ORAL ARGUMENT NOT YET SCHEDULED

No. 05-1392

[Consolidated with 05-1432]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SAN MANUEL INDIAN BINGO AND CASINO
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

UNITE HERE! INTERNATIONAL UNION
Intervenor in Support of Respondent

and

STATE OF CONNECTICUT
Intervenor in Support of Respondent

On Petition For Review and Cross-Application for Enforcement of Order of the National Labor Relations Board

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BRIEF OF INTERVENOR UNITE HERE! INTERNATIONAL UNION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Under Circuit Rule 28(a)(1), counsel for Intervenor UNITE HERE! International Union certifies the following:

a. Parties and *Amici*

All parties, intervenors and *amici* appearing before the National Labor Relations Board and in this Court are listed in the Brief for Respondent National Labor Relations Board.

B. Ruling Under Review

The rulings at issue are set forth in the brief for Respondent National Labor Relations Board.

C. Related Cases

This case has not been before this Court or any other Court. The Intervenor is not aware of any related cases pending in, or about to be presented to this Court or any other Court.

Dated: July 5, 2006

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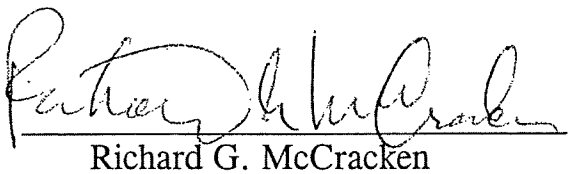
CORPORATE DISCLOSURE STATEMENT
[Fed.R.App. 26.1]

Intervenor UNITE HERE! International Union is a labor organization representing primarily private-sector employees in the United States and Canada. The Union owns Amalgamated Bank, a national bank headquartered in New York. The Union has not issued shares, bonds or other securities.

Dated: July 5, 2006



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GLOSSARY

Act	National Labor Relations Act, 29 U.S.C. § 151 *et seq*
ADA	Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213
Am. Br.	*Amici* Brief
Amici	Collective reference to National Congress of American Indians, National Indian Gaming Association, and 11 tribes which have filed a joint *amicus* brief in this Court
Board	National Labor Relations Board
Casino	San Manuel Indian Bingo and Casino
Coeur d'Alene	*Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985)
ERISA	Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461
FLSA	Fair Labor Standards Act, 29 U.S.C. §§ 201-219
Fort Apache	*Fort Apache Timber Co.*, 226 NLRB 503 (1976)
IGRA	Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721
IRA	Indian Reorganization Act, 25 U.S.C. § 461 *et seq*
ISDA	Indian Self-Determination Act, 25 U.S.C. § 450 *et seq*
Montana	*Montana v. United States*, 450 U.S. 544 (1981)
Navajo Forest	*Donovan v. Navajo Forest Prods. Indus.*, 692 F.2d 709 (10th Cir. 1982)
NLRA	National Labor Relations Act, 29 U.S.C. § 151 *et seq*

GLOSSARY

NLRB	National Labor Relations Board
OSHA	Occupational Safety and Health Act, 29 U.S.C. §§ 651-700
Pet. Br.	Petitioner's Opening Brief
San Manuel	*San Manuel Indian Bingo & Casino*, 341 NLRB No. 138 (2004)
SFI	*Sac & Fox Industries, Ltd.*, 307 NLRB 241 (1992)
Texas-Zinc Minerals	*Texas-Zinc Minerals Corp.*, 126 NLRB 602 (1960), *inj. against NLRB representation proceedings denied* 288 F.2d 162 (D.C. Cir. 1961)
Title VII	Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*
TLRO	Tribal Labor Relations Ordinance
Tribe	San Manuel Band of Serrano Mission Indians
Tuscarora	*Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960)
Union	Intervenor UNITE HERE! International Union
Yukon Kuskokwim	*Yukon Kuskokwim Health Corp.*, 328 NLRB 761 (1999)

STATEMENT OF FACTS

Intervenor UNITE HERE International Union ("Union") adopts the Statement of Facts of the National Labor Relations Board ("NLRB" or "Board") and supplements it as follows.

This case involves a gambling casino, the San Manuel Indian Bingo and Casino ("Casino"), owned by the San Manuel Band of Serrano Mission Indians ("Tribe"). The Casino has a large bingo hall, card games and over 1,000 video gaming machines, covering 115,000 square feet. JA 0188. It also sells food and beverages to patrons. JA 0188. It has approximately 1400 employees. JA 0188.

The Casino relies upon non-Indians for staffing and patronage. The vast majority of the Casino's employees are non-Indians who reside in California, off the Tribe's property. JA 0183. This will not change because, as of the 2000 census, there were less than 500 "Serrano" Indians in the United States. *See* United States Census Bureau, "Characteristics of American Indians and Alaska Natives by Tribe and Language: 2000, at 37 (December 2003) (available at http://www.census.gov/prod/cen2000/phc-5-pt1.pdf) (last visited June

29, 2006). The Casino is located 6.2 miles from the City of San Bernardino and 60 miles from Los Angeles. About 1.8 million people live within 25 miles of it. JA 0189. It is patronized almost entirely by non-Indians. JA 0183.

SUMMARY OF ARGUMENT

The NLRB's decision in this case is neither novel nor in conflict with federal Indian law. In Section I, we describe the development of Board law regarding NLRB jurisdiction over commercial businesses owned by tribes and operating on Indian reservations, showing that the Board's decision in this case developed from that law. In Section II, we place the Board's decision in the context of federal Indian law. Tribes do not retain all attributes of sovereignty: their governmental powers are limited to self-governance in intramural affairs. The federal courts of appeals have drawn on this fundamental principle to hold that federal laws of general applicability apply equally to Indian tribes unless the law would interfere with self-governance in intramural affairs or abrogate treaty rights or there is some indication in the legislative history that the law does not apply. This doctrine has been applied to hold that federal employment statutes

govern tribal businesses even where, as here, the business provides revenue for the tribe.

In Section III, we show how the Board's decision respects what tribal sovereignty exists under federal Indian law. The Board recognizes an implied exception for Indian tribes from the National Labor Relations Act, 29 U.S.C. § 151 *et seq* ("NLRA" or "Act"), but only when they are exercising their limited sovereign powers. In Section IV, we respond to the Tribe's and *amici*'s arguments about Congressional intent. When Congress has wanted to exempt tribes from federal employment laws, it has done so, and there is no evidence in the NLRA or in other federal legislation relating to Indians that Congress intended to exempt tribal businesses from the NLRA. Finally, Section V shows that the NLRA will not interfere with any established tribal rights. Tribes will not be compelled to cede any right in bargaining or to allow nonemployee organizers on their property; and they will be able to apply preferences for Indian employees and policies for protecting casino security.

ARGUMENT

I. THE *SAN MANUEL* DECISION GROWS OUT OF THE NLRB'S EARLIER ASSERTIONS OF JURISDICTION OVER TRIBAL AND RESERVATION BUSINESSES

The Board's decision does not represent a reversal of long-standing precedent. In fact, the Board decided to assert jurisdiction on Indian reservations over forty years ago and over Indian-owned enterprises fourteen years ago. *Texas-Zinc Minerals Corp.*, 126 NLRB 602 (1960), *inj. against NLRB representation proceedings den. sub. nom. Navajo Tribe v. NLRB*, 288 F.2d 162 (D.C.Cir. 1961); *Sac & Fox Indus., Ltd.*, 307 NLRB 241 (1992) ("*SFI*"). In those cases, the Board used the same analytical framework – established by the Supreme Court in *Federal Power Comm'n. v. Tuscarora Indian Nation*, 362 U.S. 99 (1960) – as it did in this case. The intervening case on which the Tribe and *amici* rely, *Fort Apache Timber Co.*, 226 NLRB 503 (1976), was an aberration that was applied in only two cases and that the Board in *SFI* acknowledged to be a departure from its previous approach.

A. The NLRB and this Court first applied the *Tuscarora* principle over forty years ago in *Texas-Zinc Minerals*

In the first case in this area, the Board and this Court held that a business is subject to the NLRA even if it is located on an Indian reservation. *Texas-Zinc Minerals Corp.*, 126 NLRB 602 (1960), *inj. den. sub. nom. Navajo Tribe v. NLRB*, 288 F.2d 162 (D.C.Cir. 1961). It did not matter whether the employees of the business are Indians. *Id.* at 164-165. This Court relied upon *Tuscarora*, where the Supreme Court stated that "it is a principle now well settled by many decisions of the Supreme Court that a general statute in terms applying to all persons includes Indians and their property interests," 362 U.S. at 116l, and held that the NLRA is such a law. 288 F.2d at 165.

B. The Board's decision in *Fort Apache* was an anomaly

Texas-Zinc Minerals involved a business that was not owned by the Indian tribe upon whose reservation it operated. In *Fort Apache*, the Board was faced for the first time with the question whether to assert jurisdiction over a commercial enterprise owned and operated by an Indian tribe on its reservation. The company was directed by the tribe's

governing body. Pointing to the tribe's right of self-government on its reservation, the Board concluded that the NLRA's exemption for state and local governments should be construed to include tribally-owned businesses. 226 NLRB at 504-05.

The Board limited *Fort Apache* almost immediately. In *Devil's Lake Sioux Mfg. Corp.*, 243 NLRB 163 (1979), the Board asserted jurisdiction over a manufacturing facility located on a reservation. The business was owned by a corporation formed between the tribe and Brunswick Corporation. The tribe owned 51 percent of the stock, and Brunswick owned 49 percent. Despite the tribe's ownership of the majority interest of the corporation, the tribe did not direct the workforce. Instead, Brunswick officials were a majority on the corporation's board of directors and Brunswick set labor policy at the facility. Because the corporation was "not a wholly owned tribal enterprise which [was] completely controlled by the tribal council," it was not exempt as an arm of a government. *Id.* at 164 (emphasis added).

The Board followed *Fort Apache* in only one case. In *Southern Indian Health Council, Inc.*, 290 NLRB 436 (1988), the Board refused to

assert jurisdiction over a tribal health facility owned and operated on a reservation by a consortium of tribes. There was no further development of the *Fort Apache* doctrine.

C. The Board abandoned the *Fort Apache* analysis in *Sac & Fox Industries*

That changed dramatically four years later in *SFI*, which clearly presaged the Board's decision in this case. The Board adopted and applied the analytical framework of *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985) (discussed in Section II.C of this brief). 307 NLRB at 243. Like this Court's decision in *Texas-Zinc Minerals*, the *Coeur d'Alene* decision rests on the proposition established by the Supreme Court in *Tuscarora* that federal laws of general applicability govern tribes. The Board followed *Coeur d'Alene* even though it recognized that the *Coeur d'Alene* test was "developed in cases involving Indian or tribal activities on the reservation," *id.* at 244 n. 20, and the business before it was located off the tribe's reservation. The Board rejected the proposition relied upon in *Fort Apache*, that Indian tribes and their businesses are like state governments and therefore share the state government exemption from the NLRA's definition of

"employer." *Id.* at 243-245. The Board distinguished *Fort Apache* and *Southern Indian Health Council* on the grounds that they involved on-reservation enterprises but studiously avoided endorsing the continued vitality of the holdings in those cases. *Id.* at 243 n. 14, 244 n.20 & 245 n.31. Then, applying the *Coeur d'Alene* analysis, the Board held it had jurisdiction because the NLRA is a statute of general application that does not explicitly exclude Indian tribes and the *Coeur d'Alene* exceptions did not apply. *Id.*

D. The *Yukon Kuskokwim* decisions reaffirmed the Board's abandonment of the *Fort Apache* approach

In its last decision in this area before this case, *Yukon Kuskokwim Health Corp.*, 328 NLRB 761 (1999), the Board upheld an NLRB Regional Director's decision to direct an election among the employees of a hospital in Alaska operated by and for Alaska Natives. The Board agreed that the hospital was subject to its jurisdiction because it was not on reservation land and most of its employees were not Indian.

The holding in *Yukon Kuskokwim* further undermined the vitality of the *Fort Apache* analysis. The *Fort Apache* reasoning was very simple and straightforward: Indian tribes are sovereign governments and therefore

exempt under the NLRA's exemption for state governments. The hospital in *Yukon Kuskokwim* was owned by a nonprofit corporation governed by a board of directors elected by the Alaskan Native tribes located in the area served by the hospital. That nonprofit corporation took over operation of the hospital from the federal Indian Health Services pursuant to a self-determination compact with the federal government. Under *Fort Apache*, this enterprise would have been regarded as part of tribal government and therefore exempt. In fact, that is exactly what happened in *Southern Indian Health Council*. One of the ways the Board distinguished *Southern Indian Health Council* was that the hospital was located on reservation land, but the actual decision in *Southern Indian Health Council* laid no emphasis on this point, instead resting on the theory that tribal operations are government operations and therefore exempt. At the end of its decision in *Yukon Kuskokwim*, the Board explicitly rejected the contention that Indian-owned enterprises are "government" operations and therefore exempt. Although it confined this ruling to the case before it, involving an off-reservation operation, *Yukon Kuskokwim* showed that

the Board had not retreated from *SFI*'s effective abandonment of *Fort Apache*.

Its order, however, was denied enforcement by this Court. *Yukon Kuskokwim Corp. v. NLRB*, 234 F.3d 714 (D.C.Cir. 2000). While the Court agreed that an Indian tribe is not a "state" within the meaning of Section 2(2) of the Act, and found no fault with the Board's use of the distinction between on and off-reservation enterprises, it returned the case to the Board for further exploration of the hospital's claim that it was part of the federal government pursuant to the Indian Self-Determination Act, 25 U.S.C. § 450, *et seq* ("ISDA").

The Board's supplemental decision was issued at the same time as *San Manuel*. *Yukon Kuskokwim Health Corp.*, 341 NLRB No. 139 (2004). The Board continued to reject the ISDA argument but now applying the analytical framework of *San Manuel*, reversed itself on the question of jurisdiction over the hospital. Instead of inquiring whether or not the operation was on a reservation, it applied the "governmental-proprietary" distinction (*see* Section III of this brief), familiar from many other contexts, and came to the unsurprising decision that because the hospital

functioned as the public hospital for the Alaskan Natives, did not serve the non-Native population, and was not in competition with private hospitals, it was governmental in character.

E. The Ninth Circuit holds that the NLRB does not plainly lack jurisdiction over tribal employers

In *NLRB v. Chapa De Indian Health Program*, 316 F.3d 995 (9th Cir. 2003), the Ninth Circuit enforced subpoenas issued by the NLRB to a tribal organization that is partially funded by ISDA and provides free health services to Native Americans. The Ninth Circuit applied that the same test as the NLRB used in *SFI*, and concluded that the NLRB does not plainly lack jurisdiction over the health center. The court specifically rejected the same argument that the Tribe makes here: that the NLRA does not apply to tribes and their organizations because the statute does not expressly state that it does. *Id.* at 998.

The Tribe and *amici* describe the Board's decision in *San Manuel* as a wayward departure from Indian law, but the Board did not invent the tests it used to determine whether it had jurisdiction. As we show in the next section, the Board followed a long line of decisions from the federal courts of appeals and actually brought its jurisprudence in line with the

dominant federal Indian law doctrine. *Fort Apache* was the aberration. *SFI* and *San Manuel* were the correction.

II. THE BOARD'S DECISION IS CONSISTENT WITH THE WELL-ESTABLISHED RULE OF FEDERAL INDIAN LAW THAT INDIAN SOVEREIGNTY IS LIMITED TO SELF-GOVERNANCE IN PURELY INTRAMURAL MATTERS

A. Tribes are dependent on the federal government for their sovereignty

Indian tribes have some attributes of sovereignty, but these are frequently misunderstood and overstated, as the Tribe and *amici* do in this case. Tribes are not akin to foreign nations with which the United States has "state-to-state" relationships. Indian tribes enjoy a limited sovereignty only by the grace of Congress. "The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance." *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

The United States Constitution, Art. I, §8, cl. 3, gives the federal government plenary authority over Indian affairs. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764-765 (1985). Federal law is therefore the source

of whatever rights Indian tribes possess[1], and Congress may restrict or modify those rights as it chooses. "[I]t is clear that all aspects of Indian sovereignty are subject to defeasance by Congress . . . ." *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 787 n.30 (1984).

The tribes are therefore recognized not to be independent units of government. They are "dependents" of the United States. *Duro v. Reina*, 495 U.S. 676, 686 (1990) ("dependent status"); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 196 (1978) ("conquered and dependent"). This is not a recent development. Indian tribes have been described by the Supreme Court as "domestic dependent nations" since *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

B. Tribal sovereignty is limited to internal self-government

The inherent sovereign powers Indian tribes possess are limited to what is needed for self-government. Tribes have inherent criminal

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[1] The Tribe may respond that its inherent or retained sovereignty predates the establishment of our federal government and therefore exists independently of federal law. In fact, the scope of tribal power is a question of federal common law. *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985).

jurisdiction only over their own members. This criminal jurisdiction does not extend to non-members, even for offenses committed on reservation lands. *Oliphant*, 435 U.S. at 196. Tribes' civil jurisdiction is also restricted. In *Montana v. United States*, 450 U.S. 544 (1981), the Court announced "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* at 565. "Tribal assertions of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be regulated by them." *Nevada v. Hicks*, 533 U.S. 353, 361 (2001).

There is a tendency to treat this standard expansively, contending as do the Tribe and *amici*, that the proceeds from commercial endeavors are necessary for self-government because valuable programs tribes adopt for their members are financed this way. The Supreme Court sees the principle much more narrowly. The laws tribes have the right to make and enforce are limited to purely intramural matters:

> In *Strate* [*v. A-1 Contractors*, 520 U.S. 438 (1997)], we explained that what is necessary to protect tribal self-government and control internal relations can be understood by looking at the examples of tribal power to which Montana referred: tribes have authority "[to punish tribal offenders ,] to determine tribal membership, to regulate domestic relations

> among members, and to prescribe rules of inheritance for members." These examples show, we said, that Indians have "'the right . . . to make their own laws and be ruled by them.'"

Hicks, 533 U.S. at 379 (emphasis added; internal citations omitted); *see also Montana*, 450 U.S. at 563-564 (stating that in addition to punishing tribal offenders, the other inherent sovereign powers of Indian tribes are "to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members"); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978) (holding that Indian tribes have the power to make law in internal matters such as membership, inheritance rules and domestic relations and to enforce those laws in their own forums). Nothing in these decisions suggests that tribes' right to make their own laws extends to laws governing ordinary commercial activities.

The importance of the *Hicks* discussion to the instant case could hardly be overstated. This description of what is truly within Indian sovereignty matches *Coeur d'Alene*'s description (which provides the jurisdictional analysis the Board used in this case): "We believe that the tribal self-government exception is designed to except purely intramural

matters such as conditions of tribal membership, inheritance rules, and domestic relations from the general rule that otherwise applicable federal statutes apply to Indian tribes." *Coeur d'Alene*, 751 F.2d at 1116. Despite the fact that the most recent pronouncement by the Supreme Court coincides exactly with the view in the *Coeur d'Alene* about the true limits of Indian sovereignty, the Tribe and *amici* completely neglect *Hicks,* its predecessor *Strate*, and the entire *Coeur d'Alene* line of cases. *Montana* and *Santa Clara Pueblo* are heavily relied upon but their description of what is truly "intramural" is left out.

C. *Merrion* could not have not overruled *Tuscarora* because it did not address the applicability of general federal statutes to tribes

The Tribe and *amici* rely heavily on the line of cases, featuring *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), holding that tribes have the inherent sovereign power to tax non-Indians doing business on the tribe's lands. Petitioner's Opening Brief ("Pet. Br."), 29-32; *Amici* Brief ("Am. Br."), 5-7. They argue from this that the many non-Indians employed by the Tribe's casino are subject to the Tribe's jurisdiction.

The Tribe's authority over its employees is actually not in dispute at all.[2] Like any other employer, the Tribe decides whom to employ under what terms and conditions of employment. The Tribe and *amici* are also right that the Court has held that a divestiture by Congress of such sovereign powers as the right to exclude unwanted persons from its land or to levy taxes within its jurisdiction require "clear indications of legislative intent." *Merrion*, 455 U.S. at 149.

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[2] The question whether a Tribe, as an employer, may establish terms and conditions of employment for its employees is different from the question whether the Tribe, as a government, has civil regulatory jurisdiction over casino employees. "[T]he existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers." *Hicks*, 533 U.S. at 360. Judge Canby has suggested that the Supreme Court "is evolving, purposefully or not, toward a nongovernmental view of tribal power":

> These Supreme Court decisions [regarding tribal civil jurisdiction over nonmembers] emphasize two factors not previously considered to be of jurisdictional importance: tribal membership (as opposed to Indian status), and land ownership (as opposed to reservation status as Indian country). Each factor inclines toward a view of tribal power that is not necessarily sovereign and governmental. Private clubs may regulate the conduct of members, but that membership-based power is not governmental; the members may resign and the club has no ability to regulate nonmembers. Private landowners can establish rules of behavior for those who wish to remain on their lands, but that power, too, is not governmental.

William C. Canby, Jr., *American Indian Law in a Nutshell* 78 (West 1998).

The problem with all this is that it has nothing to do with the issue presented here: whether a federal law of general applicability applies to tribal enterprises. That was not the issue in any of the cases cited by Tribe and its *amici*, which is undoubtedly why *Tuscarora* was not mentioned in them.

Merrion presented the question whether a tribe could impose an oil and gas severance tax on lessees operating on its land. *Id.* at 152. In *United States v. Mazurie*, 419 U.S. 554 (1975), the Court upheld a federal law granting Indian tribes the power to regulate alcohol sales within their reservations, including by non-members of the tribe. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) was a suit under the Indian Civil Rights Act (which is not a law of general applicability) challenging a tribal rule denying membership to the children of female members who married outside the tribe. The Court held that the Indian Civil Rights Act did not create a federal, private right of action to challenge tribal laws on membership, inheritance rules and domestic relations. *Id.* at 59, 72. *United States v. Wheeler*, 435 U.S. 313 (1978) held only that Indian tribes retain enough sovereignty to exercise criminal jurisdiction over tribal

members who violate tribal law. No federal statute was involved and, in fact, the Court stated that an "implicit divestiture of sovereignty has been held to have occurred . . . involving the relations between an Indian tribe and non-members of the tribe." *Id.* at 326. The Court held in *Montana* that the tribe lacked inherent sovereignty to regulate hunting and fishing by non-members of the tribe on land within the tribe's reservation that had been alienated to non-tribe members in fee simple because this power was not "necessary to protect tribal self-government or to control internal relations." *Id.* at 545-546. The tribe could posses such power only through "express congressional delegation." *Id.* at 546. Finally, the issue in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) was not whether the Tribe's off-reservation ski resort was subject to a federal law of general applicability but instead whether the Indian Reorganization Act made the resort a federal instrumentality immune from state taxation. The Court held that the tribe's need for income from the resort did not immunize it from the tax. *Id.* at 154-155, 157.

Tuscarora and *Merrion* are two separate lines of authority. The *Tuscarora* doctrine governs when tribes and their enterprises are subject to

federal laws of general applicability. *Merrion* is entirely distinct. It concerns whether tribes posses governmental powers by virtue of their inherent sovereignty. The Tribe and *amici* have relied on the wrong line.

It does not help the tribes to argue that *Merrion* undermined *Tuscarora* (without the Supreme Court apparently even being aware of it). It has been suggested that the *Coeur d'Alene* analysis actually reconciles *Tuscarora* and *Merrion*. *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966, 984 (10th Cir. 2005) (Lucero, J, concurring). In this view, *Merrion* leads to *Coeur d'Alene*'s three exceptions to the *Tuscarora* principle that "federal statutes of general applicability apply to Indian lands": purely intramural matters, abrogation of treaty rights or contrary congressional intent. *Id.*

D. Four federal circuits have held that general federal employment laws apply to tribal businesses operating on tribal land

The federal courts have been called upon to determine whether labor laws apply to tribal commercial enterprises located on tribal lands. The Second, Seventh, Ninth and Tenth Circuits have adopted the same method of analysis and have ruled that three statutes regulating employment – the

Fair Labor Standards Act, 29 U.S.C. §§ 201-219 ("FLSA"); the Occupational Safety and Health Act, 29 U.S.C. §§ 651-700 ("OSHA"); and the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 ("ERISA")– apply to these businesses.

1. The Ninth Circuit

This line of cases began with the Ninth Circuit's decision in *Coeur d'Alene*. Based on *Tuscarora*, its analysis presumes that laws of general applicability include Indians and their property interests. The court pointed out that its previous decisions involving non-labor laws uniformly applied this presumption and held the laws applicable instead of interpreting them to exclude Indians. *Coeur d'Alene*, 751 F.2d at 1115-1116. The court observed, however, that there are three exceptions to the general rule:

> (1) the law touches "exclusive rights of self-governance in purely intramural matters;" (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties;" or (3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians or their reservations . . . ." In any of these three situations, Congress must expressly apply a statute to Indians before we will hold that it reaches them.

Id. at 1116 (internal citations omitted).

The court applied these principles to the question whether OSHA applied to a tribal farm which produced crops for sale and employed non-Indians. After finding that OSHA's coverage is comprehensive, the court examined the three exceptions. *Id.* at 1115. The tribe argued that applying OSHA would infringe on its self-government powers. *Id.* at 1116. The court rejected this sweeping argument because it would mean that tribal enterprises would be exempt from virtually all federal laws, including tax laws, which had already been held to apply:

> The operation of a farm that sells produce on the open market and in interstate commerce is not an aspect of tribal self-government. Because the Farm employs non-Indians as well as Indians, and because it is in virtually every respect a normal commercial farming enterprise, we believe that its operation free of federal health and safety regulations is neither profoundly intramural . . . nor essential to self-government.

Id. (internal citations omitted). The tribe tried to persuade the court to adopt a different formulation than "purely intramural matter." It asserted that the self-government exception existed whenever the tribe would be deprived of a "fundamental aspect of sovereignty." It argued that one such aspect was its power to exclude non-Indians from its lands, including OSHA inspectors. The court completely rejected the proposed formulation

and the argument based on it. The court acknowledged that the tribe's power to exclude people from its land is a hallmark of sovereignty, but held that Congress modified it to require tribes to admit government agents, such as OSHA inspectors, onto Indian lands. *Id.* at 1117.

The court quickly dispensed with the "treaty rights" exception because the tribe had no treaty with the United States that gave it any right to exclude anyone from its reservation. *Id.* The court distinguished *Donovan v. Navajo Forest Prods. Indus.*, 692 F.2d 709 (10th Cir. 1982) because that decision involved the Navajo, who had a treaty with a specific provision giving the tribe the right to exclude non-tribe members from its reservation. *Coeur d'Alene*, 751 F.2d at 1117.[3] Finally, the third exception did not exist because nothing in the legislative history of OSHA suggests that Congress intended to exclude tribal enterprises. *Id.* at 1118.

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[3] In *Navajo Forest*, the court applied the *Tuscarora* rule. However, it found that OSHA did not apply to an enterprise on the Navajo Reservation because the treaty rights exception described in *Coeur d'Alene* was applicable. *Coeur d'Alene*, 751 F.2d at 1116. The Navajo have a treaty which gives them the right to exclude non-Indians not authorized to enter upon the Navajo Reservation. The court decided that applying OSHA to the tribal enterprise would necessarily entail the presence of OSHA inspectors on the reservation, whether or not authorized by the Navajo, in derogation of the treaty right. *Navajo Forest,* 692 F.2d at 712.

The Ninth Circuit applied its *Coeur d'Alene* analysis in two subsequent decisions. In *United States Dep't of Labor v. Occupational Safety & Health Review Comm'n*, 935 F.2d 182 (9th Cir. 1991), the court again addressed the question of OSHA's application to tribal enterprises. In that case, the tribe owned and operated a sawmill on its reservation which sold finished products in interstate commerce. The majority of the mill workers were not Indians. The mill was the largest source of income for the tribal government and almost all of the timber cut at the mill was supplied by tribal loggers. *Id.* at 183. Applying *Coeur d'Alene*, the court held that OSHA applied because the mill was a commercial enterprise and not a purely intramural matter, despite the fact that the mill's income was "critical to the tribal government." *Id.* at 184. The "treaty rights" exception was a more serious one: the tribe had a treaty with the United States that included a provision prohibiting any white person from residing on the reservation without permission. *Id.* Applying the canon of construction that treaty rights are to be liberally construed in favor of Indians, the court held that the tribe possessed a general right of exclusion but that this right was not good against OSHA inspectors. *Id.* at 185-86.

It reasoned that OSHA gave inspectors a limited right of entry and construed its earlier decisions as ruling implicitly that "the government was empowered to enforce the laws." *Id.* Accepting the tribe's argument that the treaty right gave it the power to exclude federal agents and private citizens would mean that "the enforcement of nearly all generally applicable federal laws would be nullified, thereby effectively rendering the *Tuscarora* rule inapplicable to any Tribe which has signed a Treaty containing a general exclusion provision." *Id.* at 187. The court therefore rejected the argument and held that the treaty right of exclusion and the limited access of OSHA inspectors were not in conflict. *Id.*

In *Lumber Indus. Pension Fund v. Warm Springs Forest Prods.*, 939 F.2d 683 (9th Cir. 1991), a case involving the same sawmill, the court held that ERISA applied to the mill. *Id.* The tribe argued that applying ERISA would strip its self-government powers. The court disagreed. It held that ERISA did not prevent the tribe from establishing its own employee benefit plan. *Id.* It also found that ERISA would not infringe any treaty rights and that there was no evidence that Congressional intended to exclude tribes from ERISA's coverage. *Id.* at 685-686.

2. The Seventh Circuit

The Seventh Circuit followed *Coeur d'Alene* and reached the same conclusion regarding ERISA's application to tribes. *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 936 (7th Cir. 1989). The court ruled that ERISA is a statute of general application with exceptions for governmental plans, but with no exceptions for Indian tribes or any plans they might adopt. *Id.* at 933. The Seventh Circuit then turned to the exceptions listed in *Coeur d'Alene*. The court found that the application of ERISA did not invade a purely intramural matter. *Id.* at 935. ERISA, in its view, did not broadly and completely define the employment relationship between the tribe and its employees. *Id.* It applies only if a tribe decides to offer an employment benefit plan, and then only imposes reporting, disclosure and fiduciary requirements. *Id.* The court rejected the argument that ERISA's exemption for federal and state governments should be interpreted to include Indian tribes because they are self-governing on their reservations:

> Finally, with respect to Smart's contentions that the exemptions provided for state and local governments indicate Congress' unwillingness to have ERISA apply to sovereigns generally, and thus Indian Tribes should also be similarly exempt, there is no clear evidence of congressional intent to exempt them. The analogy is particularly inapt given the

> significant differences between states and their political subdivisions on one hand and Indian Tribes on the other. Significant concerns of federalism, peculiar to Federal-State relations, account for federal deference to the autonomy of State government. Federalism uniquely concerns States; there simply is no Tribe counterpart. Smart is unable to point to any evidence of congressional intent that ERISA is not applicable to Tribe employers and Indians.

Id. (internal citations omitted).

In *Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490 (7th Cir. 1993), the Seventh Circuit considered FLSA's application to game wardens employed by a commission formed by several tribes to enforce their members' treaty rights to fish and hunt on non-reservation lands. *Id.* at 491. The majority and dissenting opinions agreed that employees of Indian agencies are covered by the FLSA. *Id.* at 495, 504. The majority held, however, that because the wardens are law enforcement personnel, they come under FLSA's exemption of police officers. *Id.* at 495. Applying the *Coeur d'Alene* test would have produced the same result. The Ninth Circuit reached that conclusion regarding law enforcement officers of the Navajo Nation Division of Public Safety because law enforcement is "a traditional governmental function." *Snyder v. Navajo Nation*, 382 F.3d 892, 895 (9th Cir. 2004).

3. The Tenth Circuit

The Tenth Circuit also adopted the *Coeur d'Alene* test. *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457, 1462-63 (10th Cir. 1989). The court found that 42 U.S.C. §§ 1981 and 2000d, laws prohibiting racial discrimination, were generally applicable laws. *Id.* at 1462. Applying the first *Coeur d'Alene* exception, however, the court found that these laws should not be applied to the facts at hand. *Id.* at 1463. Plaintiffs, descendants of the former slaves of the Cherokees, alleged that the Cherokees "have discriminated on the basis of race by refusing to accord them tribal membership and its privileges and benefits." *Id.* The court held that "no right is more integral to a tribe's self-governance than its ability to establish its membership." *Id.* Because the application of the laws would intrude into this "purely intramural matter," the court did not exercise jurisdiction. *Id.*

4. The Second Circuit

In *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996), the defendant was a construction company owned and operated by the Mashantucket Pequot, a tribe with a reservation but no treaty. *Id.* at

175. The company had both Indian and non-Indian employees. It worked exclusively on the reservation performing construction jobs, including construction of roads, homes and expansion of an Indian casino. *Id.* The question, once again, was whether OSHA applied to the company's operations. The Second Circuit held that it did, adopting and applying the *Coeur d'Alene* test. Accepting the established proposition that OSHA is a law of general applicability, the court considered whether any of the exceptions applied. The company "liken[ed] itself to a department of public works," and claimed that OSHA would deprive it of its tribal sovereignty. It also argued that application of OSHA would prevent it from adopting its own safety rules. Both arguments were rejected. *Id.* at 176.

The company claimed that its activities were purely intramural, because they were all performed on the reservation under the direction of the Tribal Council. *Id.* at 179. The court found, however, that the company "is in the construction business; and its activities are of a commercial and service character, not a governmental character. That an entity is owned by a tribe, operates as an arm of a tribe, or takes direction

from a tribal council, does not *ipso facto* elevate it to the status of a tribal government." *Id.* The company's employment of non-Indians was important to the court:

> Limitations on tribal authority are particularly acute where non-Indians are concerned. The Supreme Court has recognized that tribal inherent sovereign powers do not extend to the activities of nonmembers of the tribe. This is so because the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes. . . ."
>
> MSG's employment of non-Indians weighs heavily against its claim that its activities affect rights of self-governance in purely intramural matters. In general, tribal relations with non-Indians fall outside the normal ambit of tribal self-government. Furthermore, intramural matters generally consist of conduct the immediate ramifications of which are felt primarily within the reservation by members of the tribe. Thus, the employment of non-Indians is another factor that tips the balance toward application of OSHA.

Id. at 180-181 (emphasis added; internal citations omitted).

The final reason the court rejected the company's claim that OSHA would interfere with its sovereignty over intramural matters was that the company performed work on a casino, an enterprise indisputably involved in interstate commerce: "Indeed, a bingo hall and casino even on tribal grounds designed to attract tourists from surrounding states undeniably

affects interstate commerce . . . ." *Id.* at 181. The court also dismissed the company's claim that OSHA would prevent it from adopting its own safety regulations. The court pointed out that because tribes are not governments within the meaning of OSHA, OSHA's preemption of state and local laws does not affect the tribes, who are therefore entitled to enact their own safety regulations (just like other employers under OSHA) as long as they are consistent with OSHA. *Id.* at 182.

5. *Coeur d'Alene* has also been applied to other laws, including criminal laws

This approach has not been limited to employment cases. The Seventh, Eighth and Ninth Circuits have applied this analysis in the field of criminal law. *U.S. v. Brisk*, 171 F.3d 514, 520, 522 n.6 (7th Cir. 1999) (citing cases); *U.S. v. Baker*, 63 F.3d 1478, 1484-1485 (9th Cir. 1995); *U.S. v. Wadena*, 152 F.3d 831, 842-843 (8th Cir. 1998) ("At the time that the Indian Country Crimes Act was passed, it may have been assumed . . . that federal laws outside of enclave laws were not applicable to the Indian Country. However, as Indian law evolved, that premise was discarded. General federal criminal laws directed to all persons became recognized as applying equally to Native Americans within Indian Country.") The

Eleventh Circuit has applied *Couer d'Alene* to the non-employment provisions of the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 ("ADA") even though the ADA expressly excludes Indian tribes from the definition of "employer." *Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1130 (11th Cir. 1999).

III. THE NLRB RECOGNIZES AN IMPLIED EXEMPTION FOR TRIBES THAT ARE EXERCISING RIGHTS OF SELF-GOVERNANCE IN INTRAMURAL AFFAIRS

The Tribe argues that the NLRB's assertion of jurisdiction over the Casino is inconsistent with the NLRB's failure to assert jurisdiction over territorial governments in Puerto Rico and the United States Virgin Islands.[4] The Tribe distorts the NLRB's ruling in this case. The NLRB did not

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[4] In the cases cited by the Tribe, government agencies performing governmental functions were held exempt from the NLRA. *See Chaparro-Febus v. ILA Local 575*, 983 F.2d 325, 327 (1st Cir. 1993) (government agency created by the Commonwealth of Puerto Rico to facilitate maritime transportation to and from Puerto Rico); *Virgin Islands Port Auth. v. SIU de Puerto Rico*, 354 F.Supp. 312 (D.V.I. 1973) (port authority providing pilot services to ships). If tribes operated these types of agencies, they would likely be found exempt under the *Coeur d'Alene* test, as the hospital in *Yukon Kuskokwim* was.

hold that the NLRA always applies to tribal employers; it held that the NLRA applies to tribal employers when they are not exercising "exclusive rights of self-governance in purely intramural matters." JA 0319. The Board drew upon federal Indian law to conclude that casino gaming is not within the sphere of self-government activities over which tribes are entitled to exert their unique form of sovereignty. *Id.* While the Tribe argues to this Court that the NLRB is not competent to apply federal Indian law to the labor relations context, the Tribe's real complaint is that the NLRB did not mechanically deem Indian tribes to be sovereign governments, but instead applied federal Indian law and recognized the limitations of tribal sovereignty that federal law has established.

The NLRB will not have difficulty applying the *Coeur d'Alene* test to tribal employers and declining to exercise jurisdiction when *Coeur d'Alene*'s exceptions apply. Federal courts have had little difficulty determining when tribal employers are acting in a governmental capacity. *Compare Snyder*, 382 F.3d at 895-96 (tribal law enforcement agency performs governmental function and thus is not governed by FSLA); *EEOC*

v. Karuk Tribe Housing Auth., 260 F.3d 1071, 1080 (9th Cir. 2001) (Age Discrimination in Employment Act does not apply to a tribal housing authority because it "occupies a role quintessentially related to self-governance") *with Florida Paraplegic Ass'n*, 166 F.3d at 1129 (tribal restaurant and entertainment facility do not fall within the self-governance exception); *Mashantucket Sand & Gravel*, 95 F.3d at 181 (tribal construction company building casino does not fall within the *Coeur d'Alene* self-governance exception). Courts face a similar, although not identical, question when governmental actions are challenged as preempted by federal labor law. *See Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass/ RI, Inc.*, 507 U.S. 218, 232 (1993) (holding that state agency's actions not preempted because agency was acting in a proprietary, instead of regulatory, capacity); *Building & Constr. Trades Dep't v. Allbaugh*, 295 F.3d 28, 35-36 (D.C. Cir.), *cert. denied* 537 U.S.1171 (2002) (upholding Executive Order on same grounds).

IV. THERE IS NO EVIDENCE THAT CONGRESS INTENDED TO EXCLUDE TRIBAL BUSINESSES FROM COVERAGE OF THE NLRA

A. Applying the NLRA does not with conflict federal policies of fostering tribal self-government and economic development

Amici contend that enactment of the Indian Reorganization Act, 25 U.S.C. § 461 *et seq* (1934) ("IRA") one year before the NLRA demonstrates that Congress could not have intended to the NLRA to apply to tribes because the stated purpose of the IRA is to foster tribal self-government and economic development. There are three problems with this argument. First, nothing in the IRA addresses tribal labor relations or encourages Indian tribes to develop economically by becoming large-scale employers of non-Indians. Second, Congress passed the NLRA in 1935 to facilitate economic recovery:

> Experience has proved that protection by law of the rights of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions and by restoring equality of bargaining power between employers and employees.

29 U.S.C. § 151. There is no reason to believe that Congress would have decided that tribal businesses would not also be served by laws "encouraging practices fundamental to the friendly adjustment of industrial disputes." Third, the IRA's goal of fostering tribal self-government is not undermined by requiring tribal businesses to comply with the NLRA. Under the *Coeur d'Alene* test adopted by the Board in this case, the NLRA does not apply to tribes when they are acting as governments.

B. Congress has expressly exempted Indian tribes from employment laws when that is its intent

The Tribe takes the argument about Congress's intent in passing the NLRA in a different direction. The Tribe argues that Congress could not have intended the NLRA to apply to commercial businesses operated by tribes because, when the NLRA was enacted in 1935, there were few tribal employers. *See* Pet. Br., at 35 n.8. While this may be true, Congress subsequently amended the NLRA's definition of "employer" in 1947 and again in 1974 by adding and deleting exceptions to the definition. *See* 61 Stat. 137 (June 23, 1947) (adding "any wholly owned Government corporation, or any Federal Reserve Bank" to the exclusions from NLRA Section 2(2)); 88 Stat. 395 (July 26, 1974) (deleting exemption for "any

corporation or association operating a hospital"). By 1974, Congress was undoubtedly aware that tribes were acting as ordinary commercial employers. Congress excluded tribes from the definition of "employer" when it enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b); and it did so again in 1991 when it passed the ADA. 42 U.S.C. § 12111(5)(B)(I). Congress chose not to exclude tribes from the NLRA's definition of "employer."

C. The Tribe advocates a test for applicability of federal laws that would exempt tribes from complying with virtually all federal laws

The Tribe argues that federal laws apply to tribal businesses only if Congress expressly provides that the law applies, but does not give any examples of such a law in any field of federal regulation. The only examples of federal employment statutes with express provisions concerning tribes are Title VII and the employment provisions of the ADA, where Congress expressly provided that the laws do not apply to tribes. *See* 42 U.S.C.§ 2000e(b); 42 U.S.C. § 12111(5)(B)(I). If the Tribe is right, and the Supreme Court in *Tuscarora* and the courts of appeals following it are wrong, one would expect to see some indication in Congress' work that

it was following this approach. The Tribe points to none, so the test it advocates must mean that it and other tribes are in the position that virtually no federal employment, banking, criminal or any other laws apply to their businesses.

The Tribe argues that its casino must be exempt from federal law because tribal economic development through gaming is a governmental purpose. According to the Tribe, all of the investment and income from casino gaming is "governmental." Pet. Br., at 8, 42-43. The Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA"), does not support the Tribe's argument. IGRA does not limit the Tribe to using its gaming revenues to things which are governmental in character, like roads, sewers, or hospitals. Gaming profits can be used for "economic development." 25 U.S.C. § 2710(b)(2)(B)(iii). There is no definition or limit to this term. A tribe may invest the proceeds from its casinos in any other enterprise, finance, manufacturing, service, retail or construction, on or off a reservation. It can pay cash dividends to its members, who are not limited in what they may do with the money. 25 U.S.C. § 2710(b)(3). In fact, the Tribe's own laws provide for "per capita" payments to tribal

members. JA 0094, 96-97. These per capita payments do not serve a "governmental" purpose any more than dividend payments to corporate shareholders do.

There is apparently no end to this extraordinary claim. Nothing in its expression by the Tribe and *amici* or its logic would confine it to the reservation or to any lines of business. Once the reservation had all the homes, roads, sewers, water, schools and hospitals it could use (which is probably already the case for small tribes with large gaming revenues, like the Tribe at issue here), a tribe may become a potent competitor in the national or international economy, employing thousands of non-Indian employees, and according to Respondent, it would all be exempt from the NLRA and other federal laws silent about tribes. *Cf. Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 155 (1980) (holding that federal law "concern with fostering tribal self-government and economic development," does not "go[] so far as to grant tribal enterprises selling goods to nonmembers an artificial competitive advantage over all other businesses in a State").

V. NO POLICY REASONS MILITATE AGAINST THE NLRB'S EXERCISE OF JURISDICTION

A. The NLRA does not require tribes to agree to any proposal in bargaining that would interfere with self-government

The Tribe and *amici* argue that the NLRA would undermine tribal sovereignty because Tribes would have to cede rights in bargaining. This is wrong. The NLRA does not require an employer to make any concession to a union or agree to any particular proposal. 29 U.S.C. § 158(d). Nor does it allow the NLRB to impose agreement to any provision. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 107 (1970).

B. The NLRA will not interfere with tribes' right to exclude nonmembers from their reservations

Too much is made of the right of exclusion. Under the NLRA, all employers have the right to exclude nonemployee organizers, except in the most unusual circumstances. *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). Thus, the Tribe would automatically enjoy that same power as it has now. It is highly unlikely that the NLRB would find one of those rare exceptions in a case involving a tribe with a treaty right of exclusion, by reason of the existence of that power.

The Tribe may point out that the NLRB ruled that its refusal to permit the Union's organizers on its property was an unfair labor practice. But that is only because the Tribe discriminatorily permitted one union to enter its property to organize its employees while denying this Union the same access. JA 0389. The Tribe could easily preserve its right to exclude nonemployee organizers by excluding all nonemployee organizers uniformly. Moreover, the Tribe's purported concern is overstated: the Tribe has already granted a nondiscriminatory right of access to its property to nonemployee organizers of any union under its Tribal Labor Relations Ordinance. JA 0103.

The Tribe cannot reasonably fear that an arbitrator would order reinstatement of a fired worker and thus that person's return to the tribal land because the NLRA places that outcome entirely within the Tribe's control. Arbitration is purely a matter of mutual consent, *Litton Financial Printing v. NLRB*, 501 U.S. 190 (1991), so a tribe would have to agree to give the feared power to an arbitrator.

C. The NLRA does not prohibit the Tribe from giving Indian employees preferential treatment

The Indian hiring preference is also not endangered by the NLRA as *amici* claim. Am. Br., at 26-28. Nothing in the Act would require this or any other Tribe to give up the Indian employment preference. Indeed, this preference for Indian job applicants is probably a non-mandatory subject of bargaining, *see Star Tribune*, 295 NLRB 543 (1989) (holding that pre-employment alcohol and drug testing is not a mandatory subject of bargaining because applicants are not "employees"), so a union could not even insist on bargaining for a tribe to relinquish it. Even if pre-employment requirements were mandatory subjects generally, it is foreseeable that the NLRB would rule that this one is only permissive, in recognition of the federal Indian policy. *See, e.g., Peerless Publications, Inc.*, 283 NLRB 334 (1986) (adopting rule for bargaining in the newspaper industry in order to preserve "editorial integrity"); *see also Ang Newspapers*, 343 NLRB No. 69 (2004) (holding that newspaper's interest in protecting against the appearance of conflicts of interests outweighed reporters' statutory rights). This is particularly true since the countervailing interest is established by federal law: "[W]here the Board's

chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield." *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 147 (2002). That same policy consideration might easily lead also to a conclusion that other employment decisions like discharge and promotion of tribal member-employees are not a suitable province for collective bargaining.

No union would worry about being accused of discrimination or breach of its duty of fair representation by virtue of agreeing to (or not challenging) a tribal employer's Indian preference. *Local Union No. 35, IBEW v. City of Hartford*, 625 F.2d 416, 425 (2d Cir. 1980) ("[T]here is no violation of equal representation when a union complies with a valid affirmative action program.") In fact, a union representing employees of tribal casino might have a duty to rectify discrimination against Indians. *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 68 (1975).

D. Strikes would be possible even if the NLRA were held not to apply

The specter of strikes is raised. *See* Pet. Br., at 43; Am. Br. at 43. The Tribe's own law, however, provides for strikes after efforts to resolve

bargaining disputes have failed. JA 0105. Employers cannot reasonably fear that strikes will bring their businesses to a halt. They have the right to hire replacement workers, *NLRB v. Mackay Radio & Telegraph*, 304 U.S. 333, 346 (1938), a potent means to avoid business interruption particularly given the low-skilled service work performed in casinos.

E. The NLRA will not endanger casino security

The Tribe argues that casinos' security needs makes dealing with employees collectively, through a union, risky. Pet. Br., at 13. The same arguments were made by non-Indian casinos and were resolved in favor of NLRB jurisdiction. *El Dorado Club*, 220 NLRB 886 (1975); *El Dorado Club*, 151 NLRB 579 (1965). *Amici* do not attempt to explain how their casinos are different. Moreover, the NLRA does not prohibit gaming regulatory bodies from requiring background checks and registration of union personnel who represent gaming employees. *Brown v. Hotel & Restaurant Employees, Local 54*, 468 U.S. 491 (1984). The Tribe's law providing for such a process, JA 0103, will not be affected by the NLRA.

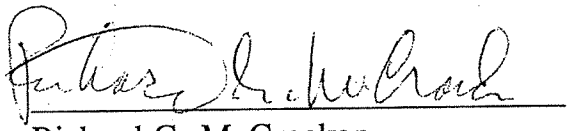
CONCLUSION

The Tribe's petition for review should be denied and the cross-petition for enforcement granted.

DATED: July 5, 2006

Respectfully Submitted,

DAVIS, COWELL & BOWE, LLP



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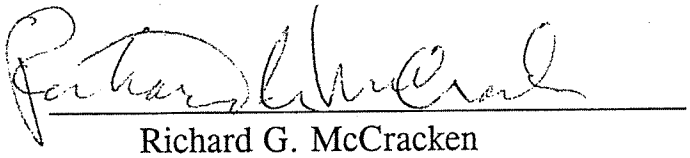
CERTIFICATE OF COMPLIANCE

Pursuant to and in accordance with the provisions of D.C. Cir. Rule 28(d) and 32(a)(3)(B)(i), I, Richard G. McCracken, hereby certify the attached Brief of Intervenor UNITE HERE! International Union in Case No. 05-1392, contains 8741 words excluding the parts of the brief exempted by Fed.R.App.P.32(a)(7) (B)(iii), on the basis of a word count made by Davis, Cowell Bowe's WordPerfect version 12.0 word processing software that counts words in both text and footnotes. This brief has been prepared in a proportionally spaced typeface in 14 point, CG Times Roman type style.



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