ORAL ARGUMENT NOT YET SCHEDULED
Case Nos. 05-1392, 05-1432

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 / Cross Petitioner

and

UNITE HERE and STATE OF CONNECTICUT,
Intervenors

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR INTERVENOR STATE OF CONNECTICUT

RICHARD BLUMENTHAL
ATTORNEY GENERAL

WILLIAM J. MCCULLOUGH
Assistant Attorney General

RICHARD T. SPONZO
Assistant Attorney General
Office of the Attorney General
55 Elm Street, P.O. Box 120
Hartford, CT 06141-0120
Tel. (860) 808-5050
Fax (860) 808-5388

Certificate as to Parties, Rulings and Related Cases

A. Parties and Amici

All parties, intervenors, and amici appearing before the National Labor Relations Board (NLRB or Board) and in this court are listed in the Briefs for Petitioners, Amici Indian tribes and tribal organizations and the NLRB as Respondent/Cross Petitioner.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Petitioners.

C. Related Cases

The case on review was not before this court or any other court, and there are no related cases currently pending in this court or in any other court of which counsel is aware.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Authorities upon which we chiefly rely are marked with asterisks.

STATUTES

CONSTITUTIONAL PROVISIONS

LEGISLATIVE HISTORY

TRIBAL ORDINANCES

GLOSSARY

Act	National Labor Relations Act
Board	National Labor Relations Board
IGRA	Indian Gaming Regulatory Act
NLRA	National Labor Relations Act
NLRB	National Labor Relations Board
TLRO	Tribal Labor Relations Ordinance

COUNTER STATEMENT REGARDING JURISDICTION

The issue before the NLRB and in this Court on petition for review is the NLRB's assertion of jurisdiction over the Petitioner San Manuel Indian Bingo and Casino as a typical commercial enterprise operating in interstate commerce, no different from non-tribal casinos long subject to the National Labor Relations Act (NLRA or Act), 29 U.S.C. § 151, et seq.

STATEMENT OF ISSUES

Should this Court defer to the NLRB's reasonable interpretation of the NLRA that the Act's well established, fundamental regulation of the labor relations of commercial enterprises engaged in interstate commerce in this country similarly covers a tribal casino operating as a classic form of commercial business in interstate commerce, indistinct from non-tribal casinos well within the Board's jurisdiction?

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Briefs for Petitioners and Amici Indian tribes and tribal organizations.

STATEMENT OF THE CASE

This case developed against a factual and legal background that is critical to understanding the issue of the NLRB's fundamental jurisdiction presented. While the case arose factually from charges of the tribe's giving a union discriminatory access to

its casino, it presents the issue of the Board's jurisdiction over on-reservation tribal commercial enterprises generally, pursuant to the casino's motion to dismiss for lack of jurisdiction. An overwhelming historical development of the growth of Indian businesses in interstate commerce and precedent of the Board and federal courts is not only essential to the statement of this case but ultimately dispositive of the legal question.

While petitioners claim the Board's reversal of thirty years of precedent, its decision was not made in a vacuum but against dramatic changes making it a natural evolution of Board law. Petitioners acknowledge the growth in tribal economic activity in interstate commerce. This was absent at the time of the decision thirty years ago, reflecting tribal commercial activity as a remote outpost of the national economy. While that decision relied on the NLRA's exemption for government employers, that was a fiction as it applied to a commercial business. The revolutionary change in tribal economic activity in interstate commerce that ensued was promoted by federal legislation, the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701, et seq., in 1988, encouraging the proliferation of Indian casinos.

The explosive growth of Indian commercial activity was accompanied by precedent in the federal courts holding federal statutes of general applicability applicable to tribes. This authority arose in the context of federal labor laws applying to tribal businesses. The exception for rights of self-governance in intramural matters

was limited to such concerns as tribal membership, inheritance rules and domestic relations. This was based on the understanding that federal laws of general applicability ought to apply to tribal activities similar to non-tribal activities, distinguishable from tribal governmental affairs. The general rule applied in the absence of express exclusion of tribes from the law. This was not inconsistent with precedent holding federal law inapplicable to tribes absent express inclusion but was limited to federal laws of general applicability.

The Board had not failed to take note of these major developments. It decided, long before its decision here, to adopt the federal court authority on federal laws of general applicability for the NLRA. This was done before the explosion of commercial activity in interstate commerce with the establishment of casinos. It was motivated by the untenable denial of jurisdiction over tribal businesses operating no differently from non-tribal ones. Its basis was the NLRA's concern with typical commercial enterprises in interstate commerce. The rule applied to tribal businesses, conducted on reservations or not, notwithstanding the Board's adoption then for off-reservation enterprises.

With the development of tribal commercial enterprises and the solidification of federal court precedent, it was a matter of time before the Board adopted the rule for on-reservation businesses. The Board's decision is based on the casino as a typical commercial enterprise within the heart of NLRA's jurisdiction. Joint Appendix, pp.

0317-19 (JA 0317-19). While the Board relies on the rule for federal laws of general applicability, it regards its jurisdiction over commercial enterprises, applicable to the casino indistinguishable from non-tribal casinos and removed from the concerns of federal Indian law and tribal governmental functions, as dispositive.

The casino operates no differently from non-tribal casinos, long subject to the NLRA, and in keen competition with them, with large numbers of non-Indian employees and a largely non-Indian clientele. If it escaped jurisdiction by being tribally owned, a tribe could operate the largest commercial establishment in the country on its reservation ungoverned by the NLRA. Tribal ownership and location on the reservation are irrelevant considerations. The Board's exception to jurisdiction for tribal governmental functions is remote from the casino as a classic commercial establishment. JA 0318-19.

The dissent to the Board's decision takes out of context federal court precedent holding federal law inapplicable to tribes absent express inclusion. This ignores the distinguishable context of federal laws of general applicability applying recently to tribal commercial businesses, no different from non-tribal businesses, their separate concerns diminishing any effect on tribal sovereignty. Simply put, what the dissent misses is the revolutionary development of Indian commercial enterprises in interstate commerce, invoking federal laws generally applicable to such businesses. NLRA

application to tribal businesses does not require express Congressional determination because it is within NLRA's central concerns.

The sole issue before this Court is the NLRB's jurisdiction over the tribal casino as the case was uncontested on the merits and petitioners intended to test the jurisdictional issue. The limited issue is decided on the limited basis of the entirely altered landscape of tribal commercial activity and its open invitation for application of federal laws of general applicability, without regard to outdated notions of tribal sovereignty in other contexts.

STATEMENT OF THE FACTS

The dominant factual reality here is the undisputed tribal operation of a casino as a typical commercial enterprise in interstate commerce. The Board's decision here supports the tribe's operation of a casino in interstate commerce no different from non-tribal casinos long held within the central jurisdiction of the Board. The Board characterizes the casino as a "typical commercial enterprise" employing non-Indians and catering to a non-Indian clientele. JA 0319. It further notes that, apart from its ownership and location, such typical commercial enterprise operates in and substantially affects interstate commerce. The Board also acknowledges the casino's comparability to its non-Indian counterparts by referring to the keen competition in the gaming industry, the non-Indian sector subject to the Board's jurisdiction. JA 0320.

The Board's confirmation of the growing impact of tribal commercial enterprises on interstate commerce supports its view of the casino here. The Board acknowledges tribal enterprises "playing an increasingly important role in the Nation's economy." JA 0318. It notes their becoming "significant employers of non-Indians" and "serious competitors" with non-Indian businesses. It concludes that, under the circumstances, including catering to a non-Indian clientele, they significantly affect interstate commerce.

The tribe operates a casino in the classic sense prevalent among non-tribal casinos. It operates a large bingo hall, card games and over a thousand video gaming slot machines, within a facility of 115,000 square feet, 95,000 for players. JA 0188. It employs over 1,400 people as one of the largest employers in San Bernardino County, California and within the Inland Empire, constituting the area of Southern California east of the coastal counties. The overwhelming majority of casino employees are non-Indian. JA 0183. Generally non-Indians work on the casino floor as machine attendants, janitors and in food and beverage operations, and employees in non-supervisory positions live in California outside the tribe's reservation. The tribe invites residents of Southern California generally to patronize the casino, and a majority of its clientele is comprised of non-Indians. JA 0188, 0183.

The bingo hall is advertised as "America's finest," containing over 2,300 seats and open seven days a week, twenty-four hours a day for a wide variety of video

machine games and popular card games. JA 0189. Prospective customers are attracted by winnings of over one billion dollars by bingo players since 1986. The casino offers live entertainment similar to casinos in Las Vegas, Atlantic City and elsewhere.

The tribe's factual recitation is an attempt to divert attention from the dispositive facts. The tribal government's organization and operation of the casino and the casino's location on the reservation are irrelevant, as confirmed by the Board itself. The remainder of the tribe's statement of facts is a most compelling presentation in favor of assertion of the Board's jurisdiction over the casino. The tribe presents a spectacular picture of its reversal of fortune and flourishing with the growth of its economic development project. All this confirms is the operation of a typical commercial enterprise in interstate commerce, no different from the classic non-tribal commercial business within the NLRB's jurisdiction. The use of casino revenues to further tribal governmental services is irrelevant, as discussed below.

Similarly, IGRA and the Tribal Labor Relations Ordinance (TLRO) only confirm the stature of the casino as the classic form of commercial enterprise subject to NLRA regulation. As confirmed by the tribe's own statement of facts, IGRA provides the federal imprimatur on casinos as tribal commercial enterprises in interstate commerce, comparable to non-tribal casinos. Tribal governmental regulation of its casino is irrelevant to the dispositive reality of the casino itself as a

commercial enterprise in interstate commerce, as explained below. The tribal-State gaming compacts for regulation of casino gaming provided by IGRA confirm IGRA's concern for regulation of the gaming activities rather than labor relations at casinos, as demonstrated below.

The TLRO pursuant to the tribe's compact with the State of California, in recognizing basic employee rights under the NLRA, embodies the conduct of labor relations at the casino comparable to non-tribal casinos. Attempt as the tribe might to distinguish the TLRO from the NLRA, its treatment embellishes the casino's commercial enterprise status. The TLRO would not preclude the NLRA's application insofar as it is derivative of IGRA and IGRA and NLRA operate concurrently. The TLRO's distinctions from the NLRA, focusing on the business as a gaming facility, are consistent with the NLRA. They highlight a typical casino concerned with its surveillance/security systems to protect gaming activities against crime. Similarly, the dispute resolution procedures and strike-related provisions of the TLRO reflect the casino's status as a revenue producing commercial activity. The extension of tribal-State gaming compacts touching labor relations is not inconsistent with NLRA as it permits regulation distinctly attuned to a gaming enterprise.

Accordingly, the relevant facts are clear: (1) The tribe's casino is a classic commercial enterprise operating in interstate commerce which has a large complement of non-Indian employees and caters to a non-Indian clientele and is in keen

competition with and indistinguishable from non-tribal casinos. (2) If, as the tribe admits, the casino is the tribal commercial enterprise generating such revenue as to sustain the tribe itself, such tribal casinos could grow to such grotesque enterprises as to dwarf ordinary businesses in terms of size and effects on interstate commerce. It would be outrageous and the height of absurdity to suggest such a business should go unregulated by the NLRA. This has already come to pass: It is called Foxwoods Casino, located in the State of Connecticut and perhaps the largest casino in the world, with yet another casino, the Mohegan Sun Casino, in our small state favorably compared to it in size and effect on commerce.

SUMMARY OF ARGUMENT

The dominant trend of recent developments in the law under the National Labor Relations Act (NLRA) and related regulation of tribal economic activity regards the operation of casinos on reservations as commercial enterprises affecting interstate commerce and subject to the NLRA's jurisdiction. With respect to each of the principal lines of argument, the law stands firmly in favor of NLRA's applicability to such enterprises.

The first line of argument concerns interpretation of the NLRA itself. From an understanding of the historical development of the NLRB's approach, the Board is justified in extending its jurisdiction to tribal commercial enterprises conducted on

reservations. Moreover, the NLRA's applicability comes within the expertise, competence and authority of the NLRB.

The second line of argument concerns principles developed by the federal courts for subjecting tribal businesses to federal laws of general applicability. These principles have been applied most notably in the context of federal labor law regulation of tribal businesses. They uniquely represent fundamental purposes of federal labor law in adapting to regulation of commercial enterprises substantially affecting interstate commerce.

The third line of argument concerns the Indian Gaming Regulatory Act (IGRA). IGRA represents a major step in recognizing casinos as developing tribal commercial enterprises. It is the Congressional embodiment of federal encouragement of casinos within the heart of the NLRB's jurisdiction.

IGRA regulates the growth of Indian casinos against the background of state licensing laws for gaming. This accentuates the identification of tribal casinos with existing casinos of non-tribal employers. IGRA's text and legislative history do not indicate Congressional concern with casino labor relations. This supports the NLRA's applicability by the principle of statutory construction giving concurrent effect to federal laws within their respective fields. This should be the end of the matter, regardless of the authority for tribal-State gaming compacts to extend to casino labor relations. The California compact referenced by petitioners and the resulting

TLRO are largely consistent with NLRA and reflect concerns peculiar to the casino context not inconsistent with NLRA.

In conclusion NLRA applicability to the tribal casinos is well supported by fundamental NLRA policy in favor of labor relations regulation of ordinary commercial enterprises operating in interstate commerce and in competition with other similar businesses. The regulation of tribal casinos as ordinary businesses similar to other casinos follows as the most sensible outcome. If NLRA applicability to tribal casinos were not recognized, the most massive of ordinary commercial businesses could be conducted by tribes yet go unregulated by the NLRA.

ARGUMENT

I. GREAT DEFERENCE SHOULD BE ACCORDED THE BOARD'S INTERPRETATION OF THE NLRA IN THIS CASE, SO CLEARLY WITHIN ITS CENTRAL COMPETENCE.

It is well established that federal courts give considerable deference to the Board's interpretation of the NLRA. NLRB v. City Disposal Systems, Inc., 465 U.S. 822, 829 (1984); Norris, A Dover Resources Co. v. NLRB, 417 F.3d 1161, 1167 (10th Cir. 2005); Community Hospitals of Central California v. NLRB, 335 F.3d 1079, 1083 (D.C. Cir. 2003). The Board's interpretation will prevail if it is a reasonable one. Holly Farms Corp. v. NLRB, 517 U.S. 392, 409 (1996). It will be so upheld even if the reviewing court would have formulated a different rule had the case come before it de novo. Lee Lumber and Bldg. Material Corp. v. NLRB, 310 F.3d 209, 216

(D.C. Cir. 2002). This Court has extended deference to a reasonable Board interpretation asserting jurisdiction over tribal employers. Yukon-Kuskokwim Health Corp. v. NLRB, 234 F.3d 714, 717 (D.C. Cir. 2000). While petitioners distinguish the legal issue substantively, as noted below, this Court deferred to the Board's interpretation extending jurisdiction over off-reservation activities beyond commercial enterprises to governmental activities, while leaving open jurisdiction over on-reservation activities. As demonstrated below, the question of jurisdiction over a casino on the reservation as a typical commercial enterprise operating in interstate commerce presents an issue so centrally within the Board's policy interests, affirmed by developments in Board and federal court precedent, recent federal legislation and the proliferation of tribal economic activity, that the highest degree of deference ought to be given the Board's interpretation.

While petitioners claim that the Board's interpretation was outside its competence, as shown below, principles of federal Indian law are irrelevant to the Board's interpretation of the NLRA's applicability to a tribal casino, whether they pertain to rules of statutory construction, alleged rights of tribal sovereignty, tribal rights of self-governance in purely intramural matters for purposes of federal laws of general applicability, or the provisions of IGRA. As for the further claim of the Board's reversal of precedent, the Board's decision here reflects the intervening developments of a vast alteration in the economic landscape by tribal commercial

activity in interstate commerce against a background of development of Board and federal court precedent and federal legislation, making the issue altogether different from the outmoded Board decision thirty years ago and entitling the present decision to enormous deference. Notwithstanding the cases cited by petitioners, this Court has deferred to a reasonable Board interpretation even where a newly formulated rule is a departure from the Board's prior policy. Lee Lumber, 310 F.3d at 216.

II. THE DEVELOPMENT OF THE LAW UNDER THE NLRA ITSELF RESOUNDINGLY SUPPORTS EXTENSION OF THE NLRB'S JURISDICTION OVER TRIBAL CASINOS, GIVEN THE NLRB'S RECENT ARTICULATION OF PRINCIPLES APPLICABLE TO INDIAN BUSINESSES AND THE OPERATION OF SUCH BUSINESSES ON RESERVATIONS IN INTERSTATE COMMERCE INDISTINGUISHABLE FROM OTHER SIMILAR ENTERPRISES LONG SUBJECT TO THE ACT.

The absence of Congressional concern with regulation of the labor relations of tribal economic activity at the time of enactment of the NLRA does not negative subsequent application of the Act to typical businesses, albeit conducted by tribes. Congress could not contemplate the development of tribal businesses similar to those subject to the Act. The most reasonable conclusion is that Congress gave no consideration to application of the NLRA to tribal businesses.

Even petitioners acknowledge Congress' lack of focus on tribes as employers in passing the NLRA. Far from implying an intent to exclude tribal businesses, this confirms Congress' failure to consider the Act's application. Congress could not

envision the operation of tribal businesses in interstate commerce parallel to other businesses. This unique potential of the tribes as employers distinguishes them from all other employers, both public and private, for purposes of Congress' consideration of the Act's applicability.

The absence of reference to Indian commerce is consistent only with the lack of concern with tribal economic activity then and the Act's focus on interstate commerce, sufficient to cover tribal businesses so engaged. Navajo Tribe v. NLRB, 288 F.2d 162, 165 (D.C. Cir. 1961). The Indian Reorganization Act of 1934 is consistent with recognition of tribal economic activity then as remote from interstate commerce. Congressional silence as to the Act's applicability would not imply inapplicability by rules of statutory construction regarding the application of general federal laws to tribes. Congress had no reason to give any thought to the Act's applicability to tribal businesses.

In Fort Apache Timber Company, 226 NLRB 503 (1976), the holding of the lack of NLRB's jurisdiction over tribal businesses conducted on reservations reflects a pragmatic decision based on the remoteness of tribal economic activity from the national economy. The precedent's survival for thirty years dates the decision to a bygone era prior to tribal conduct of casinos as major commercial enterprises.

The reliance in Fort Apache on inapplicability of federal laws to tribal governments on their reservations further reflects the Board's view of tribal

businesses as a remote outpost. Most noteworthy is the identification of tribal business with governmental activity. This serves the Board's policy interests at the time by distinguishing tribal business from other commercial enterprises, seizing on the formality of ownership by the tribe as a political entity. Such appearances distract from a common commercial enterprise and permit the Board to rely on the NLRA's exemption for governmental employers.

The holding in Fort Apache, based on the applicability of the governmental exemption to tribal businesses on reservations, has no support in the NLRA's legislative history, its provisions or precedent. The Board relied on NLRB v. Natural Gas Utility District, 402 U.S. 600 (1971), holding a utility district a political subdivision of a State as an entity administered by individuals responsible to public officials. But the governmental exemption provided an express exemption for States and their political subdivisions. There is no indication of the Supreme Court that the test for determining State political subdivisions has any applicability to tribal businesses. There is no consideration of tribal businesses as ordinary commercial enterprises rather than governmental functions suitable for governmental exemption.

The Supreme Court relied on enactment of the governmental exemption on the ground of the NLRA's inapplicability to governmental employees not having the right to strike. Id. at 604, cited in Fort Apache, 226 NLRB at 506 n. 22. This is acknowledged in petitioners' own brief, p. 40. The reason for denying governmental

employees the right to strike is to ensure the uninterrupted provision of essential public services. This applies to the services of police and fire departments, public utilities and other essential public services. It has no application to ordinary businesses run by Indian tribes.

Petitioners' response is that the tribal casino should be subject to the strike ban as being essential to the tribal economy. This hardly qualifies the casino as an essential public service. But, if that were the case, it would exempt the most grotesque form of commercial enterprise operating in interstate commerce if conducted by a tribe on its reservation.

This disposes of court and Board decisions holding governmental employers implicitly exempt from the NLRA. Puerto Rico, the Virgin Islands and their subdivisions share the characteristics of governmental employers expressly exempt in providing essential public services. The tribal police officers in Reich v. Great Lakes Indian Fish and Wildlife Commission, 4 F.3d 490, 495 (7th Cir. 1983), serve a governmental function. In NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1199 (10th Cir. 2002), a tribe was acting in its governmental capacity to enact a right-to-work ordinance rather than conducting a commercial business, the latter subject to federal laws of general applicability for employers pursuant to the Tuscarora rule discussed below, as acknowledged by the court and the Board's decision here. JA 0315 n. 14, 0316 n. 16.

The Supreme Court's implicit exemption of religious schools was based not only on the First Amendment questions but also remoteness of such educational institutions from the primary thrust of the NLRA regarding commercial enterprises. NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 504-05 (1979). But this contrasts with jurisdiction over commercial businesses constituting the classic example for Board regulation.

Even if such decisions supported implication of NLRA exemptions from policy considerations, the most fundamental NLRA policy of all, its concern with classic commercial enterprises, supports its application to the tribal casino. The absence of Congressional questioning of Fort Apache is consistent with the remoteness of tribal economic activity from the NLRA's concerns when it was rendered and the subsequent rise of such activity within the heart of NLRA, policy concerns clearly suitable for the NLRB to decide, as distinguished from the Act's express provisions enacted by Congress.

Against this unsuitability of the NLRA's governmental exemption to tribal casinos, it might be expected that the Board would develop a more appropriate framework for the Act's application to tribal businesses operating in interstate commerce. The Board did so long before the present decision. In Sac and Fox Industries, 307 NLRB 241 (1992), the Board adopted the rule that federal laws of general applicability apply to tribal businesses absent express provision to the

contrary. While the Board relied on the U.S. Supreme Court's decision in Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99 (1962), as well as Circuit Court precedent, it observed the rule's consistency with NLRA's policy concerns in coverage of commercial businesses in interstate commerce and the absence of any specific exemption of tribes. Sac and Fox, 307 NLRB at 243. While the Board left open the rule's applicability to tribal enterprises on reservations, it held the rule "clearly applicable" to off-reservation tribal enterprises. It recognized the rule's intent to apply to on reservation tribal activities because its third exception referred to proof of Congress' intent not to apply the law to Indians on their reservations. Id. at 244 n. 20.

In applying the rule's exceptions, the Board confirms the rule's suitability to tribal businesses. Regarding the first exception for exclusive rights of self-governance in intramural matters, the Board focused on the tribal enterprise as a normal commercial enterprise employing non-Indians as well as Indians. Id. at 244. As to the third exception to the rule, the Board focused on the absence of any reference in the NLRA's legislative history and its express provisions to exempt Indians or their off-reservation tribal enterprises. Id. at 245.

In Yukon-Kuskokwim Health Corporation v. N.L.R.B., 234 F.3d 714, 716-17 (D.C. Cir. 2000), this Court deferred to the Board's extension of Sac and Fox to tribal off-reservation activities when acting in a governmental capacity. This Court's

holding and its deference to the Board did not concern jurisdiction over tribal enterprises on reservations.

The above Board and court precedent sets forth the modern framework for assertion of NLRB jurisdiction over tribal activities. It offers no justification for the distinction between on-reservation and off-reservation activities. The distinction literally exploded with the development of tribal casinos in interstate commerce. Sac and Fox and Yukon-Kuskokwim involved an ordinary manufacturing enterprise and a hospital, and Sac and Fox was decided prior to the mushrooming of casino development on reservations. The present case presents the appropriate occasion for asserting NLRB jurisdiction over tribal commercial enterprises on reservations.

The Board's decision here constitutes the dramatic realization of the vastly altered realities of Indian economic activity in interstate commerce. JA 0311-31. There is no question of the dominance of NLRA central concern with classic commercial enterprises in interstate commerce. The Board's rejection of Fort Apache is premised on absence of intent to exclude tribal enterprises and the fiction of such businesses as political subdivisions of a State. JA 0314-15. While the Board relies on the federal court precedent for applying federal laws of general applicability to tribal activities, it focuses on rebutting claims regarding the precedential status of the Supreme Court's Tuscarora decision. Absent from this treatment are the Board policy interests driving reliance on the general Tuscarora framework.

Nonetheless, the Board acknowledges Sac and Fox previously adopting the Tuscarora principle. JA 0316. As noted above, Sac and Fox relies on the Board's central concern with commercial enterprises in interstate commerce. The Board here reaffirms that, referring to Sac and Fox's rejection of the exception to Tuscarora for tribal rights of self-governance, as applied to an ordinary manufacturing enterprise. The Board's regard for the distinction of on-reservation enterprises as an erroneous application of Tuscarora emphasizes the rule's focus on ordinary commercial enterprises regardless of location.

The Board's treatment of Tuscarora renews the distinction between tribal rights of self-governance and commercial enterprises in interstate commerce. JA 0317. The claim of tribal sovereignty applies to matters of self-governance rather than a commercial activity such as a casino having substantial numbers of non-Indian employees and a non-Indian clientele.

In discussing discretionary jurisdiction the Board reveals its intent in asserting jurisdiction over on-reservation enterprises. JA 0318-19. The Board holds that asserting jurisdiction over tribal enterprises would effectuate NLRA's policies because tribal enterprises are playing an increasingly important role in the national economy. It acknowledges the significant effects of tribal businesses on interstate commerce by their substantial employment of non-Indians, catering to non-Indian clients and customers and competition with non-Indian businesses.

According to the Board, running a commercial business is not an expression of tribal sovereignty as running a tribal court system. The Board states its mandate is to advance interstate commerce, and "assertion of discretionary jurisdiction over Indian tribes acting in these circumstances would effectuate the policies of the Act while doing little to the Indian tribes' special attributes of sovereignty or the statutory schemes designed to protect them."

Tribal uniqueness is exemplified by traditionally tribal or governmental functions performed on the reservations. Such activities are less likely than commercial enterprises to affect interstate commerce substantially. JA 0319. The Board further notes a body of law differentiating governmental and proprietary functions.

The Board's fashioning a test for jurisdiction over tribal activities reflects the NLRA's concern with commercial enterprises affecting interstate commerce and its exemption of governmental entities. There is nothing in Tuscarora or the federal court decisions applying it regarding an exception for governmental functions. The exception for tribal rights of self-governance in intramural matters is limited to such concerns as tribal membership, inheritance rules and domestic relations. JA 0319, 317 n. 19. The reasonable explanation for the Board's distinction is the NLRA's governmental exemption. This elevates the primacy of the Board's concern with regulation of ordinary commercial enterprises in interstate commerce.

The Board's application of the Tuscarora framework is an expression of the dominance of NLRA's concern to its analysis. JA 0319-20. The Board rejects the operation of a casino as self-governance, regarding it as a commercial enterprise in interstate commerce. The Board rejects the tribe's proprietorship of the casino as an intramural matter because, while casino revenues support tribal governmental functions, such characterization would allow the self-governance exception to swallow the Tuscarora rule.

Upon finding the exceptions inapplicable, the Board highlights policy considerations favoring jurisdiction, the casino's status as a typical commercial enterprise employing non-Indians and catering to non-Indian customers. The Board recognizes its high interest in jurisdiction in view of the parallel to non-Indian casinos and competition with them. The Board distinguishes the governmental regulation of gaming from its business operation of the casino as a commercial enterprise no different from non-tribal casinos.

The above analysis confirms the impingement of NLRA's fundamental interests on the casino's operations. The tribe's operation of a commercial enterprise distinguishes it from governmental entities and renders the casino identical to non-tribal enterprises.

III. THE TUSCARORA RULE IS THE EMBODIMENT OF FURTHERING THE NLRA'S CONCERN IN REGULATING THE LABOR RELATIONS OF COMMERCIAL ENTERPRISES IN INTERSTATE COMMERCE.

The Board relies on the general framework of Tuscarora, adopted by the federal courts, as justification for its rationale of the NLRA's concern with commercial enterprises in interstate commerce. The adoption of Tuscarora by the federal courts reflects the growing impact of tribal commercial enterprises on interstate commerce. Their adoption of Tuscarora for a broad spectrum of federal labor law suggests their concern with such tribal business activity.

Tuscarora, dictum or not, is highly significant to the distinct concern with federal laws of general applicability affecting economic activity, occasioned by the rising tide of tribal businesses. The absence of post- Tuscarora Supreme Court precedent addressing its rule is indicative of the cases before the Court in the interim dealing with federal statutes pertaining specifically to Indian tribes.

The federal court authority adopting Tuscarora, unacknowledged by petitioners' brief before this Court, is impressive, including unanimity among Courts of Appeals, and contains compelling aspects for the NLRA's jurisdiction over tribal businesses. NLRB v. Chapa De Indian Health Program, Inc., 316 F.3d 995, 998-1000 (9th Cir. 2003) (NLRA); Fla. Paraplegic Assn. v. Miccosukee Tribe of Florida, 166 F.3d 1126, 1129 (11th Cir. 1999); Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 177-79 (2nd Cir. 1996); U.S. v. Baker, 63 F.3d 1478, 1484 (9th Cir. 1995); Lumber Industry

Pension Fund v. Warm Springs Forest Products Industries, 939 F.2d 683, 685 (9th Cir. 1991); U.S. Department of Labor v. Occupational Safety and Health Review Commission, 935 F.2d 182, 185 (9th Cir. 1991); Smart v. State Farm Insurance Co., 868 F.2d 929, 932 (7th Cir. 1989); Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1117 (9th Cir. 1985). Coeur d'Alene has been followed by the Board and courts in applying the Tuscarora rule. JA 0315-16, 319.

The real import of these decisions here is not their unanimity in applying Tuscarora to a wide spectrum of federal labor laws but a comparison to the NLRA issue presented here. The federal laws in those decisions do not focus on typical commercial enterprises in interstate commerce as the NLRA does. Many labor laws apply to the public and private sector and are not focused distinctly on disruption of interstate commerce. If Tuscarora is applied to them, then it applies more clearly to NLRA by its concern with typical commercial enterprises operating in interstate commerce. This highlights the NLRA's interest in comprehensive regulation of businesses in interstate commerce, an unparalled exercise of the Interstate Commerce Clause, and its exemption of governmental entities. The prominence of this interest is heightened by a casino as a classic form of commercial enterprise.

This is strengthened by the other laws' concern with specialized aspects of the employment relationship as compared to NLRA affecting all conditions of employment. They concern, e. g., workplace safety and health, employment

discrimination and retirement and health insurance benefits. The NLRA fosters collective bargaining extending to all terms and conditions of employment. This accentuates the NLRA's more comprehensive focus on commercial enterprises and the potential for labor disputes to affect interstate commerce. Not only does this highlight the NLRA's concern with businesses in interstate commerce but it strengthens the justification for applying the NLRA to the casino, along with similar businesses, as a federal law of general applicability.

The Tuscarora rule and its exceptions must be considered in terms of the breadth of their application to tribal commercial enterprises. The federal courts have given Tuscarora an extraordinarily broad scope. The U.S. Supreme Court recognized the reach of federal statutes of general applicability to Indian tribes without exceptions. Tuscarora, 362 U.S. at 116. Coeur d'Alene acknowledged exceptions to the rule for a law's touching exclusive rights of self-government in purely intramural matters, the law's abrogation of treaty rights and confirmation in statutory language or legislative history of Congressional intent against applying the law to tribes. Coeur d'Alene, 751 F.2d at 1115. This has been adopted by the federal courts as the test for applying Tuscarora. Mashantucket Sand & Gravel, 95 F.3d at 177; Smart, 868 F.2d at 932-33.

The latter exceptions apply in the rare case of a law clashing with treaty rights and a showing of intent not to apply the law. This focuses on the first exception,

limited to such intramural matters as tribal membership, inheritance rules and domestic relations. Coeur d'Alene, 751 F.2d at 1116. Such limitation recognizes the breadth of federal laws of general applicability extending to governmental employers, e. g., wage and hour and employment discrimination laws. There is no reason why they should not apply to tribal governmental functions if they apply generally to governmental employers and their governmental functions.

The NLRA stands within the heart of the application of Tuscarora to commercial enterprises. Tuscarora, in applying federal labor laws of general applicability, is focused upon the dominance of commercial enterprises. The NLRA is directed to regulation within that sphere, exempting governmental employers.

This analysis demonstrates the primacy of the NLRA's interests in determining its applicability to commercial enterprises, notwithstanding their tribal affiliation. Tuscarora serves as a general framework, substantiating NLRA's applicability to tribal businesses. The NLRA applies on its own, dealing with the explosive effects of labor relations of commercial enterprises on interstate commerce, the competitive effects of its regulation on such businesses and the comparability of such tribal enterprises employing a huge complement of non-Indian employees and catering to a largely non-Indian clientele.

The NLRA's applicability does not approach infringing on tribal sovereignty. The Board recognized an exception for tribal governmental functions. While a casino

may be subject to tribal government regulation, this does not suggest its status as a governmental function. IGRA's concern with tribal self-sufficiency in encouraging casino development does not make the casino a governmental function, though funding governmental services. JA 0319. It is absurd to suggest that NLRA's regulation of casino labor relations is not distinguishable from regulation of a governmental function. See JA 0320. If that were the case, any tribal enterprise within the core of NLRA's concern would escape its regulation, nullifying the Tuscarora rule entirely. See JA 0319.

The tribe's labor relations with tribal members does not fall within the first exception for tribal rights of self-governance in intramural matters, as interpreted in Coeur d'Alene. This exception for exclusive rights of self-governance in purely intramural matters would not extend to labor relations with tribal members at a casino operating in interstate commerce. Such regulation extends to non-members by the large complement of non-Indian employees. NLRA's regulation of labor relations is limited, allowing union and employer to set terms of employment by collective bargaining. JA 0320. If the exception did apply, any federal law of general applicability would be inapplicable by infringing on relations between the tribe and its members. EEOC v. Fond du Lac Heavy Equipment and Const. Co., 986 F.2d 246, 249-50 (8th Cir. 1993), cited by petitioners, involved an employment discrimination

claim by one tribal member and overbroad reading of the exception for self-governance rights in intramural matters.

Precedent cited for the need for express Congressional inclusion of tribes in federal legislation arises from distinguishable governmental functions and rights outside federal statutes of general applicability. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141, 149-52 (1982), upheld tribal rights of self-government in the power to tax non-Indians entering reservations for commercial purposes and exclude non-Indians from the reservation, in respect to federal laws addressed to Indian tribes. Coeur d'Alene, 751 F.2d at 1117; JA 0317. Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 14-18 (1987), upheld tribal court jurisdiction, notwithstanding the federal diversity statute, in the absence of clear congressional intent otherwise, on the basis of intrusion into tribal self-government over reservation affairs. JA 0317. The right to exclude non-Indians from the reservation is irrelevant to federal laws of general applicability because it would nullify such laws' application to tribal commercial activities employing non-Indians. See Navajo Tribe, 288 F.2d at 164 (applying NLRA to non-tribal business on reservation against tribal right to exclude non-Indians), cited in JA 0317-18.

This analysis rebuts the overbroad claim of tribal jurisdiction over tribal trust lands. This is viewed as a tribal sovereign right to apply its civil laws to non-Indians on the reservation. Washington v. Confederated Tribes of the Colville Indian

Reservation, 447 U.S. 134, 152 (1980); Williams v. Lee, 358 U.S. 217, 223 (1959). The cases cited involve state laws, including state tax laws and the tribal right to tax, distinguishable from the federal government's superior sovereignty to impose federal laws of general applicability with respect to commercial activities. The tribal right to regulate non-Indians on non-Indian fee land within the reservation, recognized in Montana v. United States, 450 U.S. 544, 565 (1981), is divorced from the superior regulation of federal laws of general applicability over tribal commercial dealings with non-members. The tribal right of employment regulation at its casino specifically, whether before or after IGRA, does not qualify as a right of tribal sovereignty against the superior force of federal laws of general applicability. The principle of tribal authority over non-Indians on the reservation threatening the political integrity, economic security or health or welfare of the tribe is taken out of context without regard to federal laws of general applicability.

Principles of statutory construction regarding applicability of federal statutes to tribes are taken out of context as they concern federal statues specifically applicable to Indian tribes. The precedent for resolution of ambiguities in favor of Indians focuses upon interpretation of treaty rights and Congressional abrogation of treaties rather than federal laws of general applicability. United States v. Dion, 476 U.S. 734, 739-40 (1986) (requiring clear evidence of Congressional intent to abrogate a treaty); McClanahan v. State Tax Commission of Arizona, 411 U.S. 164, 174 (1973);

Choctaw Nation v. United States, 318 U.S. 423, 431-32 (1943). While the principle of construing ambiguities in federal statutes in favor of Indians is relied on, this involves federal statutes specifically addressed to Indian tribes. County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251, 268-69 (1982); Montana v. Blackfeet Tribe, 471 U.S. 759, 765-66 (1985); City of Roseville v. Norton, 348 F.3d 1020, 1032 (D.C. Cir. 2003). The principle of statutory construction that absent clear Congressional intent to the contrary, rights of tribal sovereignty are preserved arose in the context of tribal self-government, such as tribal criminal jurisdiction, and federal law relating directly to tribes. United States v. Wheeler, 435 U.S. 313, 323-26 (1978); Oliphant v. Squamish Indian Nation, 435 U.S. 191, 206-08 (1978); Williams, 358 U.S. at 223.

In considering federal laws of general applicability, the policy concerns of the laws, such as the NLRA, applicable to all businesses overwhelm their attenuated relation to rights of tribal sovereignty. Running a casino is within the NLRA's core interests. Under the circumstances, the NLRA should apply to the casino, regardless of the comprehensiveness of regulation of its labor relations. The NLRA's prime objective to promote collective bargaining also does not deny tribal sovereignty but allows the tribe to enter into a consensual arrangement with a union representing the employees for its labor relations.

The claim of NLRA interference with treaty rights in the compact between the tribe and the State of California is easily rebutted. Insofar as the so-called treaty is entered into pursuant to federal law in IGRA, the relation between the underlying federal law and NLRA would dictate the effect of the compact on NLRA. As shown below, NLRA and IGRA operate concurrently, and the compact has no effect on the consideration of NLRA applying to tribal businesses.

The second exception for treaty rights contemplates a treaty with an Indian tribe in the usual sense between the tribe and federal government, not a State. This is consistent with the focus of Tuscarora on the superior authority of the federal government over tribes in its general rule and exceptions based on a contrary interest. This would not apply to a compact with a State government with its focus on State regulation of gaming.

A further reason for the absence of NLRA interference in treaty rights is that the compact only authorizes the TLRO, which is consistent in its substantive provisions with rights afforded by the NLRA. The TLRO's additional provisions are minor, consistent with the NLRA and concern matters peculiarly related to a casino's operation.

Accordingly, NLRA is a federal law of general applicability applicable to the tribal casino within the rule of Tuscarora. Its central concerns dictate application to a casino so that Tuscarora serves as confirmation of its application in the tribal context.

IV. IGRA NOT ONLY OPERATES CONCURRENTLY WITH NLRA, ALLOWING ITS APPLICATION TO THE LABOR RELATIONS OF TRIBAL CASINOS, BUT CONSTITUTES FEDERAL CONFIRMATION OF TRIBAL ENTRY IN THE NATIONAL ECONOMY BY CASINOS IMPACTING INTERSTATE COMMERCE.

IGRA, far from dealing with casino labor relations, authorizes tribal operation of casinos as commercial enterprises in interstate commerce. IGRA provides federal regulation of tribal casinos against the background of State regulation of gaming. This needed to be regulated federally in view of the superior authority of federal law over the tribes and State governments. IGRA's regulation is directed at the gaming activities and confirms the casinos' status as commercial establishments.

IGRA's regulatory scheme was concerned with governmental licensing and control over the games, giving authority to the tribes and the States with existing licensing schemes. IGRA permits tribal gaming activities not expressly prohibited by federal law and conducted in a State not prohibiting such gaming activity. 25 U.S.C. § 2701(5). The tribe is required to negotiate compacts with the State for gaming activity on tribal lands. 25 U.S.C. § 2710(d)(3)(A). Congress intended the compacts to balance tribal sovereignty with "the states' need to protect the public against the risks typically associated with Class III-type gaming." Ysleta del Sur Pueblo v. Texas, 36 F.3d 1325, 1331 (5th Cir. 1994), citing U.S. Code Cong. & Admin. News, Senate Report No. 100-446, pp. 3083-84.

Class III gaming activity concerns IGRA's elaborate regulation of the gaming activities conducted. It provides for Class I gaming, social games offered at Indian ceremonies and not subject to regulation, and Class II gaming, bingo and non-banking card games, with the casino having no economic interest in the outcome, which are allowed if the State permits such gaming. 25 U.S.C. §§ 2703(6), 2710(a)(1), 2703(7)(A), 2710(b)(1). Class III gaming applies to such lucrative casino-style games as slot machines, blackjack, roulette and baccarat. 25 U.S.C. § 2703(8); Ysleta del Sur Pueblo, 36 F.3d at 1330-31, citing U.S. Code Cong. & Admin. News, Senate Report No. 100-446, pp. 3073, 3077. IGRA permits Class III gaming if authorized by tribal ordinance or resolution, located in a State permitting such gaming for any purpose by any person, organization or entity and conducted upon negotiation of a tribal-State compact. 25 U.S.C. § 2710(d)(1).

25 U.S.C. § 2710(d)(3)(C), concerning the subjects of tribal-State compacts, focuses on the application of criminal and civil laws and regulations of the tribe or State directly related to the licensing and regulation of such activity. 25 U.S.C. § 2710(d)(3)(C)(i). It refers to the allocation of criminal and civil jurisdiction between the State and tribe to enforce such laws and regulations. It includes State assessments on gaming activities to defray the cost of regulation and tribal taxation of the activities comparable to State assessments. It authorizes compact provisions on remedies for breach of contract and standards for operation of gaming activities and maintenance of

the gaming facility, including licensing. 25 U.S.C. §§ 2710(d)(3)(C)(v), (vi). These constitute the only specific subjects of compact provisions.

Pursuant to the Senate Report on IGRA, the use of State regulatory systems for gaming was intended to fill a gap in the absence of federal and tribal systems of gaming regulation. U.S. Code Cong. & Admin. News, Senate Report No. 100-446, pp. 3083-84. State gaming regulation could be implemented through tribal-State compacts giving tribes a role in gaming regulation. Compact provisions would vary with, inter alia, the type of gaming and would cover the subjects in IGRA. The Senate Report refers to the concern of compact provisions with licensing issues such as days and hours of operation, wage and pot limits, types of wagers and size and capacity of the facility. The Report recognized the unique application of State law to tribes regarding gaming regulation pursuant to IGRA, not extending to other State regulation of tribal activity.

This makes clear IGRA's concern with State licensing schemes for the regulation of gaming and the conduct of the types of gaming at tribal gaming facilities. Labor relations is far removed from any concern of IGRA. While labor relations may be treated in the compact, this is pursuant to IGRA's residuary clause for compact provisions on "any other subjects that are directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C)(vii); In Re Indian Gaming Related Cases, 331 F.3d 1094, 1116 (9th Cir. 2003).

IGRA and NLRA should be allowed to operate concurrently in their respective spheres. Even for federal laws dealing with tribal gaming, IGRA does not preempt or impliedly repeal such laws and must be considered in light of those laws. Ysleta del Sur Pueblo, 36 F.3d at 1335; Passamaquoddy Tribe v. Maine, 897 F.Supp. 632, 634, 636 (D.Me. 1995). IGRA provides for the tribal right to conduct certain types of gaming to be subject to the prohibition of other federal law. Passamaquoddy, 897 F.Supp. at 634, relies on the principle of statutory construction that so long as two statutes are capable of coexistence, courts should consider each as effective. A principle of statutory construction provides that where there is no clear intention otherwise, a specific statute will not be controlled by a general one, regardless of the priority of enactment. Ysleta, 36 F.3d at 1335; Passamaquoddy, 897 F.Supp. at 636. By the spheres of operation of IGRA and NLRA, the principle of concurrent operation of federal laws applies, and NLRA is the specific statute concerning labor relations compared to the generality of IGRA's concern.

Tribal regulation does not make the casinos governmental functions. Regulation of the gaming activities in IGRA highlights the casinos as entertainment venues in the classic mold of grand commercial enterprises in interstate commerce. IGRA constitutes the crowning glory of federal confirmation of tribal entry into the world of standard commercial businesses operating in interstate commerce on a massive scale. This is within NLRA's core concern, and IGRA confirms it.

The TLRO pursuant to the compact between the tribe and the State of California does not affect NLRA's applicability. If IGRA, the authorizing statute for the compact and the TLRO, does not preclude NLRA from applying, the TLRO promulgated under IGRA would not do so. The compact authorizing the TLRO is not pursuant to the Compacts Clause of the U.S. Constitution pertaining to interstate agreements and does not have the force of federal law. It is a contract between a tribe and a State subject to federal law, not a compact between States under the Constitution considered a treaty between States. The TLRO is a third level regulation removed from IGRA and the compact and a regulation of the tribe rather than federal law or the tribe and a State and should not prevail over the NLRA as federal law.

As petitioners acknowledge, the TLRO contains much the same provisions as NLRA. Any differences concern regulatory and security needs of the gaming facility not conflicting with NLRA. The Indian preference in employment by the TLRO and other tribes is not affected by NLRA due to its legality under Title VII of the Civil Rights Acts, 42 U.S.C. § 2000e(b), and independence from NLRA's concerns as specifically expressed in employment discrimination law. The TLRO's dispute resolution mechanism may be applied to such peculiarities of the gaming facility, leaving the NLRB jurisdiction over labor relations issues. This is consistent with the TLRO's providing additional regulation of labor relations consistent with NLRA, as

private employers and tribes may regulate labor relations in a manner not conflicting with NLRA. See Mashantucket Sand & Gravel, 95 F.3d at 174.

The TLRO highlights NLRA applicability to the casino as the type of commercial enterprise long subject to the Act. The TLRO applies the NLRA's provisions in the casino context, as they have been applied to non-tribal casinos. It confirms the appropriateness of NLRA regulation of tribal casinos. The TLRO's additional provisions for the regulatory and security needs of the casino do not detract from its adopting the NLRA.

The relation of IGRA to NLRA rebuts the claimed lack of Board authority to decide its jurisdiction over tribal commercial enterprises. The balancing of federal labor policy and federal Indian policy does not require consideration by Congress outside the Board's competence, due to application of the NLRA's central concerns to casinos and the attenuated relation of tribal sovereignty and governmental functions. The absence of relation of federal Indian policy to NLRA is revealed by IGRA, focused on regulation of tribal gaming activities rather than labor relations.

The association of IGRA with tribal self-sufficiency and the furtherance of tribal governmental functions is its encouragement of a commercial enterprise to generate revenues to support the tribe. Congressional awareness of a large non-Indian clientele at the casinos and its concern for tribal self-government in fostering

commercial activities do not make the casinos governmental functions for purposes of federal laws of general applicability.

Federal Indian law from IGRA to other federal law promoting tribal government is far removed from the labor relations at tribal casinos. Their support of tribal government is the generalized, indirect consequence of the revenues generated by ordinary commercial enterprises within the central concern of federal laws of general applicability such as NLRA.

Accordingly, nothing in IGRA is inconsistent with NLRA jurisdiction over the labor relations of tribal casinos, well within the central concern and competence of the Board to determine.

CONCLUSION

For the foregoing reasons, the Board's decision should be affirmed, the petition for review denied and the Board's order enforced.

Respectfully submitted,

INTERVENOR
STATE OF CONNECTICUT

RICHARD BLUMENTHAL
ATTORNEY GENERAL

William J. McCullough
Assistant Attorney General

BY: Richard T. Sponzo

Richard T. Sponzo
Assistant Attorney General
55 Elm Street, 5th Floor
P.O. Box 120
Hartford, CT 06141-0120
Tel: (860) 808-5050
Fax: (860) 808-5388

CERTIFICATE PURSUANT TO FRAP 32(a)(7)(C)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), this is to certify that this brief complies with the governing type-volume limitation for an intervenor's brief in Rule 32(a)(B)(i) of the Rules of the United States Court of Appeals for the District of Columbia Circuit because it contains 8,563 words. This brief also 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 it has been prepared in proportionally spaced typeface using Microsoft Word 2002 in 14 point Times New Roman type.

Richard T. Sponzo

Richard T. Sponzo
Assistant Attorney General

CERTIFICATION

This is to certify that two copies of the foregoing were mailed first-class, postage prepaid, on this 6th day of July, 2006, to:

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

Aileen A. Armstrong
Meredith Jason
David A. Fleischer
National Labor Relations Board
Office of the General Counsel
1099 14th Street, NW
Washington, DC 20570

Seth P. Waxman
Wilmer Cutler Pickering
Hale and Dorr LLP
1875 Pennsylvania Avenue, N.W.
Washington, DC 20006

Charles A. Hobbs, Esq.
Elliott A. Milhollin, Esq.
Hobbs, Straus, Dean & Walker LLP
2120 L Street, NW, Suite 700
Washington, DC 20037

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

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

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

Lynn E. Calkins
Holland & Knight LLP
2099 Pennsylvania Avenue, NW., Suite 100
Washington, DC 20006

John H. Dossett, Esq.
General Counsel
National Congress of American Indians
1301 Connecticut Avenue, NW
Washington, DC 20036

Richard T. Sponzo
Assistant Attorney General