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

RESPONSE OF THE NATIONAL LABOR RELATIONS BOARD TO PETITION FOR REHEARING OR REHEARING EN BANC

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STATEMENT OF THE CASE

On February 9, 2007, a panel of this Court (Circuit Judges Garland and Brown and Senior Circuit Judge Williams) issued an opinion (reported at 475 F.3d 1306) denying the petition of 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") and granting the Board's cross-application for enforcement of its Order. On March 26, 2007, the Tribe filed a petition for rehearing or rehearing en banc. The Court has directed the Board to file a response to the petition. For the reasons stated below, the Board respectfully submits that the petition should be denied.

THE DECISIONS OF THE BOARD AND THIS COURT

The Tribe, a federally recognized Indian tribe, owns and operates the San Manuel Indian Bingo and Casino on its reservation in San Bernardino County, California. (JA 312; 54-56.)[1] The casino conducts both bingo games, defined as Class II gaming in the Indian Gaming Regulatory Act (25 U.S.C. § 2701, 2703(7)) ("IGRA"), and other gaming operations defined as Class III in IGRA (25 U.S.C.

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[1] "JA" references are to the volume captioned "Joint Appendix." "Pet" references are to the petition for rehearing or rehearing en banc. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

§ 2703(8)). The casino has more than 1,400 employees and has described itself as "one of the largest employers in San Bernardino County. . . ." The great majority of the casino's employees and customers are not members of the Tribe. (JA 312; 57, 183.)

IGRA requires that any tribe, before conducting Class III gaming operations on its reservation, negotiate a compact governing such operations with the State in which the reservation is located and have the compact approved by the Secretary of the Interior. 25 U.S.C. § 2710(d)(1)(B), (C), (d)(3)(B). The State of California required, as a condition of entering into such a compact, that the Tribe enact a Tribal Labor Relations Ordinance ("TLRO"). (JA 312; 100-08.) The TLRO, unlike the National Labor Relations Act (29 U.S.C. § 151 *et seq.*) ("the Act"), prohibits strikes until a bargaining impasse has occurred and specified dispute resolution procedures are completed; prohibits strike-related picketing on the reservation; and excludes security personnel, cage cashiers, and dealers, all of whom are considered employees under the Act. (JA 100-08.)

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, 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.) The Board found that the Tribe's operation of a casino was 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 IGRA, since the Act does not regulate gaming, nor does IGRA address labor relations. (JA 320.) Accordingly, the Board denied the motion for summary judgment. (JA 320.)

The Tribe 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 that application of the Act was preempted by IGRA and the Tribe's compact with California. (JA 332-41.) The General Counsel filed a motion for summary judgment. (JA 344-49.)

The Board (Chairman Battista and Members Liebman and Schaumber) granted this motion, finding that it had already decided the jurisdictional issue and that the Tribe had shown no special or changed circumstances requiring reconsideration of that decision. (JA 387-89.) The Board thus found that the Tribe had violated the Act as alleged in the complaint, and ordered it to cease and desist from the unlawful conduct and to take affirmative remedial action. (JA 388-89.)

This Court enforced the Board's Order, finding that application of the Act to the Tribe's casino would not unduly infringe on the Tribe's sovereignty and that the Board reasonably interpreted the term "employer" in Section 2(2) of the Act to include tribal governments operating commercial enterprises. The Court noted that, while a statute limiting tribal sovereignty must do so explicitly, not every statute which constrains a tribe's actions impairs its sovereignty. 475 F.3d at 1312. In this case, the Court concluded, the impairment of tribal sovereignty resulting from application of the Act would be negligible, since the governmental functions performed — enactment of the TLRO and entry into a compact with the State of California — were ancillary to the primarily commercial activity of operating a casino. 475 F.3d at 1314-15. Because the casino was virtually identical to privately operated casinos, and because most of its employees and customers were not members of the Tribe, its operation did not simply involve internal governance of the Tribe's territory and members. *Id.* at 1315.

The Court further held that the Board's construction of the term "employer" in Section 2(2) of the Act to include the Tribe as operator of the casino was reasonable. The Board's refusal to read the statutory exemption for States and political subdivisions to include tribal governments was consistent with the ordinary meaning of the phrase "State or political subdivision." 475 F.3d at 1316-17.

Finally, the Court concluded, IGRA does not foreclose application of the Act to tribal casinos. IGRA permits tribes and states to regulate gaming activities, but nothing in IGRA precludes federal agencies from regulating employment issues arising from the operation of tribal casinos. *Id.* at 1318.

ARGUMENT

THE TRIBE HAS NOT SHOWN THAT REHEARING EN BANC IS WARRANTED

Rule 35(a) of the Federal Rules of Appellate Procedure and this Court's Rule 35(c) require that a petition for rehearing en banc show that the case is of exceptional importance or that the panel decision is in conflict with a decision of the Supreme Court, this Court, or another court of appeals. The Tribe has failed to show that any of these conditions are met here.

In arguing that the panel erred in upholding the Board's application of the Act to its casino, the Tribe contends (Pet 6, 12) that the panel ignored the principle that a statute will be construed to impair tribal sovereignty only where Congress

has clearly expressed its intent to do so. *See, e.g., Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 n. 14 (1982). Contrary to this contention, the panel expressly recognized this principle, but held that not every statute which constrains the actions of a tribal government impairs tribal sovereignty. 475 F.3d at 1312. There are no decisions to the contrary. No court has invoked the "sovereignty" principle to declare tribal commercial operations wholly exempt from general federal statutes regulating employment.

The panel correctly held that "tribal sovereignty is not absolute autonomy, permitting a tribe to operate in a commercial capacity without legal constraint." 475 F.3d at 1314. This holding is consistent with repeated pronouncements of the Supreme Court, which has stated that the relevant inquiry "is not dependent on mechanical or absolute conceptions of . . . tribal sovereignty, but [calls] for a particularized inquiry into the nature of the . . . federal and tribal interests at stake. . ." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). Tribal sovereignty is divested where its exercise "would be inconsistent with the overriding interests of the National Government." *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 153 (1980).

As the panel noted (475 F.3d at 1315) the casino "is virtually identical to scores of purely commercial casinos across the country." Thus, its operation directly implicates the federal policy, set forth in Section 1 of the Act (29 U.S.C.

§ 151), of preventing the obstruction of commerce resulting from labor disputes. A labor dispute at the Tribe's casino would clearly obstruct commerce just as much as a labor dispute at a non-Indian casino of similar size.

The panel properly concluded (475 F.3d at 1315) that the federal interest in avoiding such obstructions of commerce outweighs the "negligible" impairment of tribal sovereignty resulting from application of the Act to the Tribe's operation of its casino. It held that tribal sovereignty is impaired only to "the extent to which application of the general law will constrain the tribe with respect to its governmental functions," which it defined as "the traditional acts governments perform" (475 F.3d at 1313), and concluded that ["t]he principle of tribal sovereignty . . . recognizes the independence of [Indian tribes] *as regards internal affairs* . . . ." *Id.* at 1314 (emphasis added).

The Tribe relies (Pet 7-10) on cases holding, in other contexts, that a distinction between "governmental" and "proprietary" functions is unworkable. Those cases do not support the Tribe's basic contention that everything it does on its reservation is "governmental" and therefore exempt from federal employment laws. Rather, *Reeves, Inc. v. Stake*, 447 U.S. 429, 436 (1980), relied on by the Tribe (Pet 7) expressly stated that "[t]he basic distinction . . . between States as market participants and States as market regulators makes good sense and sound law." The Court also noted that "state proprietary activities may be, and often are,

burdened with the same restrictions imposed on private market participants." 447 U.S. at 439. Both observations are equally applicable to Indian tribes as market participants.[2] In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 755 (1998), the Court, while declining to limit tribal immunity from suit to governmental activity, stressed the distinction between immunity from suit and exemption from substantive laws. Immunity, the Court stated, concerns not the applicability of such laws, but the means of enforcing them.[3]

In operating its casino, the Tribe is clearly acting primarily as a market participant, rather than as a market regulator. In view of its geographical location and its advertising directed to coastal areas of southern California (JA 193-201),

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[2] The Tribe also relies (Pet 1, 7) on the lengthy discussion of the unworkability of the "governmental-proprietary" distinction in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S.C. 528, 537-47 (1985). However, *Garcia* discussed this issue to *reject* the argument that application of federal employment laws to States was an unconstitutional infringement on their sovereignty. The Court concluded that no such infringement would occur when the covered state agency "faces nothing more than the same . . . obligations that hundreds of thousands of other employers, public as well as private, have to meet." 469 U.S. at 554.

[3] The doctrine of tribal immunity from suit is clearly inapplicable here. Under Section 3(d) of the Act (29 U.S.C. § 153(d)), only the Board's General Counsel can issue an unfair labor practice complaint against a tribe. His doing so is equivalent to the filing of a lawsuit by the United States, and tribes have no immunity from such suits. *See United States v. Red Lake Band of Chippewa Indians,* 827 F.2d 380, 382-82 (8th Cir. 1987).

the Tribe's casino clearly competes for customers with Las Vegas casinos. As the panel noted (475 F.3d at 1315), its operation "is not a traditional attribute of self-government." As the panel further noted (*id.*), "the vast majority of the [c]asino's employees and customers are not members of the Tribe, and they live off the reservation." Thus, as the panel concluded (*id.*), the Tribe, in operating the casino, "is not simply engaged in internal governance of its territory and members . . . ."

Contrary to the Tribe's contention (Pet 10-11), the panel's conclusion is not contrary to Supreme Court decisions recognizing that tribes have some authority to regulate the activities of nonmembers who have consensual relationships with the tribe. *Montana v. United States*, 450 U.S. 544, 565 (1981), expressly reaffirmed the principle that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), dealt with the question "whether a *State* may restrict an Indian Tribe's regulation of hunting and fishing on its reservation" and concluded that application of the *state's* laws to hunting and fishing by nonmembers on the reservation "is pre-empted by the operation of federal law." 462 U.S. at 325 (emphasis added). Such pre-emption would occur, the Court held, if state law "interferes or is incompatible with *federal* and tribal interests reflected

in federal law . . . ." *Id.* at 334 (emphasis added).[4] A tribe likewise lacks the power to regulate nonmembers in a manner "incompatible with federal . . . interests reflected in federal law." This Court noted long ago 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." *Navajo Tribe v. NLRB*, 288 F.2d 162, 164 (D.C. Cir. 1961) (emphasis added).

The case law also does not support the Tribe's contention (Pet 2, 4, 9, 10) that, because the casino is its sole source of revenue, operation of the casino is necessarily a "governmental" function. The Supreme Court has held that regulation of on-reservation commercial activity "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

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[4] *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), relied on by the Tribe (Pet 2, 9, 11), likewise dealt with State, not federal, regulation of tribal bingo games. The Court noted that "'tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States'" (480 U.S. at 207; citation omitted), and that, in the case before it, the tribes' interests in operating high-stakes bingo games "obviously parallel the federal interests." (*id.* at 219). The plain implication is that tribal interests, including the interest in self-government, would be subordinate to overriding federal interests where the two were in conflict.

currently are receiving." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156 (1980) (citation omitted). There is a significant difference between raising revenue by taxation, which "is a fundamental attribute of sovereignty" (*id.* at 152), and raising it by entrepreneurial activity. Only governments can do the former, while the latter is a classic function of the private businesses whose labor relations the Board regulates.

Moreover, although the Tribe asserts (Br 4, 10) that IGRA requires that revenues from the casino "must be used for governmental purposes," the Tribe's own Gaming Revenue Allocation Act (JA 96) provides that up to 45 percent of the revenues may be distributed directly to members of the Tribe. Such distribution no more serves "governmental purposes" than a Nevada casino's distribution of profits to its stockholders.[5]

The Tribe also contends (Pet 9-10, 12) that, because an avowed purpose of IGRA is to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments" (25 U.S.C. § 2702(1)), the Tribe's operation of a casino "is necessarily a governmental activity as a matter of law under IGRA." However, as

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[5] IGRA also permits donation of tribal casino revenues to charitable organizations (25 U.S.C. § 2710 (b)(2)(B)(iv)), and the Tribe's Gaming Revenue Allocation Act permits such donation of up to 4 percent of the Tribe's casino revenues. (JA 96.) This, too, cannot be regarded as a "governmental purpose;" many private businesses and individuals make similar donations.

shown above, the panel properly concluded that the adverse impact of Board regulation on those purposes is not so great as to warrant a presumption that the Act does not apply. 475 F.3d at 1314-15.

Contrary to the Tribe's further contention (Pet 12), the panel properly concluded (475 F.3d at 1320) that neither IGRA, nor the TLRO, nor the compact between the Tribe and the State of California which incorporates the TLRO, deprives the Board of jurisdiction over the casino's labor relations. Nothing in IGRA provides that such a Tribe-State compact, or any tribal ordinance adopted pursuant thereto, will supersede inconsistent provisions of federal employment laws in general or the Act in particular.

Moreover, IGRA, by its terms, gives tribes exclusive jurisdiction over Class I gaming, but authorizes federal, as well as state, regulation of certain aspects of Class II and Class III gaming. The Tribe's position would obliterate the distinction between the different classes of gaming which Congress carefully drew.[6] The panel here properly refused to do so.

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[6] Denying the Board jurisdiction only over Class I gaming is consistent with the underlying purposes of the Act, discussed above, pp. 7-8. Class I gaming, defined as "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 unlikely to give rise to labor disputes disrupting commerce. It is also far more likely to involve only tribal members than the bingo games in Class II or the high-stakes gaming in Class III.

Finally, contrary to the Tribe's contention (Pet 14-15), the panel properly deferred to the Board's conclusion that the Tribe, in operating the casino, is an "employer" within the meaning of Section 2(2) of the Act (29 U.S.C. § 152(2)). The panel gave such deference only *after* concluding that principles of Indian law did not preclude the Board's assertion of jurisdiction, an issue which the panel expressly decided *de novo*. 475 F.3d at 1312. Once that issue was resolved in the Board's favor, the only remaining question was the construction of Section 2(2) and its exemption of "any State or political subdivision thereof." The Board has always received deference on this issue. *See NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 605 (1971); *Yukon-Kuskokwim Health Corp. v. NLRB*, 234 F.3d 714, 716 (D.C. Cir. 2000); *Aramark Corp. v. NLRB*, 179 F.3d 872, 877 & n. 8, 879 (10th Cir. 1999) (en banc).

Viewing the Tribe-State compact as overriding the Act would create a further anomaly. The compact, by its terms, is applicable only to Class III gaming. (JA 241-42, 272.) If it superseded the provisions of the Act, the Board would still have jurisdiction over the Tribe's bingo operations, but not over its Class III gaming operations. No policies of either the Act or IGRA justify such a result.

CONCLUSION

For the foregoing reasons, as well as those stated in our opening brief and in the opinion of the panel, we respectfully submit that the petition for rehearing or rehearing en banc should be denied.

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and	*	
UNITE HERE	*	
Intervenor	*	
and	*	
STATE OF CONNECTICUT	*	
Intervenor	*	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the response of the National Labor Relations Board to the petition for rehearing or rehearing en banc were served this day by first class mail upon the following counsel at the addresses listed below:

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