting Strikes By Public Employees or Stated Classes of Public Employees*, 22 A.L.R. 4th 1103 (1983). Strikes against a government are "contrary to the notion of government," and a governmental activity

> is usually undertaken by the government precisely because it is critically important to a large segment of the public, and the public is therefore especially vulnerable to "blackmail" strikes by workers in this area.

Virgin Islands, 354 F. Supp. at 313 (enjoining strike by port authority employees).

Some Tribes, like some state and local governments, forbid their employees to strike. Amicus Eastern Band of Cherokee, for example, has declared strikes by its employees "illegal and against ... public policy" for this very reason. Eastern

Cherokee Code § 95-41. Amicus Mississippi Band of Choctaw likewise prohibits its employees from striking on Choctaw land. Choctaw Code §30-1-7.

In exercising their sovereign powers Tribes depend uniquely—and, as shown in Part I, with the express protection and support of federal law and policy—on the revenues generated by economic development enterprises to support their essential governmental functions and services. While federal contracts and grants fund a portion of a Tribe's community services, they are chronically inadequate, and Tribes depend on their economic enterprises to supplement federal funds. This approach is endorsed (indeed, required) by Congress in, for example, the Indian Gaming Regulatory Act.[7]

Tribal governments have as urgent a need as state and local governments for uninterrupted performance of services to the community. Application of the NLRA to tribal enterprises would threaten the continuing provision of essential tribal government services, one of the most important expressions of tribal sovereignty. Many tribal governments have little or no discretionary funding other

---

[7] Congress requires Tribes to spend gaming profits for governmental purposes. They "are not to be used for any purposes other than—(i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies." 25 U.S.C. §2710(b)(2)(B). A tribal government must be the sole owner of any IGRA gaming facility. *Id.* §2710(b)(2)(A).

than revenue from their economic enterprises. Strikes against tribal enterprises that the NLRB describes dismissively as "commercial in nature—not governmental" (JA 317) could easily disrupt Tribes' ability to provide essential services to an even greater degree than strikes against state or local governments, because other governments can typically rely for the bulk of their revenues on their tax base, which many Tribes conspicuously lack. It is not plausible to assume that Congress would have intended to expose tribal governments to strikes by tribal employees—an exposure the Act spares other governments—in the absence of any evidence that Congress intended that result.

B. Treating Indian Tribes as Private Employers Under the NLRA Would Interfere with Their Authority to Require Indian Preference in Employment

With the approval of Congress and the courts, most Tribes have laws requiring employers on a reservation to give preference to Indians in all phases of employment—hiring, training, promotion, etc. For example, amicus Metlakatla Indian Community's Ordinance Governing Personnel Policies and Procedures provides in §II-C for Indian preference in "all phases of employment and training which includes but is not limited to: hiring, promotions, transfers, and training opportunities." Other amici Tribes have laws to similar effect. *See* Mississippi Choctaw Ordinance 56, §20 (establishing mandatory Indian preference policy for all tribal enterprises regarding "recruitment, employment, reduction in force,

promotion, training and related employment actions"); Mississippi Choctaw Labor Organizations Code §30-1-6 (prohibiting organization on tribal land of any union that does not grant an Indian preference in employment, promotion, seniority, lay-offs, or retention, and specifying that the "right of Indian preference shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization"); Eastern Cherokee Code §95-13 ("all covered employers for all employment occurring within the Reservation shall give preference to qualified Indians with the first preference to local Indians in all initial hiring, training, and other aspects of employment"); Morongo Band Gaming Facility Standards Ordinance No. 15, ¶6 (stating Band's "policy of extending preference in hiring, promotion and retention to members of federally-recognized Indian Tribes, with first preference being given to members of the Morongo Band of Mission Indians and Indian members of their immediate families"); Little River Band of Ottawa Indians, Indian Preferences in Employment Ordinance No. 04-600-02, §§4.01-4.13 (providing preferences to Band members in hiring, promotion, education, and training).

Preference laws are important in part because the unemployment rate on Indian reservations is much higher than elsewhere in the Country.[8] One of the

[8] The Bureau of Indian Affairs estimates that 50 percent of Indians residing in Indian country are unemployed. U.S. Dep't of Interior, Bureau of Indian Affairs,

primary goals of any Tribe, amici Tribes included, is to provide employment opportunities for its members. Congress recognized and protected preference laws in Title VII of the Civil Rights Act, which excludes Tribes from the definition of "employer," and exempts businesses "on or near an Indian reservation" from coverage in order to allow preferential hiring of Indians. 42 U.S.C. §2000e(b) and e-2(i). In *Morton*, 417 U.S. at 548, the Supreme Court unanimously upheld this provision because it was based on Congress' "longstanding federal policy of providing a unique legal status to Indians in matters concerning tribal 'on or near' reservation employment," and did not constitute "racial discrimination of the type otherwise proscribed." In the Indian Self-Determination Act of 1975, Congress specifically required that any contract or grant with Indian organizations or for the benefit of Indians include Indian preference provisions, except as otherwise provided by tribal law. 25 U.S.C. §450e(b).[9]

Application of the NLRA to tribal enterprises would jeopardize a Tribe's right to require and enforce such preferences for its own employees.[10] If the NLRA

1997 Labor Market Information on the Indian Labor Force: A National Report, at 4 (1998).

[9] For other Indian preference laws, see, e.g., 25 U.S.C. §45 (enacted 1834); 25 U.S.C. §46 (1882); 25 U.S.C. §44 (1894); 25 U.S.C. §47 (1908); 25 U.S.C. §472 (1934); 25 U.S.C. §633 (1950).

[10] This case involves only preferences for a Tribe's own employees. We do not address tribal regulatory authority over private employment on the reservation.

applied to Tribes as employers and tribal employees chose a union, it would become "the exclusive representative of all the employees" in the designated bargaining unit, which would likely include both tribal member and non-member employees, "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." 29 U.S.C. §159(a). The union would generally have a duty of equal treatment and nondiscrimination among employees in the bargaining unit.[11]

Because Indian preference laws or requirements generally affect employees' rights to promotion, training, and retention, they would constitute a mandatory subject of bargaining. 29 U.S.C. §158(a)(5), (d); NLRB, *Basic Guide to the National Labor Relations Act* 20 (rev. ed. 1997) (procedures for discharge, layoff,

---

The latter is important, but it raises issues not necessary to resolve in this case. *See Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294 (8th Cir. 1994) (requiring private employer to exhaust tribal remedies in challenging tribal authority to enact and enforce tribal employment rights ordinance against private employers on the reservation); *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1315 (9th Cir. 1990) (affirming tribal power to enact an Indian preference ordinance and "subject FMC to regulation of employment at its plant on fee land within the reservation" under *Montana* "consensual relationship" test); *but compare Navajo Tribe*, 288 F.2d at 164-165; *Pueblo of San Juan*, 276 F.3d at 1193.

[11] The NLRA's policy favors equal treatment and nondiscrimination among members of a bargaining unit. *See Vaca v. Sipes*, 386 U.S. 171, 177 (1967) (a bargaining representative's duty of fair representation "includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise ... discretion with complete good faith and honesty, and to avoid arbitrary conduct"); *Airline Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65 (1991).

or recall, are mandatory subjects of bargaining). Thus, the Tribe would be obligated to bargain with the union to retain its sovereign right to apply its Indian preference laws. The union's duty to represent all members of the bargaining group makes it likely that the union would object to an Indian preference that benefited only some of the members of the bargaining unit. The union might insist that the Tribe's preference law should not be applied at all, or seek to condition its acceptance of preferences on concessions by the Tribe on other issues. If neither the Tribe nor the union would yield the union could strike, thus forcing the Tribe either to give up its preference laws or to do without the revenues of the enterprise for a potentially long period. Or the Tribe could be forced to grant the union other concessions, such as increased wages, merely to retain its governmental right to impose Indian preferences. Requiring a Tribe to bargain to maintain its right to impose Indian preference laws seriously interferes with the Tribe's core retained tribal rights to make and impose its own laws, govern its economic enterprises, govern relations with its members, and govern relationships with non-members who voluntarily enter into a consensual employment relationship with the Tribe.

In view of Congress's strong support of Indian preferences, it cannot reasonably be assumed, in the absence of clear evidence, that Congress intended to force Tribes to bargain with private parties to preserve its ability to require

preferences in its own operations on its reservation. Yet this follows from the Board's new construction of the NLRA.

C. Treating Indian Tribes as Private Employers Would Interfere with Tribal Power To Exclude Non-Members in the Tribal Employment Context

The assertion of NLRB jurisdiction would conflict with Tribes' sovereign right to exclude non-members from their reservations. A Tribe's civil jurisdiction over non-members "derives not only from the tribe's inherent powers necessary to self-government and territorial management, but also from the power to exclude nonmembers from tribal land." *Babbit Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 592 (9th Cir. 1983) (citing *Merrion*, 455 U.S. at 141-144). The power to exclude non-members includes the power to "place conditions on entry, on conditioned presence, or on reservation conduct." *Merrion*, 455 U.S. at 144. A non-member who enters tribal land remains subject to the Tribe's power to exclude, and its lesser included power to regulate his conduct on tribal land. *Id.* at 144-145.

Amici Tribes clearly have the general power to exclude non-members from entering tribal enterprises on tribal lands. No federal statute, including the NLRA, expressly abrogates that power. Many tribal codes rely on this right specifically in connection with the regulation of labor organizing. Amicus Eastern Band of Cherokee Indians, for example, requires the registration of labor organizations and their business agents, and provides for their "exclusion from the territorial

jurisdiction of the [Tribe]" if they violate any of the requirements of the Tribe's Labor Organizations Code. *See* Eastern Cherokee Code Ch. 95, Art. III. Amicus Mississippi Band of Choctaw Indians' Labor Organizations Code codifies the Tribe's "inherent power to exclude non-Indians from Choctaw lands," provides detailed requirements for labor organizations and their business agents, and provides for "exclusion from Choctaw lands" as a remedy for the violation of any of those requirements. Choctaw Code, Title XXX.

But if the NLRA applies to tribes as employers, their right to exclude non-members in that context would be abrogated. For example, a hearing or arbitration required under the NLRA could lead to reinstatement and return of employees the Tribe had fired and banned from the reservation. It is unreasonable to presume that Congress intended such abrogations of a Tribe's core rights in the absence of any evidence of such intent.[12]

---

[12] The Board's decision would interfere with tribal sovereignty in other ways, such as requiring negotiation over tribal laws and displacing tribal laws and dispute-resolution procedures. It would also preempt the labor-relations provisions of tribal-state compacts such as those entered into by the Morongo, Sycuan, and Soboba Bands, that have been ratified by the California legislature (Cal. Gov't Code §12012.25) and approved by the Secretary of the Interior (25 U.S.C. §2710(d)(3)). And it would unfairly impose substantial litigation burdens on Tribes attempting to clarify the Board's unworkable governmental/proprietary "test." *Compare Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Space limitations preclude us from expanding on these points.

CONCLUSION

The NLRB's decision should be reversed.

Respectfully submitted,

Edward C. DuMont/rp

SETH P. WAXMAN
EDWARD C. DUMONT
RYAN P. PHAIR
WILMER CUTLER PICKERING
HALE AND DORR LLP
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Counsel for the National Indian Gaming Association

JOHN H. DOSSETT
GENERAL COUNSEL
NATIONAL CONGRESS OF
AMERICAN INDIANS
1301 Connecticut Ave., N.W., Suite 200
Washington, DC 20036
(202) 466-7767

Counsel for the National Congress of American Indians

CHARLES A. HOBBS
ELLIOTT A. MILHOLLIN
HOBBS, STRAUS, DEAN & WALKER LLP
2120 L Street, N.W., Suite 700
Washington, D.C. 20037
(202) 822-8282

Counsel for the Metlakatla Indian Community, the Eastern Band of Cherokee Indians of North Carolina, and the Seminole Tribe of Florida

RICHARD GUEST
NATIVE AMERICAN RIGHTS FUND
1712 N Street, N.W.
Washington, DC 20036
(202) 785-4166

Counsel for the National Congress of American Indians and the Grand Traverse Band of Ottawa and Chippewa Indians

GEORGE FORMAN
FORMAN & ASSOCIATES
4340 Redwood Highway, Suite F228
San Rafael, CA 94903
(415) 491-2310

Counsel for the Morongo Band of Mission Indians, the Sycuan Band of the Kumeyaay Nation, and the Soboba Band of Luiseño Indians

MATTHEW L.M. FLETCHER
UNIVERSITY OF NORTH DAKOTA
SCHOOL OF LAW
P.O. Box 9003
Grand Forks, ND 58202-9003
(701) 777-2264

Counsel for the Grand Traverse Band of Ottawa and Chippewa Indians

DALE T. WHITE
GENERAL COUNSEL
MOHEGAN TRIBE OF INDIANS
5 Crow Hill Road
Uncasville, CT 06382
(860) 862-6245

Counsel for the Mohegan Tribe of Indians

KAIGHN SMITH, JR.
DRUMMOND, WOODSUM & MACMAHON
245 Commercial Street
Portland, ME 04104-5031
(207) 253-0559

Counsel for the Little River Band of Ottawa Indians and the Pokagon Band of Potawatomi Indians

C. BRYANT ROGERS
VANAMBERG, ROGERS, YEPA & ABEITA, LLP
Post Office Box 1447
Santa Fe, NM 87504-14471
(505) 988-8979

Counsel for the Mississippi Band of Choctaw Indians

JOHN F. PETOSKEY
GRAND TRAVERSE BAND OF OTTAWA
AND CHIPPEWA INDIANS
2605 N. West Bayshore Drive
Peshawbestown, MI 49682
231) 534-7279

Counsel for the Grand Traverse Band of Ottawa and Chippewa Indians

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This amicus brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because the brief contains 6,961 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This amicus brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in proportionally spaced typeface using Microsoft Word 2000 in 14 point Times New Roman type, respectively.

Edward C. DuMont /ef

EDWARD C. DUMONT
WILMER CUTLER PICKERING
HALE AND DORR LLP
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000 (tel.)
(202) 663-6363 (facs.)

Dated: April 19, 2006

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of April, 2006, I caused a true and correct copy of the foregoing Corrected Brief of Amici Indian Tribes and Tribal Organizations in Support of Petitioners and Reversal of the NLRB's Judgment to be served on all counsel on the attached service list by U.S. mail.

Edward C. DuMont/sp

EDWARD C. DUMONT
WILMER CUTLER PICKERING
HALE AND DORR LLP
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000 (tel.)
(202) 663-6363 (facs.)

SERVICE LIST

Lynn E. Calkins
Holland & Knight LLP
2099 Penn. Ave., N.W., Suite 100
Washington, D.C. 20006

Jerome L. Levine, Esq.
Holland & Knight LLP
633 West Fifth Street, 21st Floor
Los Angeles, CA 90071

Todd D. Steenson
Holland & Knight LLP
131 S. Dearborn Street, 30th Floor
Chicago, IL 60603

Counsel for the San Manuel Indian Bingo and Casino and the San Manuel Band of Serrano Mission Indians

Alice Garfield
Counsel for General Counsel
NLRB Region 31
National Labor Relations Board
11150 W. Olympic Blvd., Suite 700
Los Angeles, CA 90064

Aileen A. Armstrong
Meredith Jason
David Fleischer
National Labor Relations Board
1099 14th Street, NW
Washington, D.C. 20570-0001

Counsel for the National Labor Relations Board

Richard T. Sponzo
Assistant Attorney General
State of Connecticut
55 Elm Street
Hartford, CT 06106

Counsel for the State of Connecticut

Richard G. McCracken, Esq.
Davis Cowell & Bowe, LLP
595 Market Street, Suite 1400
San Francisco, CA 94105

Counsel for UNITE HERE! International Union