ORAL ARGUMENT NOT YET SCHEDULED

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/Cross-Respondents

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

UNITE HERE

Intervenor

and

STATE OF CONNECTICUT

Intervenor

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

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners/Cross-Respondents	*	Nos. 05-1392, 05-1432
v.	*	
NATIONAL LABOR RELATIONS BOARD	*	Board Case No. 31-CA-23673, 31-CA-23803
Respondent/Cross-Petitioner	*	
and	*	
UNITE HERE	*	
Intervenor	*	
and	*	
STATE OF CONNECTICUT	*	
Intervenor	*	

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board ("the Board") certify the following:

(A) Parties and Amici: San Manuel Indian Bingo and Casino and the San Manuel Band of Serrano Mission Indians (collectively "the Tribe") are petitioners in this Court; the former was respondent before the Board. The Board is

respondent in this Court. The Board's General Counsel was a party before the Board. UNITE HERE, an international labor organization, is an intervenor in this Court. Its predecessor, Hotel Employees & Restaurant Employees International Union, was charging party before the Board. The State of Connecticut is also an intervenor in this Court and was intervenor before the Board. Communications Workers of America, AFL-CIO, was a party in interest before the Board.

The National Congress of American Indians, the National Indian Gaming Association, and the tribes listed below have filed a joint brief in this Court as amici in support of the Tribe. Those marked with asterisks were also amici before the Board.

1. Eastern Band of Cherokee Indians of North Carolina;
2. Grand Traverse Band of Ottawa and Chippewa Indians;
3. Little River Band of Ottawa Indians;
*4. Metlakatla Indian Community;
*5. Mississippi Board of Choctaw Indians;
*6. Mohegan Tribe of Indians;
7. Morongo Band of Mission Indians;
8. Pokagon Band of Potawatomi Indians;
*9. Seminole Tribe of Florida;

10. Soboba Band of Luiseno Indians; and

11. Sycuan Band of the Kumeyaay Nation.

The National Congress of American Indians, the National Indian Gaming Association, and the tribes listed below were amici before the Board in support of the Tribe. Tribes and organizations listed together filed joint briefs with the Board. Those marked with asterisks are also amici in this Court.

1. Jamestown S'Klallam Tribe, Habematolel Pomo of Upper Lake, *Metlakatla Indian Community, Micosukee Tribe of Indians of Florida, *Mississippi Band of Choctaw Indians, *Seminole Tribe of Florida, St. Regis Mohawk Tribe, Duckwater Shoshone Tribe of Nevada, Ely Shoshone Tribe of Nevada, Pueblo of Jemez, *National Congress of American Indians, Bristol Bay Area Health Corporation, and Norton Sound Health Corporation;

2. Mashantucket Pequot Tribal Nation, *Mohegan Tribe of Indians of Connecticut, and Pascua Yaqui Tribe of Arizona;

3. Menominee Indian Tribe of Wisconsin;

4. *National Indian Gaming Association; and

5. Shakopee Mdewakanton Sioux (Dakota) Community.

(B) Rulings Under Review: This case is before the Court on the Tribe's petition for review of an order issued by the Board on September 30, 2005, and reported at 345 NLRB No. 79, and on the Board's cross-application for

enforcement of that order. The propriety of a prior Board order denying the Tribe's motion to dismiss the complaint for lack of jurisdiction, issued on May 28, 2004, and reported at 341 NLRB 1055, is also in issue before the Court.

(C) Related Cases: This case has not previously been before this Court or any other court. The Board is not aware of any related cases pending in or about to be presented to this Court or any other court.

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Dated at Washington, DC
this 5th day of June 2006

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* Authorities upon which we chiefly rely are marked with asterisks.

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GLOSSARY

Act	National labor Relations Act, as amended (29 U.S.C. § 151 et seq.)
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
Coeur d'Alene	Opinion in *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985)
Fort Apache	Board's decision in *Fort Apache Timber Co.*, 226 NLRB 503 (1976)
IGRA	Indian Gaming Regulatory Act (25 U.S.C. § 2701 et seq.)
Navajo Tribe	Opinion in *Navajo Tribe v. NLRB*, 288 F.2d 162 (D.C. Cir. 1961)
Sac & Fox	Board's decision in *Sac & Fox Industries, Inc.*, 307 NLRB 241 (1992)
TLRO	Tribal Labor Relations Ordinance
Tribe	Collective reference to San Manuel Indian Bingo and Casino and San Manuel Band of Serrano Mission Indians
Tuscarora	Opinion in *FPC v. Tuscarora Indian Nation*, 362 U.S. 99 (1960)

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BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

No. 05-1392 is before the Court on the petition of the San Manuel Indian Bingo and Casino and the San Manuel Band of Serrano Mission Indians (collectively, "the Tribe") for review of an Order of the National Labor Relations Board ("the Board"). No. 05-1432 is before the Court on the Board's cross-application for enforcement of its Order. UNITE HERE and the State of Connecticut have intervened in support of the Board.

The Board had jurisdiction under Section 10(a) of the National Labor Relations Act, 29 U.S.C. § 151, 160(a) ("the Act"). This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Board's Decision and Order issued on September 30, 2005, is reported at 345 NLRB No. 79 (JA 387-89).[1] A prior Order of the Board, denying the Tribe's motion to dismiss the complaint for lack of jurisdiction, was issued on May 28, 2004, and is reported at 341 NLRB 1055 (JA 311-31.) The September 30, 2005 Order is a final order within the meaning of Section 10(f) of the Act. Although the May 28, 2004

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[1] "JA" references are to the volume captioned "Joint Appendix." "Add" references are to the separately bound Addendum of Statutes and Regulations submitted by the Tribe. "Amici Add" references are to the addendum submitted by the National Congress of American Indians, National Indian Gaming Association, and 11 tribes, herein collectively referred to as "amici," which have filed a joint

Order was not a final order within the meaning of Section 10(f), the subsequent final Order was based, in part, on findings and conclusions made in the prior Order. Accordingly, those findings and conclusions are now properly before the Court.

The Tribe filed its petition for review on October 6, 2005. The Board filed its cross-application for enforcement on November 21, 2005. Section 10(e) and (f) of the Act place no time limits on the filing of petitions for review or applications for enforcement of Board orders.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board reasonably concluded that a commercial enterprise, located on an Indian tribe's reservation and wholly owned and operated by that tribe, is an employer within the meaning of Section 2(2) of the Act.

RELEVANT STATUTORY PROVISIONS

All relevant portions of the Act and other federal statutes and regulations, state laws, tribal-state compacts, and tribal ordinances are set forth in the addenda submitted by the Tribe and amici.

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brief in support of the Tribe. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

STATEMENT OF THE CASE

On unfair labor practice charges filed by Hotel Employees & Restaurant Employees International Union, AFL-CIO, CLC ("HERE"), the Board's General Counsel issued a complaint alleging that the Tribe had violated Section 8(a)(2) and (1) of the Act (29 U.S.C. § 158(a)(2) and (1)) by allowing agents of the Communications Workers of America, AFL-CIO, CLC ("the CWA"), access to its casino for organizing purposes while denying similar access to agents of HERE. (JA 13-14.) The Tribe filed a motion for summary judgment on the ground that the Board lacked jurisdiction over its operations on an Indian reservation. (JA 23-50.)

The Board (Chairman Battista and Members Liebman and Walsh; Member Schaumber dissenting) held that commercial enterprises operated by Indian tribes on tribal reservations are "employers" within the meaning of Section 2(2) of the Act (29 U.S.C. §152(2)), and are not exempt as political subdivisions of States, and that Federal Indian law and policy do not preclude the Board from asserting jurisdiction over them. (JA 312-18.) However, the Board stated, it would not assert jurisdiction over activities, whether or not on reservations, which involved the performance of traditional governmental functions or functions unique to tribal status. (JA 318-19.) In this case, the Board found, the Tribe's operation of a casino was not a traditional governmental function, but a typical commercial enterprise employing non-Indians and serving non-Indian customers. (JA 319.)

Finally, the Board found, assertion of jurisdiction would not conflict with the Indian Gaming Regulatory Act (25 U.S.C. § 2701 *et seq.*) ("IGRA"), since the Act does not regulate gaming, nor does IGRA address labor relations. (JA 320.) Accordingly, the Board denied the motion to dismiss the complaint. (JA 320.)

The Tribe then filed an amended answer, admitting that it had engaged in the conduct alleged in the complaint, but denying that it was an employer as defined in the Act and asserting, as an affirmative defense, that application of the Act was preempted by IGRA and the Tribe's compact with the State of California. (JA 332-41.) The General Counsel filed a motion for summary judgment. (JA 344-49.) The Tribe filed a memorandum in opposition to this motion, reiterating the contentions raised in its prior motion to dismiss and arguing that Board jurisdiction was preempted by the Tribal Labor Relations Ordinance ("TLRO") which the Tribe had enacted pursuant to its compact with the State of California (JA 355-79.) The General Counsel moved to strike this argument as untimely. (JA 381-85.)

The Board (Chairman Battista and Members Liebman and Schaumber) found that it had already decided the jurisdictional issue and that the Tribe had offered no newly discovered or previously unavailable evidence, nor had it shown any special or changed circumstances that would require reconsideration of the

Board's decision to assert jurisdiction. (JA 388-89.)[2] In addition, the Board found, the Tribe had not shown why it could not have presented its TLRO argument in support of its motion to dismiss. Accordingly, the Board granted the General Counsel's motion for summary judgment and found that the Tribe had violated the Act as alleged in the complaint. (JA 387-89.)[3] The Board ordered the Tribe to cease and desist from the unlawful conduct and to take affirmative remedial action. (JA 388-89.) The Tribe filed a petition for review (JA 390), and the Board filed a cross-application for enforcement. (JA 392.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

The Tribe, a federally recognized Indian tribe, occupies and governs the San Manuel Indian Reservation in San Bernardino County, California. A General Council, consisting of all members who are at least 21 years old, is the Tribe's governing body. (JA 311; 54.)

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[2] Member Schaumber, who had dissented from the prior holding that the Board had jurisdiction, concurred in granting the motion for summary judgment on the ground that the jurisdictional issue could not be relitigated. (JA 387 n.3.)

[3] The second and third pages of the Board's Decision and Order are transposed in the joint appendix. The second page is reproduced at JA 389, the third page at JA 388.

The San Manuel Indian Bingo and Casino is a "tribal governmental economic development project" wholly owned and operated by the Tribe and located entirely within its reservation. (JA 311-12 & n.3; 55.) The Tribe has enacted the San Manuel Gaming Act, which established a tribal gaming commission to regulate and license gaming activities. (JA 312; 56, 73-92.) The Tribe's General Council sets all significant policies of the casino, such as establishing budgets, setting wage, salary, and benefits scales, setting vacation and leave policies, and determining the general working conditions of employees. (JA 312; 56.)

The casino has more than 1,400 employees and has described itself as "one of the largest employers in San Bernardino County. . . . " Members of the Tribe hold key positions in the casino and are involved in every facet of its operations. However, the great majority of the casino's employees and customers are not members of the Tribe. (JA 312; 57, 183.)

Pursuant to its compact with the State of California, the Tribe has enacted a TLRO regulating labor relations at the casino. (JA 312; 100-08.) The TLRO guarantees employees the rights set forth in Section 7 of the Act (29 U.S.C. §157); defines unfair labor practices by employers and unions, including some but not all of the conduct defined as unfair labor practices in Section 8(a) and 8(b) of the Act (29 U.S.C. §158(a), (b)); guarantees unions access to nonworking, non-public

areas of the casino for the purpose of organizing employees; prohibits all strikes except after a bargaining impasse and completion of specified dispute resolution procedures and prohibits all strike-related picketing on any Indian reservation; and excludes from coverage all security personnel, cage cashiers, and dealers. (JA 100-08.)

The Tribe permitted the CWA to place a trailer in the casino parking lot, place its banner on the trailer, place a bulletin board and CWA leaflets and other writings near the trailer, and talk to casino employees inside the casino during both working and nonworking time, all for the purpose of organizing those employees. The Tribe denied HERE equal access to the casino and its employees. (JA 389; 337-39.)

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board found, on the foregoing facts, that the Tribe, in operating the casino, was an employer within the meaning of Section 2(2) of the Act; that it was not exempt from the Act as a State or political subdivision; and that neither IGRA nor any other aspect of Federal Indian policy precluded the Board from asserting jurisdiction. (JA 313-20.) Accordingly, the Board found that, by engaging in the conduct described above, p. 8, the Tribe had denied HERE access to the casino and its employees while granting such access to the CWA, and had thereby violated Section 8(a)(2) and (1) of the Act. (JA 389.) The Board ordered the Tribe to cease

and desist from the conduct found unlawful and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights; to provide representatives of HERE, upon request, with the same rights of access to the casino and its employees that it had previously granted the CWA; and to post a remedial notice. (JA 388-89.)

SUMMARY OF ARGUMENT

1. A tribally operated business is not exempt from the Act as a State or political subdivision. The Supreme Court has consistently held that an Indian tribe is not a State, nor does a tribe meet the Board's definition of "political subdivision." While other federal statutes expressly require or authorize the treatment of Indian tribes as States, the Act is silent on the subject. The Board properly declined to exempt tribes as analogous to States or political subdivisions, since exemptions from the Act are to be interpreted narrowly. Moreover, the reason for exempting States or political subdivisions from the Act — to avoid giving their employees the right to strike — is inapplicable to tribes, as the record does not show a general pattern of tribal laws prohibiting strikes.

2. The Board properly overruled its prior decisions holding that a tribe's on-reservation commercial enterprises are not subject to the Act. The rationale of those decisions and the legal theory on which they relied were inconsistent

with later Board decisions asserting jurisdiction over off-reservation tribal enterprises. Neither Congress' failure to overrule the prior decisions nor this Court's acceptance of them as a reasonable construction of the Act precludes the Board from overruling them.

3. The Board's assertion of jurisdiction is consistent with the Congressional policy of maximizing tribal self-government. That policy does not give on-reservation tribal enterprises a blanket exemption from federal employment laws. The great majority of cases hold that, except in three situations not present here, general statutes which apply to all persons are presumed to apply to Indians as well. The same cases, as well as relevant Supreme Court decisions, hold that the exception to this principle for statutes interfering with tribal self-government does not encompass every statute that might be inconsistent with abstract notions of tribal sovereignty, but only those statutes which affect a tribe's ability to govern its intramural affairs — that is, relations among the members of a tribe. The right of a tribe to exclude outsiders from its reservation, or to impose conditions on their presence, does not entitle the tribe to exemption from federal regulatory statutes. The tribe's right of exclusion must yield in such cases to the superior sovereignty of the federal government.

4. The Board's assertion of jurisdiction is consistent with IGRA. IGRA divides gaming into three classes, but gives tribes exclusive jurisdiction only over Class I gaming, while Class II and Class III gaming, which are conducted at the Tribe's casino, are subject to extensive federal and state regulation. To engage in Class III gaming, a tribe must enter into a compact with the State in which the gaming is to occur. California required the Tribe, as a condition of such a compact, to enact a specific TLRO. Although IGRA has been held to authorize the adoption of such an ordinance, nothing in IGRA indicates that a TLRO is to supersede inconsistent provisions of the Act.

Because the Act does not address employment preferences for tribal members, it does not conflict with other federal laws, or preempt provisions of TLRO's, that require or permit such preferences. To the extent that other provisions of TLRO's, including those incorporated into compacts between tribes and States, conflict with the Act, they, rather than the Act, are preempted, for both the tribes and the States must yield to the superior sovereignty of the federal government.

ARGUMENT

THE BOARD REASONABLY CONCLUDED THAT A COMMERCIAL ENTERPRISE, LOCATED ON AN INDIAN TRIBE'S RESERVATION AND WHOLLY OWNED AND OPERATED BY THAT TRIBE, IS AN EMPLOYER WITHIN THE MEANING OF SECTION 2(2) OF THE ACT

A. Introduction

The Tribe essentially admitted before the Board, and does not dispute in this Court, that it discriminatorily allowed one union access to its casino for organizing purposes while denying similar access to another union—conduct which, when done by an "employer," violates Section 8(a)(2) and (1) of the Act.[4] Thus, if the Board properly found that the Tribe's casino was subject to its jurisdiction, its Order is entitled to enforcement.

In finding that it had jurisdiction, the Board made the following subsidiary findings: (1) The Tribe, when operating a commercial enterprise on its reservation, is an "employer" within the meaning of Section 2(2) of the Act; and (2) Federal policy with respect to Indian tribes, including IGRA, does not preclude the Board from asserting jurisdiction over such a tribal enterprise. We discuss each of these findings in turn.

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[4] An employer who distinguishes between unions in this manner unlawfully assists the favored union in violation of Section 8(a)(2) and (1). *See, e.g., Duane Reade, Inc.,* 338 NLRB 943, 944, 950 (2003), *enforced mem.,* 99 Fed. Appx. 240, 242 (D.C. Cir. 2004).

B. A Commercial Enterprise Operated by an Indian Tribe is an Employer within the Meaning of the Act

1. Applicable Principles and Standard of Review

The Supreme Court "has consistently declared that in passing the . . . Act, Congress intended to and did vest in the Board the fullest *jurisdictional* breath constitutionally permissible under the Commerce Clause." *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963). When an entity is an "employer" within the meaning of Section 2(2) of the Act (29 U.S.C. § 152(2)), and is engaged in "commerce" within the meaning of Section 2(6) (29 U.S.C. § 152(6)), any unfair labor practices it commits are within the Board's statutory jurisdiction to prevent. *See Electrical Contractors, Inc. v. NLRB*, 245 F.3d 109, 118 (2d Cir. 2001). The labor relations of gaming casinos are within the Board's statutory jurisdiction. *See NLRB v. Harrah's Club*, 362 F.2d 425, 427 (9th Cir. 1966).

Section 2(2) of the Act "on its face clearly vests jurisdiction in the Board over 'any' employer doing business in this country save those Congress excepted with careful particularity." *State Bank of India v. NLRB*, 808 F.2d 526, 531 (7th Cir. 1986). The only entities expressly excluded from the definition of "employer" are the United States; any wholly owned Government corporation or Federal Reserve Bank; any State or political subdivision thereof; any person subject to the Railway Labor Act (45 U.S.C. § 151 *et seq.*); and any labor organization, except with respect to its relations with its own employees.

The Supreme Court has refused to find Board jurisdiction, absent a clear expression of Congressional intent, only in two exceptional circumstances: where the Board's assertion of jurisdiction would raise serious constitutional questions, as in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500-01, 504-07 (1979), and where such assertion could entail serious adverse effects on international relations, as in *McCulloch v. Sociedad Nacional*, 372 U.S. 10, 17-22 (1963). Moreover, in *ILA Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195, 199-200 (1970), the Court held that the Board *did* have jurisdiction over a labor dispute "centered on the wages to be paid American residents, who were employed by each foreign ship not to serve as members of its crew but . . . to do casual longshorework." This suggests that the Board lacked jurisdiction in *Sociedad Nacional*, not because the foreign-flag ship there was not an "employer," but because its foreign crew were not statutory "employees."

The term "employee," like the term "employer," is a broadly defined term with a limited number of specific exceptions. *See NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 90-91 (1995); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891-92 (1984). The Board must "take care that exemptions from [Board] coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach." *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996).

The task of defining the statutory term "employer," like the task of defining the term "employee," "is one that 'has been assigned primarily to the agency created by Congress to administer the Act' . . . ." *Sure-Tan, Inc.*, 467 U.S. at 491 (citation omitted). Accordingly, "the Board's construction of that term is entitled to considerable deference, and [a reviewing court] will uphold any interpretation that is reasonably defensible." *Id.* at 892 (citation omitted). The same deference is due the Board's interpretation of exemptions from the Act. *See Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99, 409 (1996).

2. A tribally operated business is not exempt from the Act as a State or political subdivision

The Tribe does not dispute that, in operating the casino, it employs individuals who perform the same functions that statutory employees perform at non-tribal casinos. However, it contends (Br 39-43) that it is equivalent to a State or political subdivision and should therefore receive the same exemption from the Act. As shown below, the Board properly rejected this contention.

The Supreme Court held as far back as 1831 that an Indian tribe is "not a state of the Union." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 15 (1831); *cf. id.* at 16 (noting that Commerce Clause of Constitution expressly distinguishes Indian tribes from States). More recent decisions have reaffirmed this principle. *See, e.g., White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) ("Tribal reservations are not States . . . .")

Nor does case law justify treating Indian tribes as political subdivisions of States. Indian tribes "were self-governing sovereign political communities" before Columbus set foot in America. *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978). Political subdivisions of states "never were and never have been considered as sovereign entities." *Reynolds v. Sims*, 377 U.S. 533, 575 (1964). In contrast, Indian tribes "still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *United States v. Wheeler*, 435 U.S. at 323. However, this retained sovereignty, unlike that of States, "exists only at the sufferance of Congress and is subject to complete defeasance." *Id.*

Moreover, as the Board explained (JA 314), the Tribe plainly does not meet the Board's traditional definition of "political subdivision," which is limited to entities either created directly by a State or administered by individuals responsible to public officials or to the general electorate. *See NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 604-05 (1971). Indian tribes were plainly not created by the States; they existed long before the States did. Nor is the Tribe administered by individuals responsible to public officials or to the general electorate. The Tribe's General Council includes all of its adult members.

Congress has also recognized that Indian tribes are different from States or their political subdivisions. As originally enacted, Title VII of the Civil Rights Act

of 1964 (42 U.S.C. § 2000e *et seq.*) expressly excluded from the definition of "employer," *inter alia*, "an Indian tribe, *or* state or political subdivision thereof . . . ." 78 Stat. 253 (emphasis added).[5] The specific reference to Indian tribes would have served no purpose if the term "State or political subdivision thereof" were broad enough to encompass them.

When Congress wishes to require or authorize the treatment of Indian tribes as States, it does so explicitly. The Indian Tribal Government Tax Status Act (26 U.S.C. § 7871, reproduced at Amici Add 133-35) requires that tribal governments be treated as States for purposes of various provisions of federal tax laws. Section 7871(b) of that Act limits the treatment of tribes as States for purposes of laws dealing with excise taxes to "transaction[s] involv[ing] the exercise of an essential governmental function of the Indian tribal government." Section 7871(e) limits the term "essential governmental function" to those functions "customarily performed by State and local governments with general taxing powers."

The Clean Water Act (33 U.S.C. § 1377(a), reproduced at Amici Add 155) likewise expressly requires that Indian tribes be treated as States under one

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[5] The 1972 amendments to Title VII repealed the exemption for States and political subdivisions and specifically made Title VII applicable to them. 86 Stat. 103, 42 U.S.C. § 2000e (a), (b), (f), (h). *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 449 n.2 (1976). The explicit exemption for Indian tribes remains unchanged.

provision of that statute (33 U.S.C. § 1251(g)), and permits their treatment as States under several other provisions if certain conditions are met. *See* 33 U.S.C. § 1377(e). The Clean Air Act (42 U.S.C. § 7601(d), reproduced at Amici App 185-86) also authorizes, but expressly does not require (*see* 42 U.S.C. § 7601(d)(4)), the treatment of Indian tribes as States, if the same conditions are met. Similarly, the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. § 9626, reproduced at Amici Add 187) requires, and the Safe Water Drinking Act (42 U.S.C. § 300 j – 11, reproduced at Amici Add 158), using language similar to that in the Clean Air Act, permits, but does not require, the treatment of Indian tribes as States.

The Tribe (Br 39-45) and the amici (Br 13-14, 22-23) contend that the exemption in the Act for States and political subdivisions should be broadly interpreted as including all governmental entities. As shown below, the Board properly rejected the argument that Indian tribes should be entitled to "an exemption by analogy." (JA 314.)

The Act has been held not to exempt all employers which might in some sense be considered "governments." It does not, for example, exempt the commercial activities of a bank in the United States merely because a foreign

government owns the bank. *See State Bank of India v. NLRB*, 808 F.2d 526, 530-34 (7th Cir. 1986).[6]

Exemptions from the Act are to be interpreted "'in light of the purposes Congress sought to serve.'" *State Bank of India v. NLRB,* 808 F.2d at 531 (citation omitted). The Supreme Court has explained the purpose of the exemption for States and political subdivisions: to preserve existing law denying their employees the right to strike. *See NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 604 (1971). Most States totally prohibit strikes by public employees.

The record does not show a similar pattern of tribal laws against strikes. Amici refer (Br 22-23) to no-strike laws enacted by two of them (out of 11). The Cherokee law was enacted in April 2000 (Amici Add 219), and the record does not indicate when the Choctaw law (Amici Add 300) was enacted, but it was no earlier than 1982. (Amici Add 297.) The Tribe's ordinance permits strikes after a

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[6] The Tribe (Br 41) and amici (Br 22) rely on court decisions treating territorial governments as exempt States or political subdivisions. The Board has never decided the question. However, it is clear that territories are like States and political subdivisions in denying their employees the right to strike. *See, e.g., Virgin Islands Port Authority v. SIU de Puerto Rico*, 494 F.2d 452, 453-55 (3d Cir. 1974). Moreover, "a territorial government is entirely the creation of Congress," and in enacting laws, "it is not acting as an independent political community like a State, but as '"an agency of the federal government"'. *United States v. Wheeler*,

bargaining impasse and use of tribal dispute resolution procedures for 60 days. All other California tribes operating casinos adopted the same ordinance. *See In Re Indian Gaming Related Cases*, 331 F.3d 1094, 1107, 1115 (9th Cir. 2003). Accordingly, Congress' rationale for exempting States and political subdivisions from the Act does not apply to tribal enterprises.

Other rationales suggested by the Tribe and amici for this exemption do not warrant a different result. Amici suggest (Br 13) that States and political subdivisions were exempted "in part because their employees provided essential services." However, there is no general exemption in the Act for providers of "essential services." In *Motor Coach Employees v. Wisconsin Employment Relations Board*, 340 U.S. 383, 387, 397-99 (1951), the Supreme Court held that the Act applied to public utilities and preempted state legislation banning strikes by public utility employees "which would cause an interruption of an essential service."

The Tribe (Br 40-41) and amici (Br 14, 22-23) also suggest that notions of sovereign immunity were a substantial factor in the enactment of the exemption of States and political subdivisions from the Act. However, coverage under a statute and suability for violations thereof "are two entirely different questions." *See*

U.S. 313, 321 (1978) (citation omitted). This suggests that territories share, not the States' exemption from the Act, but that of the United States.

Florida Paraplegic Assn. v. Miccosukee Tribe of Florida, 166 F.3d 1126, 1130 (11th Cir. 1999). Moreover, as the Board pointed out (JA 317), neither States nor Indian tribes have sovereign immunity from suits by the United States. *See United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 382-83 (8th Cir. 1987).

3. The Board properly overruled its prior decisions

In holding that on-reservation tribal enterprises are subject to the Act, the Board (JA 311, 316) expressly overruled two of its prior decisions: *Fort Apache Timber Co.*, 226 NLRB 503 (1976), and *Southern Indian Health Council*, 290 NLRB 436 (1988). That the Board overruled its prior decisions does not change the standard of review. The Board "is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* . . . ." *NLRB v. Iron Workers Local 103*, 434 U.S. 335, 351 (1978). We show below that the Board was justified in overruling its prior precedent.

The Board first considered activities on an Indian reservation in *Simplot Fertilizer Co.*, 100 NLRB 771 (1952). The Board there asserted jurisdiction and directed an election among all employees, including but not limited to Indians, employed at a phosphate mine on an Indian reservation. The employer was a private corporation operating the mine pursuant to leases with the tribal council,

which permitted the union to enter the reservation to engage in organizational activity among the employees. 100 NLRB at 773.

In *Texas-Zinc Minerals Corp.*, 126 NLRB 603, 604 (1960), the tribal council adopted a resolution prohibiting any union solicitation on the reservation. The Board nevertheless directed an election among employees of a uranium processing mill located on the reservation on land leased from the tribe. A majority of the unit employees were members of the tribe. The Board could "perceive no valid basis for reading the Act to exclude from its coverage Indians or Indian reservations as a class." 126 NLRB at 606. It noted (*id.*):

> Where, under similar Federal statutes, Congress has legislated concerning a particular field of major national policy and where the reach of the statute is defined in sweeping language, the courts have held that Indians and Indian reservations, although not specifically mentioned, are contemplated with statutory coverage.

Thus, the Board concluded, "the Act applies to commercial enterprises operating on an Indian reservation . . . ." *Id.* at 607.

This Court refused to enjoin the election in *Texas-Zinc*. It observed that "the circumstance that the [employer's] plant is located on the Navajo Reservation cannot remove it or its employees – be they Indians or not – from the coverage of the Act" and that "the Board regulates labor disputes affecting interstate commerce, and the Act authorizes it to do so without stating any exception which would preclude its acting with respect to a plant located within an Indian

reservation, *or* one employing Indians." *Navajo Tribe v. NLRB*, 288 F.2d 162, 164-65 (D.C. Cir. 1961) (emphasis added).

However, in *Fort Apache Timber Co.*, 226 NLRB 503 (1976), the Board held that it lacked jurisdiction over a business owned and operated by a tribe on its reservation. The tribal council set the wages and working conditions for the employees, who were frequently transferred to and from other tribal enterprises without loss of seniority or benefits. 226 NLRB at 504.

The Board viewed the case as presenting an issue significantly different from that in *Texas-Zinc* and *Simplot*: "Does the Act apply to Tribal Council enterprises as employers?" *Id.* at 504 n.4. In answering this question in the negative, the Board, citing the principle that "Indian tribes on reservations retain their powers of internal sovereignty" (*id.* at 505), concluded that "individual Indians and Indian tribal governments, at least on reservation lands, are generally free from state or even in most instances Federal intervention, unless Congress has specifically provided to the contrary." *Id.* at 506. It further concluded that a tribal council "is a government both in the usual meaning of the word, and as interpreted and applied by Congress, the Executive, and the Courts." *Id.* Accordingly, the Board concluded, both the tribal council and the enterprises it operated on the reservation were "implicitly exempt as employers within the meaning of the Act." *Id.*

The Board followed *Fort Apache* in *Southern Indian.* 290 NLRB 436, 437 (1988). However, it did not follow *Fort Apache* in *Sac & Fox Industries,* 307 NLRB 241 (1992), involving a defense contractor wholly owned by an Indian tribe. The facility in issue there was off the tribal reservation, although at least one of the employer's other facilities was on the reservation. 307 NLRB at 241 n.6; *id.* at 247 (dissenting opinion). The Board found this fact crucial, distinguishing *Fort Apache* and *Southern Indian*, which, it said, had "repeatedly stressed" the enterprises' location on the reservation in finding that the assertion of jurisdiction would interfere with tribal sovereignty. *Id.* at 242-43, 245. The Board also noted that neither the statutory exemption for political subdivisions nor any other exemption includes off-reservation tribal enterprises. *Id.* at 243, 245. Nor did the Board regard it as significant that some of the employer's other facilities might be located on the tribal reservation; it saw no inconsistency between declining jurisdiction over those facilities and asserting jurisdiction over an off-reservation facility. *Id.* at 245.

In concluding that application of the Act to the off-reservation facility would not interfere with the tribe's rights of self-government, the Board considered several factors. First, the facility was engaged in a normal manufacturing operation, and most of its employees were not members of the tribe. Second, the Act would not "broadly and completely define" the relationship between the tribe

and the employees, and thus would not usurp the tribe's decision-making power, since the Act does not compel any agreement between employees and their employer or regulate the substantive terms of any such agreement. Finally, its effects would not extend beyond the tribe's business activities to regulate purely intramural matters, such as tribal membership, inheritance rules, or domestic relations. *Id.* at 244.

In *Yukon Kuskokwim Health Corp.*, 328 NLRB 761 (1999), *remanded*, 234 F.3d 714 (D.C. Cir. 2000), the Board reaffirmed *Sac & Fox* and asserted jurisdiction over a hospital operated by a nonprofit corporation whose board of directors was elected by the governments of 58 Alaskan Native tribes. The employer and amici contended that *Sac & Fox* could not properly be applied to Alaskan Native tribes because Congress had abolished all but one of their reservations. 328 NLRB at 761, 762. The Board nevertheless found that the hospital was "not located on any land owned by any tribe" (*id.* at 763), nor was it "located on or near 'Indian country.'" *Id.* Accordingly, the Board concluded, the hospital, as "an acute care hospital located *off* a treaty reservation," (*id.* at 762), was subject to the Board's jurisdiction.

The Board described *Fort Apache* as holding "in an *on-reservation* case, that an Indian tribal governing body . . . comes within the political subdivision exception [in] Section 2(2) of the Act" (*id.* at 763), but said that *Sac & Fox* had

"rejected the political subdivision approach in analyzing jurisdiction in off premises tribally controlled enterprises" (*id.* at 763-64), and had "stated unequivocally that it read *Fort Apache* as limited to situations in which the tribal enterprise is located *on the reservation*." (*id.* at 764). Thus, the Board concluded, the hospital in *Yukon Kuskokwim* "does not constitute a political subdivision under the Act because it is not located on a reservation or on Indian country." *Id.* at 764.

This Court, although remanding *Yukon Kuskokwim* on other grounds, upheld as reasonable the Board's distinction between on-reservation and off-reservation tribal enterprises, noting that "[t]he Board . . . has never drawn a distinction based upon the nature of the Indian enterprise," that "[a]n Indian tribe, like any other governmental unit, typically operates in its governmental capacity only within its geographical jurisdiction," and that "[t]he distinction between commercial and governmental activities . . . is often elusive, . . . and the Board has long and reasonably preferred bright line rules in order to avoid disputes over its jurisdiction." *Yukon-Kuskokwim Health Corp. v. NLRB*, 234 F.3d 714, 717 (D.C. Cir. 2000).

The Board's decision on remand in *Yukon Kuskokwim* was issued on the same day as its decision in this case. The Board,[7] noting that it had adopted a new standard (see above, p. 4) for assertion of jurisdiction over tribal enterprises in this case, applied that standard to decline jurisdiction over the employer. It held that the employer, in providing free health care to Indians, was fulfilling a "unique governmental function," since Congress had declared that the federal government has a legal responsibility to provide such care. Moreover, the employer's impact on interstate commerce was relatively limited, since 95 percent of its patients were native Alaskans from the local area, and the employer did not compete with other hospitals clearly subject to the Board's jurisdiction. The off-reservation location of the hospital was of little significance because Native Alaskan businesses must be off-reservation, given Congress' abolition of all Alaska reservations except one. *Yukon Kuskokwim Health Corp.*, 341 NLRB 1075, 1077 (2004).

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[7] Member Schaumber concurred in the result for essentially the same reasons stated in his dissent in this case.

Thus, Board law prior to the decision in this case was as follows: Where an enterprise was wholly owned and operated by an Indian tribe *and* was on the tribe's reservation, it was exempt from the Act, regardless of the nature of the enterprise. However, where the enterprise, although wholly owned and operated by the tribe, was off the reservation, *or* where it was on the reservation, but operated by a non-tribal entity, it was subject to the Act, again without regard to the nature of the enterprise. The Board had ample reason to reject this dichotomy.

First, as the Board pointed out (JA 315), nothing in the Act supports a distinction based on geographical location. The explicit exemptions for federal, state, and local governments apply without regard to location. We have shown above, pp. 15-21, that the Board was not required to read into Section 2(2) of the Act an implied exemption for Indian tribes. There is still less justification for reading into the Act an implied exemption only for on-reservation enterprises, and only for those owned and operated by tribes. As the Tribe (Br 31-32 & n.7) and amici (Br 5, 27 n.10) acknowledge, to the extent that principles of tribal sovereignty are implicated, they apply to *all* consensual business dealings between Indians and non-Indians initiated by the latter. *See Montana v. United States*, 450 U.S. 544, 565-66 (1981). The position of the Tribe and amici would logically preclude Board jurisdiction over the on-reservation commercial activities of non-

Indian employers, a result expressly rejected by this Court in *Navajo Tribe v. NLRB*, 288 F.2d 162, 164-65 (1961).

Navajo Tribe emphasized the power of the Board to regulate labor disputes affecting interstate commerce. 288 F.2d at 165. In determining whether a particular labor dispute has sufficient impact on commerce to come within its jurisdiction, the Board properly considers the potential cumulative impact of all similar disputes. *See Polish National Alliance v. NLRB*, 322 U.S. 643, 648 (1944). The Board noted here (A 312) that during the past 30 years, commercial enterprises operated by Indian tribes have vastly increased in scope and variety, and their impact on commerce has increased correspondingly. In particular, their impact on non-Indians has been magnified as they have employed significant numbers of non-Indians and become serious competitors of non-Indian businesses concededly subject to the Act.

The propriety of the Board's exercise of jurisdiction cannot be judged on the basis of the impact of tribal economic activities on commerce in 1935, when the Act was enacted. The Board is entitled to change its views on the basis of its cumulative experience and changing economic realities. *See NLRB v. Weingarten, Inc.*, 420 U.S. 251, 266 (1975). These considerations have often led the Board to reexamine and alter existing precedent concerning its jurisdiction. *See, e.g., Management Training Corp.*, 317 NLRB 1355, 1357-59 (1995); *Foley, Hoag &*

Eliot, 229 NLRB 456, 456-57 (1977); *Cornell University*, 183 NLRB 329, 330-34 (1970).

The overruling of prior decisions is especially appropriate when those decisions do not reflect a considered analysis of the issue. *See Weingarten,* 420 U.S. at 264. This is such a situation. The Board's opinions in *Fort Apache* and *Southern Indian* set forth no rationale for their key conclusions and are based on premises inconsistent with those relied on in *Sac & Fox* and the original decision in *Yukon Kuskokwin.*

The critical premise of *Fort Apache* was that a tribe's governing council is equivalent to a state or local government. 226 NLRB at 505-06. However, neither that decision nor *Southern Indian* explained why a tribe should be viewed as a government when it engages in the operation of a commercial enterprise for profit. Further, *Sac & Fox* comprehensively explained (307 NLRB at 244) why assertion of jurisdiction over an off-reservation tribal commercial enterprise would *not* improperly interfere with the tribe's right to self-government. This explanation substantially undermined the holdings in *Fort Apache* and *Southern Indian.*

The prior cases also relied on inconsistent legal theories. In *Sac & Fox*, 307 NLRB at 243-45, the Board applied a rule of construction set forth in *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960), that a general federal statute, in terms applicable to all persons, is equally applicable to Indians, unless it falls

within one of three recognized exceptions to this rule. However, in *Fort Apache*, 226 NLRB at 505, the Board, without citing *Tuscarora,* applied a different rule, that Indians retain their powers of local self-government except to the extent expressly divested by Congress. Thus, the Board presumed the applicability of the Act to off-reservation tribal enterprises, but presumed its inapplicability to on-reservation enterprises.

We show below, pp. 37-51, that the Board properly concluded in this case (JA 315-19) that the presumption of applicability, set forth in *Tuscarora* and its progeny, is the proper standard for all cases involving tribal enterprises, and thus properly overruled *Fort Apache* for failing to follow this standard. However, neither *Tuscarora* nor the cases relied on in *Fort Apache* distinguish between on-reservation and off-reservation tribal enterprises. Accordingly, nothing in either line of cases justifies applying one presumption in off-reservation cases and another, opposite presumption in on-reservation cases.

The categorical distinction between on-reservation and off-reservation enterprises produced other anomalies in Board law. As illustrated by *Sac & Fox*, a tribal enterprise may operate at two facilities, one on the reservation and one off it. Under prior Board law the former would have been exempt from the Act, and the latter subject to the Act, even though both were engaged in the same business, were operated in identical fashion, and had identical labor policies.

Similarly, as the Board recognized in *Yukon Kuskokwim*, 328 NLRB at 761, under the Alaska Native Claims Settlement Act (43 U.S.C. § 1618 (a)), all but one of the existing reservations for Alaskan Natives were abolished. The effect of the Board's categorical distinction between on-reservation and off-reservation enterprises was to give a preference, in the form of exemption from the Act, to one Alaskan native tribe over all others and to tribes in the other 49 States over those in Alaska.

The Tribe (Br 20, 37, 45, 47) and amici (Br 19-21) contend that, in light of Congress' failure to amend the Act to abrogate the holding in *Fort Apache*, and this Court's approval in *Yukon-Kuskokwim* of the distinction between on-reservation and off-reservation tribal enterprises, the Board is not now free to overrule its prior decisions. However, the Supreme Court has said (*NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 351-52 (1953)):

> If Congress [is] more than satisfied with the Board's practice, if it [wants] to be certain that the Board [will] not in [the] future profit by its experience, . . . it [must] change the language of the statute . . . to take from the Board the discretionary power [to interpret the Act] . . . which the Board [is] asserting and exercising. We cannot infer an intent to withdraw the grant of such power from what is at most a silent approval of specific exercises of it.

Congress has not written *Fort Apache* into law. Indeed, as the Board noted here (JA 314-15 & n.13), Congress has rejected at least one proposal to do so.

Nor does this Court's decision in *Yukon-Kuskokwim* preclude the Board from abandoning its prior practice. This Court, in *Yukon-Kuskokwim*, expressly noted that it "'must accept the Board's position unless it conflicts with the "unambiguously expressed intent" of Congress or is [otherwise] not "a permissible construction of the statute."'" 234 F.3d at 716 (citations omitted). The Court did not hold that the Act required the Board's former construction, but found that construction reasonable and deferred to it. *Id.* at 717. This does not preclude the Board from adopting any other reasonable construction. *See Mesa Verde Construction Co. v. Northern California District Council of Laborers*, 861 F.2d 1124, 1129-30, 1134-36 (9th Cir. 1988) (*en banc*) (upholding Board repudiation of prior interpretation of the Act which both Supreme Court and Ninth Circuit had found reasonable).

The Tribe (Br 66-67) and amici (Br 20, 30 n.12) contend that the Board's new approach, under which it will not assert jurisdiction over tribal enterprises performing "traditionally tribal or governmental functions" (JA 319), is unworkable because considerable litigation will be needed to determine which functions fall into this category. However, the Board's prior approach did not avoid litigation. The question whether a tribal business was on a reservation was litigated in this case (JA 311-12 n.3), in *Sac & Fox* (307 NLRB at 241 n.6), and in *Yukon Kuskokwim* (328 NLRB at 761-63). The latter case involved the legal questions whether the tribal enterprise was in "Indian country" and, if so, whether

that should be equated with being on a tribal reservation, at least in Alaska. Thus, the Board's prior approach fell well short of establishing "bright line rules [which] avoid disputes over its jurisdiction . . . ."[8] *Yukon-Kuskokwim Health Corp., v. NLRB*, 234 F.3d at 717.

The Board's decision on remand in *Yukon Kuskokwim* makes it clear that the Board will decline jurisdiction, not only when the tribal enterprise's function is traditionally performed by government, but also when the Federal Government has undertaken to perform that function for the benefit of Indians. The Board also stated here that it would decline jurisdiction over tribal enterprises performing functions "unique to their status as Indian tribes." (JA 319.)

Thus, the Board has clearly indicated its intention to decline jurisdiction over three categories of tribal activities: those traditionally performed by government; those which the Federal Government has assumed an obligation to perform on Indians' behalf; and those unique to tribal status. In many cases, it will

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[8] Moreover, the Board, with judicial approval, has often rejected "bright line rules" in favor of a case-by-case approach, even on jurisdictional issues. *See e.g., Davis Memorial Goodwill Industries v. NLRB*, 108 F.3d 406, 410 (D.C. Cir. 1997) (recognizing that Board uses case-by-case approach to determine whether handicapped workers who receive rehabilitative training are statutory employees); *Waterford Park, Inc.*, 251 NLRB 874, 874 n.2, 875-76 (1980) (asserting jurisdiction over motel located near horse racetrack, based on findings that motel was not integrally related to operation of racetrack), *enforced mem.*, 672 F.2d 898 (D.C. Cir. 1981).

be clear that the tribal activity in issue falls into one of these categories. In many other cases, it will be equally clear that the activity falls into none of these categories. The remaining areas of uncertainty "will in time be narrowed through future adjudications," and their existence is not a basis for overturning the Board's decision, for the Act "does not require that the Board establish standards devoid of ambiguity at the margins." *Food & Commercial Workers Local 150-A v. NLRB*, 1 F.3d 24, 33 (D.C. Cir. 1993).

C. The Board's Assertion of Jurisdiction is Consistent With Federal Indian Policy

We have shown above that the language, structure, and purposes of the Act support the Board's assertion of jurisdiction here. However, the Supreme Court has held that "the Board has not been commissioned to effectuate the policies of the . . . Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives." *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942). The Tribe (Br 21-66) and amici (Br 4-30) argue that the Board's interpretation of the Act as applying to on-reservation tribal commercial enterprises contravenes Congressional policy towards Indians as reflected in numerous statutes, especially IGRA. This argument is without merit.

The Tribe and amici invoke the Congressional policy of maximizing tribal self-government, which, they assert, requires that any federal statute limiting tribal sovereignty must do so explicitly and unambiguously. Their position would give

on-reservation tribal enterprises a blanket exemption from federal statutes dealing with employment, for no such statute expressly includes tribes. As shown below, the Board properly rejected this position.

The Board expressly recognized the principle of tribal sovereignty. (JA 312, 315-19.) However, it rejected the notion every activity of a tribe on its reservation so implicates its sovereignty that any federal regulation thereof must be expressly authorized by Congress. Rather, the Board held (JA 316-19), where the activity is a commercial enterprise that employs significant numbers of non-Indians and serves primarily non-Indian customers, it is subject to general federal statutes governing the employer-employee relationship, unless Congress specifically exempts it from coverage. The Board's position is consistent both with general principles of statutory construction and with specific principles relating to the applicability of statutes to tribal activities.

No federal employment law expressly *includes* Indian tribes as employers. However, at least two such laws expressly *exclude* them. Both Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e (b)) and the Americans With Disabilities Act (42 U.S.C. § 12111 (5)(B)) specifically state, "The term 'employer' does not include . . . an Indian tribe . . . ." The Board reasonably concluded (JA 314) that the foregoing statutes show that Congress expressly excludes tribal enterprises from federal employment laws when it so desires, and

that its silence in other laws, including the Act, therefore indicates an intention to apply them to such enterprises. Indeed, the explicit exclusion of Indian tribes would serve no purpose if statutory silence were equivalent to implicit exclusion. It makes sense only if Congress both desired to exclude tribes from the statutes in question *and* believed that silence would result in their inclusion.

The Tribe (Br 23-24) and amici (Br 6) rely on the principle that ambiguous statutes should be construed in favor of Indians. *See, e.g., Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982). However, statutory silence is not the same as ambiguity. In *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960), the Supreme Court observed, "[I]t is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests." The Court cited prior decisions holding federal tax laws applicable to Indians without explicit language including them. Most of those decisions preceded the enactment of the Act in 1935. One of them—*Superintendent of Five Civilized Tribes v. CIR*, 295 U.S. 418, 419-20 (1935), decided a few weeks before enactment of the Act — expressly rejected the proposition that statutes apply to Indians only when they specifically say so. Thus, contrary to the contention of the Tribe (Br 37), when Congress enacted the Act, it was by no means clear that, under governing law, statutory silence meant exclusion of Indians from coverage.

The Board here relied (JA 316-17, 319) on the *Tuscarora* presumption that general laws apply to Indians unless they are specifically excluded. This Court, in *Navajo Tribe v. NLRB*, 288 F.2d 162, 164-65 & n.4 (1961), likewise relied on *Tuscarora*, and noted that the Act, in view of the "broad and comprehensive scope" of its jurisdictional provisions and definitions of such terms as "employer," "employee," and "commerce," is clearly a general statute to which the *Tuscarora* presumption applies.

In *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985) (citation omitted), the court set forth three exceptions to the *Tuscarora* principle: (1) where a law touches "'exclusive rights of self-government in purely intramural matters;'" (2) where the application of the law to the tribe would "'abrogate rights guaranteed by Indian treaties;'" and (3) where there is affirmative evidence, in the legislative history or elsewhere, that Congress intended a law to be inapplicable to Indians on their reservations. In these three situations, the court declared, "Congress must *expressly* apply a statute to Indians before we will hold that it reaches them." The Board here considered, and found inapplicable, these three exceptions. (JA 315-16, 319.)

Neither the Supreme Court nor this Court has passed on *Coeur d'Alene*, nor has the Supreme Court applied *Tuscarora* to an employment-related statute. However, the great majority of decisions in the courts of appeals have applied

Tuscarora, as limited by the exceptions set forth in *Coeur d'Alene*, to such statutes. In *Coeur d'Alene* itself, 751 F.2d at 1116-18, the Ninth Circuit held that the Occupational Safety and Health Act (29 U.S.C. § 651 *et. seq.)* ("OSHA") applied to a farm, wholly owned and operated by a tribe and located on its reservation, and employing both Indians and non-Indians. The court rejected the contention that all tribal commercial activity comes within the "tribal self-government" exception to *Tuscarora*, which it viewed as applying to "purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations . . . ." 751 F.2d at 1116. The court concluded (*id.* (citation omitted)):

> 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."

The Ninth Circuit reached the same conclusion in *U.S. Dept. of Labor v. OSHRC*, 935 F.2d 182 (1991), holding that OSHA applied to an on-reservation sawmill owned and operated by a tribe, where nearly half the sawmill's employees and virtually all its customers were non-Indians. The court specifically held that the fact that "revenue from the mill is critical to the tribal government" was insufficient to bring its operations within the "tribal self-government" exception. 935 F.2d at 184.

On the specific question of applicability of the Act to a tribal health care provider, the Ninth Circuit has stated, "as the [Act] is silent, *Coeur d'Alene* controls." *NLRB v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995, 999 (9th Cir. 2003). The court held the "tribal self-government" exception inapplicable, in part because half of the employees in issue, and nearly half of its patients (customers), were non-Indian. Thus, the court concluded, the case "does not concern a relationship between the . . . tribe and its members." 316 F.3d at 1000.

In *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996), the Second Circuit, adopting the test applied in *Coeur d'Alene,* concluded that OSHA applied to a construction firm, wholly owned and operated by a tribe, which excavated building sites and assisted in building roads, tribal homes, and expansion of the tribal casino, the tribe's principal source of income. All its work occurred on the tribal reservation. The tribe argued for an expansion of the "tribal self-government" exception to *Tuscarora* to require explicit reference to Indian tribes in every federal statute that diminished tribal sovereignty. The Second Circuit rejected this reading as overbroad, pointing out that virtually every federal statute would, if applied to tribal activities, have some effect on tribal sovereignty. 95 F.3d at 178. Rather, the court held, "[t]he question is not whether the statute affects tribal self-governance *in general*, but whether it affects tribal self-

government *in purely intramural matters*." *Id.* at 181. In light of the commercial nature of the tribal firm's activities, its substantial employment of non-Indians, and its work on a hotel and casino designed to attract out-of-state customers, the court concluded that its activities were not a purely intramural matter. *Id.* at 180-81.

Smart v. State Farm Ins. Co., 868 F.2d 929 (7th Cir. 1989), involved the application of the Employee Retirement Income Security Act (29 U.S.C. § 1001 *et seq.*) ("ERISA") to an employee benefit plan established by an Indian tribe for employees of a health center owned and operated by the tribe on its reservation. Applying *Coeur d'Alene*, the court stated, "a statute of general application will not be applied to an Indian Tribe when the statute threatens the Tribe's ability to govern its intramural affairs, but not simply whenever it merely affects self-governance as broadly conceived." 868 F.2d at 935. The court noted that even a statute requiring the withholding of federal taxes from employees' salaries interfered with tribal sovereignty to some extent. *Id.* It concluded that ERISA, if anything, was less of an interference with tribal self-governance than the withholding tax law, for it "[did] not broadly and completely define the employment relationship," but only required the tribe to meet reporting and accounting standards designed for the protection of the employees. *Id.* at 935-36.

Reich v. Great Lakes Indian Fish & Wildlife Commission, 4 F.3d 490 (7th Cir. 1993), relied on by the Tribe (Br 36, 41, 43), is not to the contrary. The court

there held that police officers employed by a consortium of tribes to enforce its hunting and fishing regulations were not subject to the overtime provisions of the Fair Labor Standards Act (29 U.S.C. § 207(k)) ("FLSA"), which expressly exempted state and local law enforcement officers. However, the court expressly disclaimed any intention to hold that tribal employees generally were exempt from the FLSA. 4 F.3d at 495. Rather, it held only that employees performing law enforcement or other governmental functions for Indian tribes were exempt to the same extent as employees performing similar functions for state or local governments. *Id.* The case thus holds only that when a general federal statute regulating employment is held applicable to Indian tribes, the specific exemptions contained in that statute are likewise applicable.[9]

Most of the other cases holding employment laws inapplicable to Indian tribes fall squarely within one or more of the exceptions recognized in *Coeur d'Alene*. *EEOC v. Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989); *EEOC v. Fond du Lac Heavy Equipment & Construction Co.*, 986 F.2d 246 (8th Cir. 1993); and *EEOC v. Karuk Tribe Housing Authority*, 206 F.3d 1071 (9th Cir. 2001), all held the Age Discrimination in Employment Act (29 U.S.C. § 621 *et*

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[9] The employees in issue in *Great Lakes* were engaged in law enforcement, a classic example of a traditional governmental function. Accordingly, the Board

seq.) ("ADEA") inapplicable to Indian tribes on the facts before the courts. *Cherokee* relied on explicit language in a treaty which recognized the tribe's right to make laws applicable to its members within its boundaries as bringing the case within the "treaty" exception to *Tuscarora*. 871 F.2d at 938 & nn. 2, 3. *Fond du Lac* found the "tribal self-government" exception applicable on "the narrow facts of this case which involve *a member of the tribe*, the tribe as an employer, and on the reservation employment . . . ." 986 F.2d at 251 (emphasis added). Similarly, *Karuk* held that a tribal member's discharge by the tribal housing authority was not subject to the ADEA because it "[did] not concern non-Indians as employers, employees, customers, or anything else." 260 F.3d at 1081.[10]

In *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1199 (10th Cir. 2002) (*en banc*), relied on by the Tribe (Br 34, 41) and amici (Br 14, 21, 27), the court held

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would likely decline to assert jurisdiction over such employees under its new standard announced in this case (see above, pp. 33-35).

[10] The same cannot be said of the conduct in this case. Discriminatory denial of access to union organizers has an adverse effect on the rights of all employees, whether or not they are members of the tribe. Similarly, a tribal enterprise's discharge of a tribe member for union activity would discourage all employees, whether tribe members or not, from engaging in such activity. Accordingly, such unfair labor practices clearly concern non-Indians as employees. *Cf. Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984) (denying protection of Act to undocumented aliens would "create [ ] a subclass of workers without a comparable stake in the collective goals of their legally resident co-workers, thereby eroding the unity of all the employees and impeding effective collective bargaining").

that *Tuscarora* "does not apply where an Indian tribe has exercised its authority as a sovereign . . . rather than in a proprietary capacity such as that of employer . . . ."[11] The "sovereign" activity of the tribe consisted of enacting a "right-to-work" law and applying it to a non-tribal lumber company operating on the tribal reservation. *See* 276 F.3d at 1189. The court's decision must be viewed in light of the unique status of "right-to-work" laws. By expressly authorizing States and Territories to enact such laws in Section 14(b) of the Act (29 U.S.C. § 164 (b)), Congress made a policy determination that national uniformity in this field is not necessary. Accordingly, the Act does not preempt enactment or enforcement of "right-to-work" laws by States, territories, or tribes. *See Retail Clerks v. Schermerhorn*, 375 U.S. 96, 101-05 (1963).

"Right-to-work" laws represent a limited exception to the general rule that the Act preempts any inconsistent State or Territorial laws. This preemption

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[11] The same court, alone among federal courts of appeals, had previously questioned the continued validity of *Tuscarora*. *See Donovan v. Navajo Forest Products Industries*, 692 F.2d 709, 713 (10th Cir. 1982). However, although *Navajo Forest* was decided prior to *Coeur d'Alene*, its facts fit within a specific exception to *Tuscarora* recognized in *Coeur d'Alene*: Application of OSHA to the tribal enterprise in *Navajo Forest* would have violated a tribal right (the right to exclude outsiders from its reservation) unambiguously guaranteed by a prior treaty. 692 F.2d at 711-12. To the extent that the court's opinion in *Navajo Forest* went further and suggested (*id.* at 712-13) that even in the absence of such a treaty, the right to exclude outsiders must be expressly abrogated by statute, *Coeur d'Alene* rejected it. 751 F.2d at 1117 n.5.

doctrine is "necessary to obtain uniform application of [the Act's] substantive rules and to avoid . . . diversities and conflicts likely to result from a variety of local . . . attitudes toward labor controversies." *Garner v. Teamsters Local 776*, 346 U.S. 485, 490 (1953). To exempt Indian tribes from the Act under the guise of "sovereignty" would leave the labor relations of this nation's casinos covered, not by one law, but potentially by as many as 556 different laws, as the Department of the Interior has recognized that number of tribal entities. (JA 294-305.) This Court should adhere to its holding in *Navajo Tribe v. NLRB* that "Congress has adopted a national labor policy, superseding the local policies of the States *and the Indian tribes*, in all cases to which the . . . Act applies." 288 F.2d at 164 (emphasis added).[12]

The Tribe has not shown that any of the *Coeur d'Alene* exceptions apply here.[13] First, as to the legislative history exception, the Tribe does not contend that the Act or its legislative history shows any intent to exclude on-reservation tribal

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[12] Moreover, since the employer in *San Juan Pueblo*, like the employer in *Navajo Tribe*, was not an Indian tribe, but a private employer operating on a tribal reservation, any reading of *San Juan Pueblo* as authorizing the tribe there to do more than enact a "right-to-work" law would put it in direct conflict with *Navajo Tribe*.

[13] Since the *Coeur d'Alene* exceptions result in exemption from an otherwise governing statute, the Tribe has the burden of proving their applicability. *See NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711 (2001); *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 936 (7th Cir. 1989).

enterprises from the Act. As amici concede (Br 11), "neither the Act nor its extensive legislative history makes even a passing reference to Indian [t]ribes." The Tribe suggests (Br 36) that Congress, in enacting the Act and later in amending it, never considered the question of its applicability to tribal enterprises. However, failure to consider the issue is not the same as considering it and deciding that the Act should not apply. *See, e.g., United States v. Funmaker*, 10 F.3d 1327, 1332 (7th Cir. 1993).

Likewise, the Tribe does not contend that application of the Act to its casino would violate any treaty between it and the United States. It does contend (Br 52-53) that its compact with the State of California (discussed below, p. 54) is equivalent to a treaty, and that applying the Act therefore "interferes with the effective equivalent of a treaty right." However, it properly defines "treaty" as "'a compact made between two or more independent nations, with a view to the public welfare.'" (Br 52 n.13) (citations omitted). Under no circumstances can a State be considered an "independent nation," and a compact with a State therefore cannot be a "treaty." *Coeur d'Alene* made clear what it meant by "treaty," saying, "[T]here is no treaty between the Coeur d'Alene Tribe and the United States government," nor "any document to which the United States is a signatory that specifically guarantees the [t]ribe's right to exclude non-Indians." 751 F.2d at 1117.

The "tribal self-government" exception is similarly inapplicable. *Coeur d'Alene* read that exception as limited to "purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations . . . ." 751 F.2d at 1116. Although the Supreme Court had previously stated that tribes retain "inherent power" in these three areas (*Montana v. United States*, 450 U.S. 544, 564 (1981)), it stressed in the same case that "'the powers of self-government . . . involve *only the relations among members of a tribe*.'" *Id.* (citation omitted).

The present case, involving a casino whose work force and customers are both predominantly nontribal, is plainly not about "the relations among members of [the] [T]ribe." The Board, in *Sac & Fox*, 307 NLRB at 244, recognized that a statute which "broadly and completely define[d] the employment relationship between the tribe and the employees" would unduly interfere with tribal self-government, but held that the same would not be true of a statute which "simply impose[d] certain regulatory requirements and standards for the employees' protection." The Act clearly falls into the latter category. It does not preclude a tribal enterprise from "'discharg[ing] an employee for a good reason, a bad reason, or no reason, so long as it is not for an unlawful reason.'" *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 224 (D.C. Cir. 2005) (citation omitted). And, while it would require the tribal enterprise to bargain with a representative chosen by a majority of its employees in an appropriate unit, it

would not prescribe, or permit the Board to prescribe, any specific terms of employment for the employees, or require the tribe to reach agreement with the union on any such terms. *See H. K. Porter Co. v. NLRB*, 397 U.S. 99, 103-09 (1970). Finally, as shown below, pp. 56-57, the Act does not address the question of employment preferences for tribal members. The Board was thus warranted in concluding (JA 316-18) that none of the *Coeur d'Alene* exceptions applied here and that the casino was subject to the Act.

Although the Tribe (Br 47-49) and amici (Br 13 n.2) criticize the *Tuscarora* approach as dicta and question its continued validity, neither contends that any subsequent Supreme Court decision has expressly overruled it. Overruling of prior decisions by implication is disfavored. *See Shalala v. Illinois Council on Long Term Care*, 529 U.S. 1, 18 (2000); *United States v. Rodriguez*, 311 F.3d 435, 439 (1st Cir. 2002). Moreover, since the Supreme Court decided *Tuscarora* on the explicit ground that the general federal law there in issue applied to the tribal lands in issue (362 U.S. at 118), that holding may not be characterized as dicta merely because the Court could have, but did not, rest its decision on the narrower ground that the statute expressly referred to tribal lands. *See Massachusetts v. United States*, 333 U.S. 611, 622-23 (1948); *Richmond Co. v. United States*, 275 U.S. 331, 340 (1928); *Whetsel v. Network Property Services*, 246 F.3d 897, 903 (7th Cir. 2001).

The Tribe (Br 49-50 n.12) and amici (Br 17-18, 20-21) would either reject *Coeur d'Alene* altogether or treat "tribal sovereignty" as a fourth exception to *Tuscarora*. The Tribe contends, in the alternative (Br 50-52), that application of the Act to its casino would so interfere with its right to self-governance as to come within the first *Coeur d'Alene* exception. Supreme Court precedent does not support either position.

The Supreme Court has consistently stressed the limited scope of tribal sovereignty and its defeasibility by invocation of the superior sovereignty of the United States. *See, e.g., Duro v. Reina*, 495 U.S. 676, 693 (1990) (tribal sovereignty "is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members"); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156 (1980) (citation omitted) (state taxation on sale of cigarettes by tribal smokeshops on tribal reservation "does not infringe the right of reservation Indians to 'make their own laws and be ruled by them,'. . . merely because [its] result . . . will be to deprive the [t]ribes of revenues which they currently are receiving"); *United States v. Wheeler*, 435 U.S. 313, 326 (1978) (areas where tribes "implicitly lost [sovereignty] by virtue of their dependent status" are "those involving the relations between an Indian tribe and nonmembers of the Tribe;" retained powers of self-government "involve only the relations among members of a tribe").

No Supreme Court decision has adopted the sweeping definition of sovereignty advocated by the Tribe and amici. In particular, no Supreme Court decision holds that tribal operation of a commercial enterprise with primarily nontribal employees and customers is an exercise of sovereign power presumptively exempt from federal regulation.

The Tribe (Br 25, 30-31) and amici (Br 29-30) contend that application of the Act would interfere with tribal sovereignty by limiting the tribes' right to exclude outsiders from their reservations or impose conditions on their entry. As shown below, this contention is without merit.

The Supreme Court has stated that a tribe retains the power to exclude non-Indians from its reservation, which "necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct . . . ." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982). However, it has never held that a tribe may condition entry to or presence on the reservation on the foregoing of rights guaranteed by a federal statute. To permit such action would amount to holding that the tribe's sovereignty is superior to that of the federal government. The law is the reverse. *See, e.g.*, *Oliphant v. Squamish Indian Tribe*, 435 U.S. 191, 208-10 (1978); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 178-79 (2d Cir. 1996).

Moreover, the argument of the Tribe and amici cannot logically be limited to on-reservation tribal enterprises. Application of the Act to nontribal enterprises on a reservation also limits the tribe's right of exclusion. Nevertheless, this Court has held that the tribal power of exclusion must yield to the Act in cases involving such employers. *See Navajo Tribe v. NLRB*, 288 F.2d at 164.[14]

The Board expressly recognized the importance of preserving tribal self-government. (JA 318-19.) However, as shown above, the Board properly held that a tribe's right to self-government does not include the right to operate a business affecting interstate commerce free of the requirements that federal employment laws impose on its competitors.

D. The Board's Assertion of Jurisdiction is Consistent With IGRA

The Tribe (Br 53-58) and amici (Br 19, 23) contend that the Board's assertion of jurisdiction is inconsistent with IGRA. The Tribe further contends (Br 56-58) that the TLRO (reproduced at JA 100-08), which it adopted pursuant to a compact with the State of California, preempts the application of the Act to its

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[14] Under the Act, the Tribe has the same right as any other employer to bar solicitation by nonemployee union organizers. It cannot (as it did here) discriminate by allowing solicitation by one union's organizers while prohibiting solicitation by another union's organizers. However, a nondiscriminatory ban on solicitation on the reservation by nonemployee organizers would be lawful absent a

gaming facilities. We show below that nothing in IGRA precludes the Board's assertion of jurisdiction and that, to the extent that preemption exists, the Act preempts the TLRO, rather than vice-versa.

Congress enacted IGRA in 1988 in response to the Supreme Court's holding in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221 (1987), that a State which did not completely prohibit bingo games could not regulate them when they were conducted on Indian reservations. *See Cabazon Band of Mission Indians v. National Indian Gaming Commission*, 14 F.3d 633, 634 (D.C. Cir. 1994). IGRA was designed "'to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme.'" *In Re Indian Gaming Related Cases*, 331 F.3d 1094, 1096 (9th Cir. 2003) (citation omitted),

IGRA divides gaming into three classes. Class I gaming, consisting of "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as part of, or in connection with, tribal ceremonies or celebrations," is subject to regulation only by the tribes. 25 U.S.C. §§ 2703(6), 2710(a)(1). Class II gaming includes bingo and similar games, as well as card games not prohibited by State law and played in accordance with State

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showing that they lack reasonable alternative means of communicating with the employees. *See Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533-35 (1992).

regulations on hours of operation or size of wagers permitted, but not banking card games (those in which the player bets against the casino), electronic games of chance, or slot machines. 25 U.S.C. § 2703(7). Indian tribes have jurisdiction over Class II gaming, but it is also subject to federal regulation, and IGRA sets forth specific requirements for ownership and control of Class II gaming operations, use of revenues derived from such operations, and background checks for key management officials and employees. 25 U.S.C. § 2710(b), (c).

Class III consists of all gaming operations not in Class I or II. 25 U.S.C. § 2703(8). Class III gaming is permitted on Indian reservations only when authorized by a tribal ordinance meeting the requirements set forth in IGRA for Class II gaming operations and approved by the Chairman of the National Indian Gaming Commission. 25 U.S.C. § 2710(d)(1)(A). Such gaming activities must be conducted in accordance with a compact negotiated by the tribe and the State and approved by the Secretary of the Interior. 25 U.S.C. § 2710(d)(1)(B), (C), (d)(3)(B). The compact may include provisions relating to six specific subjects and to "any other subjects that are directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C). The Secretary of the Interior may disapprove a compact if it violates IGRA or "any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands." 25 U.S.C. § 2710(d)(8)(B).

It is undisputed that the Tribe's casino conducts both Class II (bingo) and Class III gaming activities. In September 1999, the Tribe and the State of California entered into a compact (JA 239-79) governing only the Tribe's Class III gaming activities (JA 241). This compact was expressly conditioned on the Tribe's adoption of a Model TLRO. (JA 286.) The Tribe did adopt the Model TLRO (JA 100-08), which differs from the Act in significant respects. It defines unfair labor practices by both the Tribe and unions, including most of those in Section 8(a) and 8(b) of the Act (29 U.S.C. § 158(a), (b)). However, it omits the provisions of the Act (Section 8(a)(3) and 8(b)(2)) protecting employees from discrimination. It also denies employees certain rights protected by the Act. Thus, it permits strikes only after a bargaining impasse and completion of specified dispute resolution procedures (A 102, Sec. 6(2), A 105, Sec. 11), and prohibits all strike-related picketing on the reservation. (A 105, Sec. 11.) In addition, security personnel, cage cashiers, and dealers are excluded entirely from coverage. (A 101, Sec. 2(a)(3)-(5)).[15]

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[15] The Board has applied the Act to these three classifications of casino employees. *See Thunderbird Hotel, Inc.*, 144 NLRB 84, 86-87 & n.11 (1963) (security guards); *Trump Plaza Hotel and Casino*, 310 NLRB 1162, 1162 n.3, 1168-70 (1993) (dealers); *Conquistador Hotel, Inc.*, 186 NLRB 123, 124-25 (1970) (Condado Beach Hotel) (cage cashiers).

Although IGRA nowhere refers specifically to labor relations, its authorization for a Tribal-State compact to address "any . . . subjects . . . directly related to the operation of gaming activities" (25 U.S.C. § 2710(d)(3)(C)(vii)) has been held to include labor relations. *See In Re Indian Gaming Related Cases,* 331 F.3d 1094, 1115-16 (9th Cir. 2003). However, nothing in IGRA indicates that the provisions of such a compact are to supersede inconsistent provisions of existing federal laws.[16]

The contention that IGRA eliminated the Board's jurisdiction over tribal casinos is inconsistent with "the 'cardinal rule . . . that repeals by implication are not favored.'" *Cook County v. Chandler*, 538 U.S. 119, 132 (2003) (citation omitted). The Tribe seeks (Br 53-54) to invoke a countervailing principle: "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974). However, in that very case, the Court stressed that "when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to

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[16] IGRA does render part of one federal statute, the Johnson Act (15 U.S.C.§ 1175, banning gambling devices in Indian country), inapplicable to any gaming conducted under a Tribal-State compact. 25 U.S.C. § 2710(d)(6). It is improbable that, if Congress intended to render a wide variety of federal statutes inapplicable, it would mention only one.

regard each as effective." 417 U.S. at 551. There is no showing here that IGRA and the Act are incapable of coexistence.[17]

Further, the structure of IGRA strongly suggests that it was not intended to exempt tribal casinos from federal employment laws. As shown above, pp. 52-53, IGRA divides gaming into three classes, and makes tribal jurisdiction exclusive *only* as to Class I gaming. Under the Tribe's construction of IGRA, however, it would also have exclusive jurisdiction over employment issues relating to Class III gaming. Such a construction would be contrary to the plain language of IGRA, which clearly differentiates between Class I and Class III gaming, and to the obvious proposition that "Class III gaming is subject to a greater degree of *federal*-state regulation than either [C]lass I or [C]lass II gaming." *In Re Indian Gaming Related Cases*, 331 F.3d 1094, 1097 (9th Cir. 2003) (emphasis added).

Amici (Br 24-28 & n.9) assert an irreconcilable conflict between the Act and federal statutes, as well as tribal ordinances, including the Tribe's TLRO (JA 104, Sec. 9), which require or permit employment preferences for Indians in general, and tribe members in particular, on jobs on or near tribal reservations. A similar

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[17] If this case is viewed as a labor law case, the canon invoked by the Tribe works against it. The Act contains specific provisions dealing with labor relations; IGRA does not even mention labor relations. Accordingly, the general language in IGRA cannot override the specific language in the Act.

contention was rejected in *Saipan Hotel Corp. v. NLRB*, 114 F.3d 994, 996-97 (9th Cir. 1997), holding that application of the Act to nonresident workers employed in the Commonwealth of the Northern Mariana Islands ("CNMI") did not conflict with CNMI statutes giving resident workers preference in employment. Similarly, since the Act does not address the issue of employment preference for Indians, it does not conflict with other federal laws, nor preempt the provisions of TLRO's, that grant such preference.[18] As the Board noted (JA 319 n.23), application of the Act "will not impair the [Tribe's] ability to hire as it wishes."

Amici contend (Br 26-28) that the duty of fair representation would compel any bargaining representative to seek the abrogation of tribal preferences in employment. The Board has never held that a union violates its duty of fair representation by agreeing to continue employment preferences specifically required or authorized by federal law. In any event, amici's argument is premature, since no union has been certified. Speculation about a union's possible bargaining position is not a valid basis for denying employees the protection of the Act. *See Borek Motor Sales, Inc. v. NLRB*, 425 F.2d 677, 682 (7th Cir. 1970).

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[18] The Act would preempt tribal ordinances such as that of the Choctaws (reproduced at Amici Add 300, § 30-1-6(6)), prohibiting organization of or membership in any union which opposes the Choctaws' tribal preference policies. Such provisions directly interfere with employees' right under the Act to join unions and bargain collectively through representatives of their choice.

Any contention that a union has bargained in bad faith by insisting on elimination of tribal preferences may be raised by filing unfair labor practice charges against the union. *See Bell & Howell Co. v. NLRB*, 598 F.2d 136, 147-48 (D.C. Cir. 1979).

The "reverse preemption" argument of the Tribe -- that the TLRO "preempts" any inconsistent provisions of the Act -- is contrary to the fundamental principle that "[t]ribal sovereignty is 'dependent on, and subordinate to,' the federal government." *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 178 (2d Cir. 1996) (citation omitted). A "subordinate" sovereign cannot preempt the laws of a superior sovereign; only the converse is true. Nor does it matter that the TLRO was adopted as part of a compact between the Tribe and the State of California. Under Section 10(a) of the Act (29 U.S.C. § 160(a)), the Board's jurisdiction over unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by *agreement*, *law*, or otherwise." (emphasis added). In contrast, State regulation of activity arguably subject to the Act is generally preempted. *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244-46 (1959). If the State enacted a statute identical to the TLRO, it could not apply that statute to any labor dispute covered by the Act, nor could it allow any employer to "opt out" of the Act's coverage by agreeing to

abide by the statute. Similarly, it cannot, by entering into a compact requiring the Tribe to enact the TLRO, authorize the Tribe to "opt out" of the Act.

Nor does the fact that IGRA authorized the compact require a different result. As shown above, p. 55, IGRA does not provide that the terms of a compact made under its aegis will supersede the provisions of the Act, and it does not require that the compact address labor relations at all. The absence of any inconsistency between the compact and IGRA is not enough to transform the compact into a federal law that overrides preexisting federal laws such as the Act.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for review should be denied and that the Board's Order should be enforced in full.

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v.	*	
NATIONAL LABOR RELATIONS BOARD	*	Board Case No. 31-CA-23673, 31-CA-23803
Respondent/Cross-Petitioner	*	
and	*	
UNITE HERE	*	
Intervenor	*	
and	*	
STATE OF CONNECTICUT	*	
Intervenor	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) the Board certifies that its brief contains 13,854 words of proportionally-spaced, 14-point Times New Roman type, and the word processing system used was Microsoft Word 2003.

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