ORAL ARGUMENT NOT YET SCHEDULED

Case Nos. 05-1392, 05-1432

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

San Manuel Indian Bingo and Casino,
San Manuel Band of Serrano Mission Indians,
Petitioners,

v.

National Labor Relations Board, *et al.*,
Respondents/Cross Petitioners.

On Petition for Review of the Order of the
National Labor Relations Board

PETITIONERS' REPLY BRIEF

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GLOSSARY

Act	National Labor Relations Act
AB	Corrected Brief of Amici Indian Tribes and Tribal Organizations In Support of Petitioners and Reversal Of The NLRB's Judgment
ADA	Americans with Disabilities Act
Board	National Labor Relations Board
BB	Brief of Respondent/Cross-Petitioner National Labor Relations Board
CB	Brief of Intervenor State of Connecticut
Compact	Tribal-State Gaming Compact between the Tribe and the State of California
HERE	Hotel Employees & Restaurant Employees International Union
IGRA	Indian Gaming Regulatory Act
IRA	Indian Reorganization Act
NLRA	National Labor Relations Act
NLRB	National Labor Relations Board
Opposing Parties	National Labor Relations Board and Intervenors UNITE HERE! and State of Connecticut
Project	San Manuel Indian Bingo and Casino
San Manuel	San Manuel Band of Serrano Mission Indians
TB	Petitioner's Opening Brief

TLRO	Tribal Labor Relations Ordinance
Tribe	San Manuel Band of Serrano Mission Indians
Tuscarora	*Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1962)
UB	Brief of Intervenor UNITE HERE! International Union

I. Summary of Argument

The National Labor Relations Board ("Board") defends its unprecedented decision extending its jurisdiction to the Tribe's on-reservation activities based on five propositions.

First, the Board presumes that Indian law is irrelevant to its initial construction of the National Labor Relations Act ("Act"). Second, it claims that its precedents, applying the Act to off-reservation tribal conduct but exempting tribes on the reservation, cannot now be squared with the Act. Third, the Board believes that increased tribal economic activity authorizes it to re-balance federal labor and Indian policies and reverse decades of precedent. Fourth, the Board presumes that *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), and *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985), provide the governing interpretive rule and fully protect tribal sovereignty. Finally, the Board presumes to unilaterally determine whether its exercise of jurisdiction interferes too much with tribal sovereignty by assessing whether the tribal activity is one "traditionally performed by government," which "the Federal Government has assumed an obligation to perform on Indians' behalf" or which is "unique to tribal status." Board Brief at 34 ("BB 34").

Each premise conflicts with federal Indian law and policy and the Board's authority. The Board's interpretive process ignores that "the standard principles of statutory construction do not have their usual force in cases involving Indian law." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

The federal government's trust relationship with Indian tribes requires that this Court interpret the Act using two fundamental Indian canons of construction: tribal sovereignty will not be diminished absent clear congressional direction, *see, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978), and "ambiguities in federal statutes are to be read liberally in favor of the Indians." *City of Roseville v. Norton*, 348 F.3d 1020, 1032 (D.C. Cir. 2003). Neither the Act nor its legislative history reflects congressional intent that it apply to tribes. The Act's silence, particularly in light of the canons, mandates reversal here.

The Board's assertion that the Act cannot support a territorial distinction ignores the Supreme Court's conclusion that tribal governmental authority depends on location and that governmental sovereignty – and thus the Act's governmental exemptions – is necessarily limited to each government's territorial jurisdiction. The Board's attempted re-balancing of labor and Indian policies, because of increasing tribal economic activity,

ignores both its limited authority and Congress's declaration that tribal economic activity – and particularly gaming – *is governmental.*

The Board's assumption that *Tuscarora* and *Coeur D'Alene* fully define and protect tribal sovereignty is wrong. The Board relies on dictum the Supreme Court has never cited again and that conflicts with both Congress's policies regarding, and the Supreme Court's views of, tribal sovereignty and federal Indian policy.

Finally, the Board's claim to accommodate tribal sovereignty by deciding case-by-case whether exercising its jurisdiction would interfere too much with federal Indian policy must be rejected. The Board lacks the authority and the expertise to make such decisions. The "governmental/proprietary" distinction it intends to apply is inconsistent with federal Indian law. It is also unworkable, as the Supreme Court has recognized in rejecting it elsewhere.

The Board's attempt to re-balance federal labor and Indian policies without congressional authorization should be reversed.

II. ARGUMENT

A. The Indian Canons of Construction Must Be Applied In the Act's Initial Interpretation

The Board's initial construction negates Indian law. It not only ignores the canons, but applies three contrary principles to reach its unprecedented interpretation: (1) reading the Act as broadly as constitutionally permissible; (2) construing exceptions to the Act narrowly; and (3) seeking deference for its decisions. The Board's effort to relegate Indian law to an afterthought must be rejected.

1. The Act Must Be Construed In Light of The Indian Canons

The Supreme Court has clearly rejected the Board's approach of construing statutes affecting Indians without reference to Indian law. "[T]he standard principles of statutory construction do not have their usual force in cases involving Indian law." *Blackfeet Tribe*, 471 U.S. at 766. Applying the canons, *Blackfeet Tribe* held that the "strong presumption against repeals by implication" did not apply in Indian law; thus, federal legislation authorizing state taxation of tribal oil and gas leases did not survive a later federal act silent as to state taxing authority. *Id.* Similarly, *Wagnon v. Prairie Band Potawatomi Nation*, 126 S. Ct. 676, 687 (2005), teaches that "the doctrine of

tribal sovereignty ... requires us to reverse the general rule that exemptions from tax laws should ... be clearly expressed."

Thus, the Board and this Court must apply Indian law when initially interpreting whether the Act applies to on-reservation tribal activity. The Board erred in relying on labor law rules to read the Act expansively and its exceptions narrowly. Its attempt to ignore the Indian canons also contradicts the Supreme Court's requirement of a clear statement of congressional intent before the Act is applied to interfere with other significant interests analogous to tribal sovereignty. *See NLRB v. Catholic Bishop,* 440 U.S. 490, 507 (1979) (refusing to apply the Act to church-run schools without a clear statement of congressional intent); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 17-22 (1963) (refusing to apply the Act to foreign flag ships absent clear congressional intent).

Moreover, agency decisions involving Indian sovereignty issues do not receive *Chevron* deference. This "departure from the *Chevron* norm" occurs because "the rule of liberally construing statutes to the benefit of the Indians arises not from ordinary exegesis, but from principles of equitable obligations and normative rules of behavior applicable to the trust relationship between the United States and the Native American people." *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001). *Cobell*, coupled

with numerous Supreme Court decisions refusing to defer to the Board's interpretations of statutes or legal regimes outside its sphere of competence (Tribe's Brief ("TB") at 19-21, 59-62), demonstrates that the decision should be reviewed *de novo* using the Indian canons.

2. All Evidence Of Congressional Intent Demonstrates The Act Does Not Apply

The Act's text, legislative history, purpose, and historical context demonstrate that Congress did not intend the Act to apply to on-reservation tribal governmental activity. Congress undisputedly intended the Act to regulate private employers, not governments. TB at 35-37. Indeed, courts have implied exemptions from the Act's coverage for other governments not expressly named in the Act. *See Chaparro-Febus v. Int'l Longshoremen Ass'n*, 983 F.2d 325, 329-30 (1st Cir. 1993); *Compton v. Nat'l Mar. Union*, 533 F.2d 1270, 1274 (1st Cir. 1976); *Virgin Islands Port Auth. v. SIU de Puerto Rico*, 354 F. Supp. 312, 312-13 (D.V.I. 1973).[1] And the evidence concerning the state of the law and the status of Tribes (TB at 36-37, Amici Brief ("AB") at 7-14) make it inconceivable that in 1935 Congress considered tribal governments within the class of private commercial

[1] The Board attempts to distinguish these cases, but does not dispute the lack of Board jurisdiction over territorial governments.

employers to be regulated under the Act. The Board cannot explain why Congress would have subjected tribes, alone among all governments, to the Act.

The claim that the governmental exemption does not apply because tribes lack no-strike laws is similarly meritless. The Board's admission that a purpose of the Act's governmental exemption is to protect governments from the threat of strikes (BB 19) supports the Tribe's position. The TLRO limits the right to strike to cases in which collective bargaining negotiations have reached an impasse and the matter is not resolved in "the tribal forum procedures set forth in Section 13(b)" of the TLRO. JA 105 (TLRO § 11). Moreover, "Strike-related picketing shall not be conducted on Indian lands as defined in 25 U.S.C. § 2703(4)." *Id.*

Furthermore, the reason the Act exempts governments -- the risk that strikes could limit the provision of critical government services -- applies more forcefully to tribes. *See* DiSabatino, *Who Are Employees Forbidden to Strike Under State Enactments or State Common-Law Rules Prohibiting Strikes by Public Employees or Stated Classes of Public Employees*, 22 A.L.R. 4th 1103 (1983).

San Manuel has as urgent a need as state or local governments to uninterrupted performance of services to its citizens, and is more vulnerable.

The Tribe's casino is essentially its sole source of revenue. A strike against this enterprise that the Board dismissively describes as "not governmental" would disrupt tribal services to a greater degree than state or local governments. The Tribe, unlike those governments, has no tax revenues. Moreover, given competition in private industry, unions must be careful to avoid making demands that would put an employer out of business; such limits do not exist with tribes. Allowing unions the right to strike without the TLRO's protections would give them inordinate leverage to demand larger and larger shares of the tribal enterprise's revenues that are intended to provide desperately needed services on the reservation and that are statutorily mandated to governmental uses. *See* 25 U.S.C. § 2710(b)(2)(B).

There is no basis to assume that Congress intended to expose tribal governments to strikes by tribal employees – an exposure the Act spares other governments. Because the TLRO expressly regulates and limits strikes, and strikes similarly interfere with tribes' ability to perform government services, applying the governmental exemption to tribes serves "'the purposes Congress sought to serve'" through the governmental exemption. BB at 19 (*quoting State Bank of India v. NLRB*, 808 F.2d 526, 531 (7th Cir. 1986)).

3. The Indian Canons Mandate Reversal

Under the Indian canons, the Board's decision must be reversed. Applying the Act limits the Tribe's sovereign rights by requiring it to bargain with a third party even with respect to its member employees, interferes with Indian preferences,[2] and subjects tribes to strikes without the TLRO's protections. TB at 26-29; AB at 21-30. Because the Act does not even address its applicability to Indian tribes, it may not be applied to limit on-reservation tribal sovereignty. As Board Member Schaumber recognized, this should end the case. JA at 0325-26.

The "clear statement" canon is strengthened considerably here by IGRA's provision that "Indian tribes have the *exclusive right* to regulate gaming activity on Indian lands if the gaming activity is *not specifically prohibited* by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity."

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[2] The Union's assertion that Act jurisdiction will not interfere with Indian preferences because pre-employment matters are not mandatory subjects of bargaining and the Board could treat preferences as merely permissive subjects of bargaining misses the point. Preferences are not limited to hiring, but apply to all employment decisions (such as training, promotion and seniority privileges, AB at 27), and it is mere speculation that the Board would declare Indian preferences to be non-mandatory subjects of bargaining. Moreover, Congress has frequently endorsed tribal preferences, strongly suggesting that it did not intend to force tribes to bargain over this fundamental sovereign prerogative. AB at 26 and n.9

25 U.S.C. § 2701(5) (emphasis added). IGRA grants tribes the exclusive right to regulate all aspects of gaming employment and labor relations, subject to the Compact process. Because the Act does not address tribal governments, it should not be read to interfere with the Tribe's IGRA rights.

At a minimum, congressional silence concerning the Act's application to on-reservation tribal activities renders it ambiguous. *See, e.g., Augustine v. Department of Veterans Affairs*, 429 F.3d 1334, 1342 n. 4 (Fed. Cir. 2005) ("Where a statute's text and legislative history are *silent* on an issue . . . the overriding purpose of the provision is highly relevant in resolving the *ambiguity*") (emphasis added); *Kentuckians for Commonwealth Inc. v. Rivenburgh*, 317 F.3d 425, 441 (4th Cir. 2003) ("the statute is silent . . . and such silence normally creates ambiguity"). The Indian canons require that any such ambiguity be resolved in the Tribe's favor. *See Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 152 (1982).

The opposing parties' efforts to avoid the canons are meritless. The Board's claim that "statutory silence is not the same as ambiguity," based on *Tuscarora* (BB at 37), merely begs the question: what is the effect of Congressional silence concerning the applicability of federal statutes to Indian tribes. It is also wrong. *See, e.g., Augustine*, 429 F.3d at 1342 n. 4; *Kentuckians for Commonwealth Inc.*, 317 F.3d at 441; *United States v.*

Quarrell, 310 F.3d 664, 669 (10th Cir. 2002) ("statute is ambiguous when it is capable of being understood by reasonably well-informed persons in two or more different senses").

The Union attempts to sidestep the canons by distinguishing the cases the Tribe cited demonstrating their applicability and claiming that *Tuscarora* and *Merrion* represent separate lines of authority. UB at 19. Both assertions are erroneous. The cases the Tribe cited all applied the canons to narrowly construe federal statutes and avoid limiting tribal sovereignty absent a clear statement from Congress. TB at 23-25; AB at 4-7. That they involved different substantive issues misses the point.

The Union's claim that *Merrion* merely dealt with the tribe's inherent power to tax, not the applicability of federal laws, is also wrong. *Merrion* held that tribal power remained despite federal laws arguably limiting tribal power and directly affirmed the Indian canons, finding no "'clear indications' that Congress has implicitly deprived the Tribe of its power," and observing that "if there were ambiguity on this point, the doubt would benefit the Tribe, for '[a]mbiguities in federal law have been construed generously in order to comport with ... traditional notions of sovereignty and with the federal policy of encouraging tribal independence.'" 455 U.S. at 152. *Merrion's* articulation of tribal sovereign power has repeatedly been

cited and reaffirmed by the Supreme Court. *See, e.g.*, *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987); *National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 851 n. 12, 856 & n. 20 (1985); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983).[3]

The Indian canons mandate reversal.

B. The Board Fails to Justify Overruling *Fort Apache*

The Board next asserts that it appropriately overruled *Fort Apache Timber Co.*, 226 NLRB 503 (1976), claiming: (1) the Act cannot support a distinction between on-reservation and off-reservation activity; and (2) tribal exemptions in Title VII and the ADA suggest Congress intended the Act to apply to tribes. Each assertion is wrong.

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[3] *Strate v. A-1 Contractors,* 520 U.S. 438, 453 (1997), and *Nevada v. Hicks*, 533 U.S. 353 (2001) are not to the contrary. *Strate* addressed whether a tribal court could exercise jurisdiction over an automobile collision between two non-Indians on non-Indian land. *Hicks* held merely that a tribal court lacks jurisdiction over a tort suit against a non-Indian state law enforcement officer based upon on-reservation acts when investigating an off-reservation crime. Neither case limits a tribe's governmental power to operate a gaming enterprise expressly authorized by Congress as an exercise of self-government and to regulate interactions with non-members who have voluntarily entered into a consensual employment relationship with the tribe. *Montana v. United States*, 450 U.S. 544, 565-66 (1981) (tribes retain sovereign power to regulate non-members who enter into consensual relationships).

1. Distinguishing Between On-Reservation and Off-Reservation Tribal Activities Was Proper

The Board's prior reliance on geography in determining whether Tribes are exempted governments is consistent with federal Indian law and the Act. *Wagnon* teaches that because tribal sovereignty has a significant territorial aspect, the Supreme Court examines state efforts to tax tribal activity in Indian country under the Indian canons, but that "absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Wagnon*, 126 S.Ct. at 688. *See also Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973). "An Indian tribe, like any other governmental unit, typically operates in its governmental capacity only within its geographical jurisdiction." *Yukon-Kuskokwim Health Corp. v. NLRB*, 234 F.3d 714, 717 (D.C. Cir. 2000).

The Board erroneously claims that basing a tribal governmental exemption on the enterprise's location would conflict with the remaining governmental exemptions that it asserts are not territorial. States – like all governments – act as sovereigns only within their territorial boundaries. *See State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 421-22 (2003); *BMW of North America, Inc. v. Gore,* 517 U. S. 559, 572-73 (1996). The Act's governmental exemptions are necessarily limited to the

government's territorial jurisdiction; *Fort Apache* simply treated Tribes like all other governments.[4]

The implied exemption for on-reservation tribal governmental activity the Board recognized for decades is consistent with federal Indian policy, the exemption for all other governments and Supreme Court decisions requiring a clear statement of congressional intent before applying the Act to interfere with other substantial interests. TB at 34-46.

2. The Board's Reliance on Other Federal Statutes is Misplaced

The Board's claim that Congress's express exemption of tribes from Title VII and the ADA suggests it intended to apply the Act to tribes is wrong. An express exemption in a law passed in 1964 says nothing about Congress's intention when it passed the Act in 1935.[5] Moreover, Congress excluded Indian tribes from Title VII's definition of "employer" "in

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[4] This principle harmonizes *Fort Apache* with *State Bank of India v. NLRB*, 808 F.2d 526 (7th Cir. 1986). Because the State Bank of India was operating outside of its territorial jurisdiction it was appropriately treated as a general commercial entity. *Id.* at 527-28.

[5] Congress's failure to amend the Act to exempt tribes does not demonstrate an intent to include them. "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, *including the inference that the existing legislation already incorporated the offered change.*" *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 187 (1994) (emphasis added).

recognition of Indian tribes' status as separate sovereign entities entitled . . . 'to conduct their own affairs and economic activities' without regulatory interference." 110 Cong. Rec. 13702 (1964); *see also NLRB v. Pueblo of San Juan*, 280 F.3d 1278, 1285 (10th Cir. 2000), *aff'd. on rehearing en banc* 276 F.3d 1186 (10th Cir. 2002) (Title VII's exclusion of Indian tribes from its definition of "employer" "illustrates congressional intent not to interfere in employee-management disputes on reservations," absent an express statement of such intention). That fundamental intention demonstrates tribes on their reservations should be exempt from the Act as well.

C. Increased Tribal Governmental Economic Activity Cannot Justify the Board's Decision

The Board eventually concedes that its decision rests on its balancing of labor and Indian policy in light of increasing tribal economic activity. It fails, however, to refute the Tribe's showing that it lacks the authority and expertise to balance labor and Indian policies and that its purported "balance" flatly conflicts with Congress's repeated statements – including its express statement in IGRA – that tribal economic activity is governmental activity, not mere commercial activity. TB at 59-66. It also ignores the Supreme Court's recognition that increased tribal economic activity does *not* warrant limiting tribal sovereignty. *Kiowa Tribe of Oklahoma v. Mfg.*

Technologies, Inc., 523 U.S. 751, 758-59 (1998) (refusing to limit tribal sovereign immunity based on increased tribal economic activity).

The Board cannot privilege its unauthorized and unsupported "rebalancing" of federal labor and Indian policy by claiming that it is entitled to change its views "on the basis of its cumulative experience and changing economic realities." BB at 29. The Board relies on cases involving matters squarely within its sphere of competence. For example, *NLRB v. Weingarten*, 420 U.S. 251, 266 (1975), involved whether the Act grants unionized employees the right to have a union steward present during any investigatory interrogation that might lead to discipline. *Foley, Hoag & Eliot,* 229 NLRB 456 (1977), addressed whether the activities of a law firm affect interstate commerce. And *Cornell University,* 183 NLRB 329 (1970), considered whether the Board would discontinue discretionarily declining jurisdiction over non-profit universities.

That the Board may change its mind about matters within its expertise does not authorize it to balance federal labor and Indian policies and extend the Act to cover another sovereign without congressional authorization and in conflict with other congressional policies. As Member Schaumber correctly concluded, Congress, not the Board, should conduct any such balancing. *See* JA at 0321.

The remaining attempts to justify overruling *Fort Apache* are similarly meritless. The claim that *Fort Apache* undermines labor law uniformity merely begs the question whether Congress intended tribal labor relations to be uniform. Allowing tribes to adopt varying approaches to their governmental labor relations is consistent with Congress's promotion of tribal self-determination and IGRA's Compact authorization, which allows tribe-by-tribe and state-by-state differences in tribal casino regulation. TB at 53-59. Any conflict should be addressed by Congress. The Board's suggestion that the Tribe's position will preclude Act jurisdiction over non-Indian employers on the reservation is simply wrong. The Board's prior law, and the Tribe's position, is that the exemption applies only to tribal governments.

The Board provides no persuasive justification for its abrupt change of result. Neither Congress nor any court has challenged *Fort Apache*. The Act has not changed and the canons of construction underlying *Fort Apache* are still the law. *See City of Roseville,* 348 F.3d at 1032. For 70 years, Congress, tribes, states, and labor unions have structured their relations in reliance on the Act's inapplicability to tribal governments on their reservations.

D. The *Tuscarora* Language the Board Relied On is Dictum, Has Never Been Followed by the Supreme Court, is Distinguishable, is Subject to Exceptions Applicable Here, and Conflicts With IGRA's Comprehensive Regulation of Indian Gaming

The Board majority erroneously relied on dictum from *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), suggesting "a general statute in terms applying to all persons includes Indians and their property interests," *id.* at 116. This statement has never been followed by the Supreme Court, is distinguishable and inapplicable given IGRA, the Compact and the TLRO, conflicts with federal Indian law and congressional intent, and is subject to exceptions applicable here.

Tuscarora addressed whether the Federal Power Act ("FPA") authorized condemnation of fee (not reservation trust) lands owned by a tribe. *See id.* at 100. In holding that the FPA authorized condemnation of tribal lands, the Court noted that the FPA "specifically defines and treats with lands occupied by Indians – tribal lands embraced within Indian reservations" and "gives every indication that . . . Congress intended to include lands owned or occupied by any person or persons, including Indians." *Tuscarora*, 362 U.S. at 118 (internal quotations and citations omitted).

Tuscarora does not hold that statutes of general applicability silent as to tribes apply to on-reservation tribal governmental activities. It concerned

the taking of fee land, not the application of federal law to limit on-reservation tribal sovereign powers. The Court's broad language about the applicability of general statutes to Indians was merely dictum, because the FPA specifically addresses the taking of tribal lands, reflecting a clear Congressional intent to apply the FPA to Indians tribes. It was "unnecessary to the Court's decision, and cannot be considered binding authority." *Kastigar v. United States*, 406 U.S. 441, 454-55 (1972).

Moreover, the three cases *Tuscarora* cited for its "rule" did not support it. They involved the taxation of individual Indians, *not* the inherent sovereign rights of tribes on reservations. They stated a unique tax law principle holding tax statutes applicable to all citizens absent a clearly expressed exclusion. [6] Thus, *Tuscarora's* dictum did not accurately state the law concerning the meaning of Congressional silence toward tribes in 1935 when the Act was passed.

Federal Indian law since *Tuscarora* confirms *Tuscarora's* dictum is not the law. The Supreme Court has never again cited the "rule" the Board

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[6] *See Oklahoma Tax Commission v. U.S.*, 319 U.S. 598 (1943) (state could impose inheritance tax on estate of tribal member); *Superintendent of Five Civilized Tribes v. Commissioner*, 295 U.S. 418 (1935) (federal tax laws applied to earnings of funds invested on behalf of individual tribe member); *Choteau v. Burnet*, 283 U.S. 691, 693, 697 (1931) ("The intent to exclude must be definitely expressed, where, as here, the general language of the act laying the tax is broad enough to include the subject matter").

applied. It has cited *Tuscarora* in only one other Indian law decision, *Escondido Mutual Water Co v. La Jolla Band of Mission Indians*, 466 U.S. 765, 786-87 (1983), and then only to reiterate that the FPA "specifically defines and treats with land occupied by Indians," and "that ... Congress intended to include lands owned or occupied by any person or persons, including Indians" – confirming that the *Tuscarora* "rule" is non-binding dicta.[7]

In contrast, the Supreme Court has repeatedly invoked the Indian canons since 1960. In *Merrion,* the Court addressed whether two congressional statutes governing Indians and other federal energy legislation implicitly divested the Tribe's inherent sovereign power to tax companies extracting oil and gas from leased reservation lands. The Court did not engage in a *Tuscarora-Coeur d'Alene* analysis, but rather restated the requirement of a "clear indication" of Congressional intent to impinge on tribal sovereignty and reaffirmed the principle that ambiguities in Federal law must be construed generously "'in order to comport with . . . traditional

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[7] Ironically, the Court has most often cited *Tuscarora* for Justice Black's dissenting edict: "Great nations, like great men, should keep their word." *Tuscarora*, 362 U.S. at 142. *See C.I.A. v. Sims*, 471 U.S. 159, 175 n. 20 (1985); *Heckler v. Mathews*, 465 U.S. 728, 748 (1984); *Astrup v. Immigration and Naturalization Service*, 402 U.S. 509, 514 n. 4 (1971).

notions of sovereignty and with the federal policy of encouraging tribal independence.'" 455 U.S. at 152.

In *Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9 (1987), decided after *Coeur d' Alene*, the Court again declined to apply *Tuscarora/Coeur d'Alene.* Examining whether Congress intended the federal diversity jurisdiction statute to deprive tribal courts of jurisdiction, the Court ruled that because the diversity statute contained no clear expression of congressional intent to impair tribal sovereignty, tribal jurisdiction remained unabridged. 480 U.S. at 17.

Furthermore, *Coeur D'Alene's* holding that the Indian law canons apply only if the law impacts "exclusive rights of self-government in purely intramural matters" such as tribal membership, inheritance rules, and domestic relations (751 F.2d at 1116) flatly conflicts with *Merrion,* which applied the clear statement canon to laws affecting tribal taxation of non-Indians – presumably far outside *Coeur D'Alene's* "purely intramural matters." It even more clearly conflicts with this Court's decision in *City of Roseville*, 348 F.3d at 1032, that the canons apply to the construction of IGRA: "IGRA is designed to promote the economic viability of Indian Tribes, and AIRA focuses on ensuring the same for the Auburn Tribe. In this context, the Indian canon requires the court to resolve any doubt in favor

of the tribe." *Merrion* and *City of Roseville* mandate that the canons, not *Tuscarora's* dictum, be applied here.

Thus, the Indian canons, not *Tuscarora*, are the governing interpretive principle. Indeed, some courts have recognized that *Merrion* effectively overruled *Tuscarora's* supposed "rule." *See Pueblo of San Juan*, 280 F.3d at 1283–1284 (reiterating its conclusion in *Donovan v. Navaho Forest Products*, 692 F.2d 709, 712 (10th Cir. 1982), that *Merrion* had limited or implicitly overruled the *Tuscarora* dictum).

Furthermore, *Tuscarora* is inconsistent with federal Indian policy in both 1935 and today. The 1935 Congress could not have relied on a principle that the Supreme Court did not even mention in dicta until 1960. Given Congress's enactment of the Indian Reorganization Act only a year earlier, it would not have understood that its failure to mention tribes meant the Act would apply to them. *Tuscarora* was decided during a period of congressional hostility to tribal sovereignty, but those policies have been repudiated. *City of Roseville,* 348 F.3d at 1022. *Tuscarora's* dictum is contrary to Congress's repeated efforts to reduce federal regulation of tribes and to promote tribal economic enterprises as a means to tribal self-government. It is inappropriate to apply the *Tuscarora* "rule," born out of a period hostile to tribal sovereignty, to the 1935 pro-tribal-sovereignty

Congress that passed the Act or the even more pro-tribal-sovereignty Congress today. *See* TB at 59-66; AB at 14-20.

Coeur d' Alene is also distinguishable because the Act interferes with tribal governmental operations and sovereignty significantly more than the statutes in the cases applying *Coeur d' Alene*. BB at 37-43. ERISA applies only if the tribe offers an employee benefit plan, and then merely requires it to follow certain procedural rules. *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 935-36 (7th Cir. 1989). OSHA merely requires the tribe to comply with minimum safety requirements. In contrast, the NLRA regulates the entire employment relationship, requiring a sovereign tribe to bargain over all terms and conditions of employment, even as to member employees. Finally, the *Coeur d' Alene* line of cases does not deal with industries subject to comprehensive, preemptive federal regulation, as is the case here under IGRA. There was no federal statute comparable to IGRA regulating the tribal farm in *Coeur d' Alene* or the tribal sawmill in *U.S. Dept. of Labor v. OSHRC*, 935 F.2d 182 (9th Cir. 1991).

The opposing parties showing that several courts of appeals have followed *Coeur d' Alene* does not make it the law. Some circuit court acceptance cannot privilege a conclusion that conflicts with Supreme Court precedent or congressional intent. *See, e.g., Lexecon Inc. v. Milberg Weiss*

Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998) (rejecting statutory interpretation accepted by every court of appeals).

Even if *Coeur d' Alene* were the law, however, the exceptions for governmental functions and treaty rights must apply.[8] As this Court

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[8] The Board's claim that the Compact is not equivalent to a treaty under *Coeur d' Alene* is unpersuasive. The Supreme Court has defined a "treaty" as "'a compact made between two or more independent nations with a view to the public welfare.'" *U.S. v. Belmont*, 301 U.S. 324, 330 (1937) (*quoting B. Altman & Co. v. United States*, 224 U.S. 583, 600 (1912)). *See New Jersey v. New York*, 523 U.S. 767, 831 (1998) ("the Compact here is of course a treaty").

"[W]here Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the States' agreement into federal law under the Compact Clause." *Cuyler v. Adams*, 449 U.S. 433, 440 (1981). *Cuyler* aptly describes the Compact at issue here. "Congress may consent to an interstate compact by authorizing joint state action in advance or by giving expressed or implied approval to an agreement the States have already joined." *Cuyler*, 449 U.S. at 441. Thus for a Compact to be federal law under the Compacts Clause of the Constitution it is sufficient for Congress to authorize the compact's negotiation and execution in advance. When Congress approves a compact in advance of its execution and grants an administrative agent the power to authorize the compact once it is executed, the authorizing agent exercises Congress's constitutional compacts power when it approves the compact. *See Milk Industry Foundation v. Glickman,* 132 F.3d 1467, 1471 (D.C. Cir. 1998) (Congress properly delegated power to Secretary of Agriculture to authorize an inter-state compact). Thus, contrary to the Board's unsupported claims, the Compact and its TLRO are federal law.

While the Board now declines to view the Tribe as a sovereign government, Congress plainly does. Federal authorization and approval of the Compact and its TLRO, as mandated by IGRA, brings the Compact within this *Coeur d' Alene* exception.

recognized, Congress has expressly declared that tribal economic development, and especially gaming, is not mere commercial activity but sovereign, governmental activity. *Taxpayers of Michigan Against Casinos v. Norton*, 433 F.3d 852, 865 (D.C. Cir. 2006) (Congress enacted IGRA "in large part to 'provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency and strong tribal governments'"). *See also* TB at 53-66; AB at 14-20.

The opposing parties' denial that tribes operate casinos as governments under IGRA is specious. Casinos must be wholly owned by the tribal government, situated on land over which the tribe exercises governmental authority, operated under a tribal-state compact, and their revenues must be used for governmental purposes. *See* JA 250 (Compact § 6.2); *id.* at 245 (Compact § 4.2); *id.* at 239-41 (Compact Preamble and § 1); 25 U.S.C. §§ 2710(b)(2)(A), § 2703(4), § 2710(d), § 2710(b)(2)(B). The opposing parties' sole response – that they believe (without support) that some of the purposes for which casino revenues may be used are not governmental – falls far short of undermining Congress's clear expressions that tribes operate casinos as a fundamental exercise of self-government.

The Act further interferes with internal self-government by limiting the tribe's right to regulate member employees. *See EEOC v. Fond du Lac Heavy Equipment and Const. Co.*, 986 F.2d 246, 249-50 (8th Cir. 1993) (dispute between tribal employer and tribal member is internal matter to which Age Discrimination in Employment Act does not apply). The Board's response that acts toward member employees could affect non-member employees ignores that all non-member employees have entered into a consensual relationship with the tribe and are subject to tribal jurisdiction under *Montana.* 450 U.S. at 565-66.[9]

E. The Board's "Lawless" Claim Insults the Very Tribal Sovereignty Congress Supports

The opposing parties' suggestion that Indians will be unregulated if the Tribe's argument is accepted fails to distinguish between individual Indians and tribal governments and between on- and off-reservation activities, all of which are central to resolving jurisdictional and choice of law questions. *See, e.g., Wagnon*, 126 S.Ct. at 687; *Mescalero Apache Tribe*, 411 U.S. at 148-49; *Bryan v. Itasca County*, 426 U.S. 373, 389 (1976).

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[9] Their claim that employment of non-members does not involve self-government similarly conflicts with *Montana.*

The existence of the Compact, TLRO, and San Manuel Gaming Act of 1989, demonstrate there is applicable law governing the Casino. *See* JA 73, 100, 239.

Along with its Labor Relations provision, *see* JA 272, the Compact mandates tribal compliance with: "federal workplace and occupational health and safety standards," including State and federal inspection rights, JA 270; "federal laws and state laws forbidding" employment discrimination, with an exception for tribal preferences, *id.*; "state statutory workers' compensation system" rights and remedies, JA 271; "the State's program for providing unemployment compensation benefits and unemployment compensation disability benefits," JA 272; and withholding and payment of State employment taxes. *Id.*

Any suggestion that the Tribe is not competent to enforce such laws is a direct affront to the right of tribes to govern their affairs and their territory, implying that tribal government regulation of on-reservation affairs is somehow either absent or incompetent. The Supreme Court has expressly rejected attacks on the competence of tribal governmental institutions that the opposing parties raise as a reason for intruding on tribal sovereignty. *See Iowa Mut. Ins. Co.*, 480 U.S. at 19 ("The alleged incompetence of tribal courts is not among the exceptions to the exhaustion requirement established

in *National Farmers Union*, 471 U.S. at 856, n. 21, and would be contrary to the congressional policy promoting the development of tribal courts") (footnote omitted).

Nor would application of the canons rather than *Tuscarora* result in a federal law vacuum. Congress knows how to pass laws expressly applicable to Indian tribes and does so regularly. All of Title 25 of the U.S. Code is dedicated to Indians and Indian tribes. *See also* 25 C.F.R. Congress has also expressly addressed the applicability of general federal laws to Tribes in numerous circumstances, including the federal tax and environmental laws (BB at 17-18), and could easily do so with respect to the Act and other employment laws. Upholding the Tribe's position here would be entirely consistent with the Supreme Court's statement in *Montana* that individuals who knowingly enter a consensual employment relationship with an Indian tribe on its reservation are generally subject to tribal rather than federal regulation of that relationship. That outcome furthers Congress's intent to promote tribal economic development as a means of strengthening tribal self-government. *See* 25 U.S.C. § 2702(1). Again, Congress must perform any re-balancing of competing federal Indian and labor policies.

F. This Court Should Reject the Board's "Governmental v. Proprietary" Distinction

The Board promises to protect tribal sovereignty by voluntarily declining 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." BB at 34. However, its offer does not protect tribal sovereignty as Congress has defined it.

First, the governmental/proprietary distinction is inconsistent with tribal sovereignty and Indian policy established by Congress and the Supreme Court. *See, e.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219 (1987) ("Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members"). Tribal governments' operation of what the Board calls "commercial business[es]" reflects "Congress' desire to promote the 'goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development.'" *Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991).

Second, the Board should not be entrusted to make fundamental decisions about the scope of tribal sovereignty and the impact of federal

regulation when the Supreme Court has repeatedly refused to defer to Board determinations outside its expertise. *See* TB at 19-20, 59-62. The Board's performance in this case – ignoring the Indian canons of construction, the Supreme Court's definition of tribal sovereignty, and Congress's clear statement that tribal gaming is sovereign governmental activity – demonstrates why it should not be allowed to make these decisions.

Third, the Supreme Court has recognized that a similar governmental/proprietary distinction is simply unworkable. In *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528 (1985), addressing the Tenth Amendment limitations on congressional authority over states, the Court rejected "as unsound in principle and unworkable in practice, a rule ... that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.'" *Id.* at 546-547.[10] *See also Yukon-*

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[10] *Garcia* "held that the concept of 'traditional governmental function' . . . was incoherent, there being no explanation that would make sense of the multifarious decisions placing some functions on one side of the line, some on the other." *U.S. v. Morrison*, 529 U.S. 598, 646 (2000). A serious defect in looking to "historical" governmental versus private functions "is that it prevents a court from accommodating changes in the historical functions of States, changes that have resulted in a number of once-private functions like education being assumed by the States and their subdivisions." 469 U.S. at 543-44. In the area of tax immunity, the Court "unanimously ... conclude[d] that the distinction between 'governmental' and 'proprietary' functions was 'untenable' and must be abandoned." *Id.* at 542 (*quoting New York v. United States*, 326 U.S. 572, 583 (1946)).

Kuskokwim Health Corp. v. N.L.R.B., 234 F.3d at 717 ("[t]he distinction between commercial and governmental activities, however, is often elusive").[11]

Finally, leaving the tribes to case-by-case adjudication of the Act's applicability is unworkable and unfair. Tribes must know, in advance,

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[11]There is a long history of governmental gaming to raise public funds:

> Benjamin Franklin and other prominent citizens sponsored a lottery to raise funds to buy a battery of cannon for the defense of Philadelphia.... [I]n 1768 George Washington managed a lottery for the purpose of building a road over the Cumberland Mountains..... The Continental Congress in 1776 voted a lottery to raise $10 million to finance the Revolution.... Between 1765 and 1806 Massachusetts authorized four lotteries to build dormitories and supply equipment for Harvard.

J. Scarne, *New Complete Guide to Gambling*, 150-52 (Simon & Schuster1974). According to the National Gambling Impact Study Commission's Final Report ("Report"):

> Lotteries held a prominent place in the early history of America, including an important role in financing the establishment of the first English colonies. Lotteries frequently were used in colonial-era America to finance public works projects such as paving streets, constructing wharves, and even building churches. In the 18th century, lotteries were used to finance construction of buildings at Harvard and Yale.

Report, ch. 2, p. 1 (available at http://govinfo.library.unt.edu/ngisc/reports/fullrpt.html) (last visited July 28, 2006); *see* Public Law 104-169, 104th Congress (creating National Gambling Impact Study Commission). The vast majority of the States today operate state lotteries, generating public funds from gambling operations that far exceed the size and scope of tribal gaming. Report, ch. 2, p. 1.

whether the Act governs their conduct. The *Fort Apache* on-reservation/off-reservation test satisfied this need, as this Court recognized when approving it as reasonable in *Yukon Kuskokwim*. *See* 234 F.3d at 717 ("the Board has long and reasonably preferred bright line rules in order to avoid disputes over its jurisdiction"). Given the special intermingling of economic development and self-government goals in federal Indian policy generally, and IGRA specifically, the need for clarity is especially acute.

The Board's new test is more difficult to administer and imposes greater litigation burdens on tribes. Its assertion that it applies vague tests in other areas does not justify its position here. *See* BB at 34-35. Those cases involve whether entities otherwise within the Act's scope affect commerce – a necessarily vague test. They do not support extending jurisdiction to another sovereign based upon a vague test imposing significant litigation burdens when a simple test, consistent with the Act and federal Indian law – *Fort Apache* – is available.

III. Conclusion

For these reasons, the Tribe respectfully requests that the Court grant the Tribe's Petition, reverse, and order the Board to dismiss the case for lack of jurisdiction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) because the brief contains 6958 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(2).

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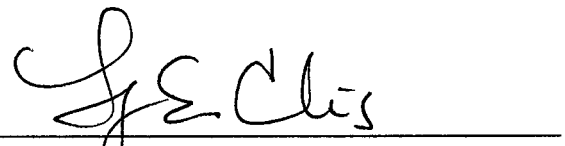

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