Docket Nos. 16-70397 & 16-70756

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CASINO PAUMA, AN ENTERPRISE OF THE PAUMA BAND OF LUISENO MISSION INDIANS OF THE PAUMA AND YUIMA RESERVATION, A FEDERALLY RECOGNIZED INDIAN TRIBE
PETITIONER-CROSS RESPONDENT,

V.

UNITED STATES OF AMERICA, ET AL.,
RESPONDENT-CROSS PETITIONER

AND

UNITE HERE INTERNATIONAL UNION,
INTERVENOR.

ON CROSS-PETITIONS FOR REVIEW AND ENFORCEMENT FROM THE NATIONAL LABOR RELATIONS BOARD CASE NOS. 21-CA-125450, 21-CA-126528, & 21-CA-131428

BRIEF OF AMICI CURIAE CALIFORNIA NATIONS INDIAN GAMING ASSOCIATION, SOUTHERN CALIFORNIA TRIBAL CHAIRMEN'S ASSOCIATION, THE CALIFORNIA ASSOCIATION OF TRIBAL GOVERNMENTS AND THE RINCON BAND OF LUISENO INDIANSIN SUPPORT OF CASINO PAUMA

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STATEMENT OF INTEREST

Amici are three California Tribal Associations comprised of the governments of 81 federally-recognized California Tribes. Member Tribes of the associations include gaming and non-gaming Tribes, all of whom have a strong interest in protecting their status as governments, and in the continuing viability and undisturbed operations of tribal government gaming in California, whether directly, through the operation of tribal government gaming facilities on their sovereign tribal lands, or indirectly, through receipt of annual distributions of $1.1 million to each California non-gaming and limited gaming Tribe from the Tribal government gaming Revenue Sharing Trust Fund ("RSTF") created under some 73 Tribal-State Class III Gaming Compacts and implementing California statute. Tribal government gaming thus has brought economic independence and self-sufficiency, in varying degrees, to all federally-recognized California Tribes.[1]

Amicus California Nations Tribal Indian Gaming Association ("CNIGA)" is a non-profit organization founded in 1988 and comprised of 32 federally-recognized California tribal governments. CNIGA is dedicated to protecting the sovereign right of Indian tribes to operate gaming for governmental purposes on federally-recognized Indian lands. It acts as a planning and coordinating agency for legislative, policy, legal and communications efforts on behalf of its members and serves as an industry forum for information and resources.

[1] No counsel for a party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Parties have been timely notified. Petitioner's consent is on file with the Court. All parties have consented to the filing of this amicus.

Amicus Southern California Tribal Chairmen's Association ("SCTCA") is a multi-service consortium of 19 federally-recognized Southern California Indian Tribes. SCTCA is a non-profit corporation established in 1972. The primary mission of SCTCA is to serve the health, welfare, safety, educational, cultural, economic and employment needs of its member Tribes and their individual tribal members and descendants in Southern California, including its urban areas. A board of directors comprised of the elected chairpersons of each of its member Tribes governs SCTCA. Thirteen of the member Tribes of SCTCA are parties to ratified gaming Compacts with California; one of SCTCA's member Tribes operates Class III gaming on its Indian lands pursuant to procedures prescribed by the Secretary of the Interior pursuant to 25 U.S.C. section 2710(d)(7).

Amicus California Association of Tribal Governments ("CATG") is a non-profit organization consisting of 32 federally-recognized California Tribes, and includes gaming and non-gaming Tribes. Its mission and purpose is to protect tribal rights and sovereignty, and enhance the ability of tribal governments to meet the varied needs of their Reservation communities -- needs that often are not met by any other unit of government.

Amicus Rincon Band ("Rincon Band") of Luiseño Indians of the Rincon Reservation is a federally-recognized tribe located in San Diego County, California that owns and operates Harrah's Resort Southern California, pursuant to Secretarial Procedures issued by the Secretary of the U.S. Department of the Interior in accordance with the Indian Gaming and Regulatory Act ("IGRA"), 25 U.S.C. 2701 *et. seq.* Those procedures include a Tribal Labor Relations Ordinance ("TLRO") negotiated between California's Tribal governments and the California Federation of Labor, and approved by the State of California.

INTRODUCTION AND SUMMARY OF ARGUMENT

Of the 566 federally-recognized Indian tribes in the United States, 110 are located in California. 81 Fed. Reg. 5019 (Jan. 29, 2016). Of the 110 California tribes, 73 have ratified Tribal-State Compacts ("Compacts").[2]

While some of Amici's respective members operate casinos and others do not, they all share the common status of governments that predate that of the United States, and all have the right under the IGRA to operate gaming for the governmental purposes prescribed therein. Indeed, but for their status as governments, they could not operate gaming at all -- a fact that the National Labor Relations Board ("Board") consistently has ignored.

Tribal government gaming in California has a long, and at times, contentious history that produced the Supreme Court's landmark decision in *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987). *Cabazon* clarified that if a State does not prohibit all forms of gambling as a matter of public policy, the State's gambling laws are civil/regulatory rather than criminal/prohibitory within the meaning of 18 U.S.C. § 1162 and thus inapplicable to Tribes and individual Indians in Indian country, and that relevant tribal and federal interests in tribal economic self-sufficiency and self-governance outweighed whatever interest the State may have had in exercising jurisdiction over on-reservation tribal government gaming activity.

However, the battle was not over. States pressed Congress for federal legislation to protect state interests from perceived threats from gaming on Indians lands free from state control. State efforts to obtain jurisdiction over on-

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[2] *See* California Gambling Control Commission, Ratified Tribal-State Gaming Compacts, *available at*: http://www.cgcc.ca.gov/?pageID=compacts.

Reservation gaming and tribal efforts to resist erosion of the rights recognized in *Cabazon* culminated in the passage of the IGRA which President Reagan signed into law on October 17, 1988.

The IGRA has been described as *"cooperative federalism,"* because it recognized and balanced the respective sovereign interests of federal, state and tribal governments by giving each a role in authorizing and regulating gaming in Indian country. *Artichoke Joe's v. Norton* 216 F.Supp.2d 1084, 1092 (2002). Even after passage of the IGRA, the struggle between the State of California and its Tribal governments was not over.

Beginning in 1990, California negotiated a series of five Compacts that authorized Tribes to operate facilities offering simulcast wagering on horse races. However, negotiations between California's Governor and a larger group of Tribes for Compacts that would authorize and provide for regulation of other forms of Class III gaming foundered when the parties could not agree over the scope of Class III gaming for which California was obligated to negotiate. When this Court held that the IGRA did not obligate California to negotiate for any form of Class III gaming that state law does not affirmatively authorize, the Governor refused to negotiate further, asserting that Tribes were engaged in illegal Class III gaming.

To break the impasse with the State, California Tribes sponsored Proposition 5, an initiative statute on the November, 1998 general election ballot that offered every California Tribe with gaming-eligible Indian lands under IGRA a model tribal-state compact. *In re Indian Gaming Related Cases v. State of California*, 331 F.3d 1094, 1100 (2003). Although opposed by the Hotel Employees and Restaurant Employees International Union (now "UNITE-HERE") and Nevada gambling interests, Proposition 5 passed by a wide margin.

In re Indian Gaming Related Cases, 331 F.3d at 1101. UNITE-HERE and several individuals immediately challenged Proposition 5 in the California Supreme Court, which ultimately overturned all but one section of the statute (the section waiving the State's sovereign immunity to suit based on the State's failure to negotiate or agree in good faith to a compact) on the ground that it permitted the operation of gaming devices and banking games in violation of Article IV, section 19(e) of the California Constitution, which prohibits casinos of the type currently operating in Nevada and New Jersey. *Hotel Employees & Rest. Employees Int'l Union (HERE) v. Davis*, 21 Cal. 4th 585 (1999).

California's next Governor, also elected in November, 1998, resumed negotiations with Tribes, and those negotiations culminated in a model Compact that included substantial and unprecedented concessions by tribes, in return for which the State agreed that Tribes could have the exclusive right to operate slot machines and banked and percentage card games, as well as any devices or games authorized by State law to the California Lottery. However, in order for the Compacts to take effect, the State Constitution would have to be amended to authorize the negotiation and ratification of Compacts authorizing such forms of Class III gaming.

In 1999, as it had for decades previous, the Board") disclaimed jurisdiction over tribes as employers on the basis that tribes were exempt from the National Labor Relations Act's ("NLRA") definition of "employer" because they are governments. One of the concessions demanded by the State, Section 10.7 of the 1999 Compacts, was that the Tribes would have to enact a State-approved procedure in order to protect the organizational and representational rights of tribal gaming employees. .[3] For this concession, the Tribes

[3] Two other critical terms were the Tribes' agreement to create and pay into the Indian Gaming Revenue Sharing Trust Fund ("RSTF"), from which each so-called "Non-

received valuable consideration in the form of a constitutional amendment authorizing slot machines and house-banked/percentage card games, The only procedure that the State would approve was a model Tribal Labor Relations Ordinance (the "TLRO"). *In re Indian Gaming Related Cases, 331 F.*3rd at 1106.

Between July and September of 1999, California tribes conducted independent negotiations with labor representatives and agreed on a model TLRO that met the requirements of Section 10.7. *In re Indian Gaming Related Cases*, 331 F.3d at 1106. The substantive provisions of the TLRO extended organizational rights to casino employees very similar to those provided under the NLRA, with certain mutually consensual limitations to preserve the significant governmental interests of tribes.

The Governor and some 58 tribes signed Compacts in September, 1999, and the California Legislature voted to place the necessary constitutional amendment (Art. IV, section 19(f)) on the March, 2000 ballot as Proposition 1A.[4] On March 7, 2000, Proposition 1A received more than 63% of the vote, and the Secretary of the Interior's notice that the 1999 Compacts had been approved was published in the Federal Register on May 16, 2000, on which date the 1999 Compacts took effect. 65 Fed. Reg. 31189 (Mar. 16, 2000).

Compact Tribe" is to receive up to $1.1 million per year, and the Indian Gaming Special Distribution Fund ("SDF"), from which the State is to be reimbursed for its regulatory costs, programs of problem-gambling assistance are to be funded, money is to be granted to local governments impacted by tribal government gaming, shortfalls in the RSTF are to be backfilled, and such other gaming-related purposes as the Legislature may specify. One of those purposes was the funding of the Statewide Tribal Labor Panel created under the TLRO.

[4] *See* California Proposition 1A, "Gambling on Tribal Lands. Legislative Constitutional Amendment," at: http://vig.cdn.
sos.ca.gov/2000/primary/pdf/1a.pdf.

One Tribe, dissatisfied with, among other provisions, the requirement that the Tribe enact and maintain the TLRO, challenged the state's insistence on the provision as bad-faith negotiation, contending that the IGRA did not permit the State to condition its entry into a Compact upon the Tribe's extension to gaming employees of the TLRO's organizational and representational rights. In *In re Indian Gaming Related Cases*, this Court found that the Section 10.7 requirement of the TLRO was sufficiently related to the issues that the IGRA permitted to be included in a Compact under 25 U.S.C. § 2710(d)(3)(C)(vii), and thus was an appropriate topic for compact negotiations. Further, this Court found that the state had not acted in "bad faith by requiring tribes to adopt the TLRO or forgo entering a compact." *In re Indian Gaming Related Cases*, 331 F.3d at 1116. This Court clarified that the state was not demanding that tribes adopt a specific set of legal rules governing all employment practices on tribal lands, but only that the tribes meet with labor unions to independently negotiate a labor ordinance addressing organizational and representational rights limited to employees of tribal casinos and related facilities. This Court concluded:

> Given that the State offered concessions to the tribes in return for the Labor Relations provision (including the exclusive operation of Las Vegas style class III gaming in California), it did not constitute bad faith for the State to insist that this [labor relations] interest be addressed in the limited way provided in the provision [10.7].

In re Indian Gaming Related Cases, 331 F.3d at 1116.

It is against this historical backdrop that California Tribes strongly object to the Board's newly-asserted jurisdiction over tribal government gaming facilities operated on tribal lands. The TLRO, negotiated and bargained for by the

State, organized labor and the Tribes is a material term of the 1999 Compact. By imposing a new and far more intrusive labor relations regime on California tribal governments, the Board is effectively revising, or possibly even placing Tribes in potential violation of, their 1999 Compacts. This interference directly harms the jurisdictional, political, legal and economic interests of gaming and non-gaming California Tribes, as well as the State's interests in receiving the benefit of the bargain that it struck, including revenue sharing to offset its regulatory costs, enormous economic benefits through job growth, income and sales tax revenue, charitable giving by California tribal governments, and even General Fund contributions from a number of California gaming tribes.

ARGUMENT

I. Application of the NLRA Displaces the Negotiated Agreement Between California Tribes and Organized Labor and Creates Untenable Uncertainty As to the Binding and Exclusive Effect of the TLRO as a Matter of Federal Indian Law.

California Indian tribes have developed an eight billion dollar tribal government gaming industry that directly employs 42,000 Californians.[5] This development was made possible primarily because at the time the Board deemed tribes to be governments, not "employers" subject to the NLRA. *Fort Apache Timber Company*, 226 N.L.R.B. 503, 506 (1976). In addition, the Tribes and the State mutually understood

[5] 2014 California Tribal Gaming Impact Study, An Updated Analysis of Tribal Gaming Economic and Social Impacts, With Expanded Study of RSTF and Charitable Effects, Beacon Economics LLC; http://www.yourtribaleconomy.com/media/uploads/2014-California-Tribal-Gaming-Impact-Study.pdf.

that the subject of labor relations was a permissible topic for compact negotiations. *In re Indian Gaming Related Cases*, 331 F.3d at 1116.

The TLRO and the revenue sharing provisions, the RSTF and the Indian Gaming Special Distribution Fund ("SDF"), of the 1999 Compacts are essential elements of the bargained-for exchange agreed to by Tribes to induce the State to enter into and ratify the Compacts pursuant to the IGRA. The State identified the TLRO and revenue sharing requirements as non-negotiable preconditions to entering into the Compacts amidst the uncertainty of litigation with organized labor. Specifically, Section 10.7 of each 1999 Compact declared it:

> ...null and void if, on or before October 13, 1999, the Tribe has not provided a procedure acceptable to the State for addressing organizational and representational rights of Class III gaming Employees and other employees associated with the Tribe's Class III gaming enterprise, such as food and beverage, housekeeping, cleaning, bell and door services, and laundry employees at the Gaming Facility or any related facility, the only significant purpose of which is to facilitate patronage at the Gaming Facility.

In re Indian Gaming Related Cases, 331 F.3d at 1106 *citing* Section 10.7 of the California Tribal-State Gaming Compact, Division of Gambling Control (March 2003).

As described above, to meet the labor relations requirements of Section 10.7 and conclude the compact process, California Tribes conducted independent negotiations with organized labor representatives to create a framework that would meet the concerns of organized labor in the 1999 Compact. *In re Indian Gaming Related Cases*, 331 F.3d at 1106. The TLRO that was included in 58 1999 Compacts in-

disputably proves that California Tribes agreed to major concessions that provide significant protections for organizational and representational rights of tribal casino employees on Indian lands. Indeed, with the inclusion of the TLRO, UNITE-HERE and other constituents of California's organized labor that had opposed Proposition 5 because it lacked explicit labor relations provisions *supported* Proposition 1A, the State constitutional amendment that was integral to the bargained-for exchange.

The Board has fractured the triad of consideration that supports the 1999 Compacts without a shred of evidence in either the IGRA or NLRA that Congress ever intended the Board to exercise jurisdiction over tribal government gaming operations. In *San Manuel Bingo & Casino v. NLRB*, 341 NLRB 1005 (2004) *affirmed* 475 F.3d 1306 (D.C. Cir. 2007), the sole dissenting Board member recognized that application of the NLRA should be preempted by the Tribe's enactment of the TLRO.[6] On appeal, the D.C. Circuit Court correctly observed that the enactment of the TLRO and negotiation of the gaming compact were governmental acts, but then trivialized them as ancillary to the activity of gaming with only modest impacts on tribal revenue and legislative authority. *Ibid.*

In *Casino Pauma v. NLRB,* 363 NLRB 60 (2015), the Board rejected the Tribe's argument that the TLRO, not the NLRA, governs the labor dispute, noting "

> such argument would have been valid prior to the Board's 2004 decision in *San Manuel*, pursuant to which the Board for the first time opted to exercise jurisdiction over Indian casinos which it had previ-

[6] The dispute before the NLRB in *San Manuel* arose well before the Tribe's 1999 Compact and its TLRO became effective.

> ously declined to do for the historical and policy reasons discussed at length in that decision."

Id. at 4.

However, this Court determined that the labor relations framework established by the 1999 Compacts is a regulatory matter of state public policy and tribal sovereign authority as discussed above. *In re Indian Gaming Related Cases*, 331 F.3d at 1116.

Even if this Court were to uphold the Board's decision in *Casino Pauma*, there would be no legal basis to sustain Board jurisdiction over the operations of tribes like Rincon Band engaged in Class III gaming activities pursuant to procedures prescribed by the Secretary of the Interior ("Secretarial Procedures") which reaffirms the TLRO in the 1999 Compacts[7]. The IGRA authorizes the Secretary of the Interior ("Secretary") to prescribe procedures for the regulation of Class III gaming on a Tribe's Indian lands if a state fails in good faith to consent to a compact. 25 U.S.C. §2710(d)(7)(B)(vii). For example, the TLRO incorporated into the Rincon Band's Secretarial Procedures issued in 2013, expressly confirms Section 10.7 found in the 1999 Compacts, that the Tribe shall maintain the agreement that was entered into on or before October 13, 1999, that addresses the organizational and representational rights of casino employees. Through the issuance of these Secretarial Procedures, the Secretary, as the primary arm of the federal government with recognized expertise in -- and primary authority over -- federal Indian policy, has established a co-equal federal framework that resolves labor disputes through the TLRO, in direct conflict with many provisions of the NLRA. Moreo-

[7] *Secretarial Procedures for the Rincon Band of Luiseno Indians, also known as the Rincon Band of Luiseno Indians of the Rincon Reservation, a federally recognized sovereign Indian tribe*, issued February 8, 2013.

ver, the Secretary has openly notified the Board that the Department of the Interior disagrees with the Board's recent assertion of jurisdiction over tribal gaming operations as a matter of federal Indian law:

> The DOI, through its Office of the Solicitor, wrote to counsel for the NLRB stating that the 'DOI takes the position that, as a matter of Federal Indian law, the NLRB cannot charge the Band with an unfair labor practice for its exercise of its sovereign authority in adopting a constitution and enacting tribal labor laws.' The DOI further urged the Board 'to put an end to this enforcement action as soon as possible.'

Little River Band of Ottawa Indians v. NLRB, 747 F. Supp. 2d 872, 880 (W.D. Mich. 2010), (*citing* AVC Ex. L (1/15/2009 letter to Ronald Meisburg, General Counsel for the NLRB and John E. Higgins, Jr., Deputy General Counsel for the Board)(*cert. den.* 136 S.Ct. 2508 (2016).)

The United States Supreme Court also agrees that the IGRA is an unambiguous statute, ending its judicial inquiry by refusing to interpret the IGRA to abrogate tribal sovereign immunity over Class III gaming activities on Indian lands in the absence of clear legislative intent. *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024. Justice Kagan, writing for the Court, reiterated a fundamental tenet of Indian law, that courts should not "lightly assume" that Congress intends to undermine Indian self-government in the absence of an unequivocal expression to do so. *Bay Mills* at 2032

Thus far, at least one House of Congress agrees with both the Secretary and the Supreme Court on the question of

tribal sovereign authority over labor relations on Indian lands. On November 17, 2015, the U.S. House of Representatives passed the Tribal Labor Sovereignty Act, which amends the NLRA to provide that any Indian tribe or any enterprise or institution owned and operated by an Indian tribe located on Indian lands is not considered an "employer" under the NLRA. H.R. Res. 511, 114th Cong. (2015).

All three branches of the United States confirm that the IGRA is a comprehensive, carefully-considered statute that cannot be displaced by the NLRA, particularly in this case where the TLRO in the 1999 Compacts creates a competing federal framework that should override a statute, such as the NLRA, that is unequivocally silent with respect to its application to Indian tribes. Finally, this Court previously concluded that the subject of labor relations falls within the *exclusive* purview of tribal sovereign authority under the IGRA. 25 U.S.C. 2710(d)(3)(C); *In re Indian Gaming Related Cases*, 331 F.3d at 1116.

II. Unintended Consequences of Reforming or Rescinding Material Terms of Ratified Compacts Disrupt the Funding Scheme and Protections of the TLRO.

As detailed above, California's 1999 (and subsequent) Compacts were the product of detailed negotiations between the Governor and federally-recognized Indian Tribes, culminating in ratification by the State Legislature and a voter-approved constitutional amendment.[8] In that context, the agreements are quasi-legislative acts approved in government-to-government relations, consistent with Congress' in-

[8] California Proposition 1A, "Gambling on Tribal Lands. Legislative Constitutional Amendment," at: http://vig.cdn.sos.ca.gov/2000/primary/pdf/1a.pdf.

tent that gaming compacts exemplify cooperative federalism. *Artichoke Joe's v. Norton* 216 F.Supp.2d at 1092.

The 1999 Compacts are a package of agreements that include inextricably linked material terms that were relied upon by the State and tribes in crafting an overall framework to regulate gaming under the IGRA. The Board's assertion of jurisdiction over California gaming operations threatens to unravel the entire structure, with unintended consequences beyond preemption and invalidation of each tribe's TLRO, including, but not limited to[9]:

(i) Disruption of the overall financial and regulatory structure of the California compacts. The Preamble to the 1999 Compact recites that the State's purported interest in the RSTF, established in Section 4.3.2.2, is to promote the purposes of IGRA for all federally-recognized tribes in California, whether gaming or not. The RSTF, which is funded through tribal purchases of gaming device licenses or direct payments into the RSTF, grants non-gaming tribes in California a maximum payment of of $1.1 million payment each year.[10] The 1999 Compact also established the SDF, which is financed through either direct payments or payments of percentages of the tribes' net win from the operation of their gaming machines. The funds deposited into the SDF are restricted to the following purposes: grants for programs to address problem gambling; grants for state and local governments impacted by tribal gaming; regulatory costs incurred to the state in connection with implementation of the compacts; payment of shortfalls to the RSTF; and other pur-

[9] California Tribal-State Gaming Compact, Division of Gambling Control (March 2003).

[10] The number of machines a tribe can operate under the Compacts executed in September, 1999 and that took effect in May, 2000, is capped at 2,000.

poses specified by the Legislature.[11] Application of the NLRA could adversely impact gaming revenues that fund essential government services provided by gaming tribes, non-gaming tribes and California's Gambling Control Commission, Office of Problem Gaming and Department of Justice.

(ii) In reliance on the compact regulatory structure, tribes have created gaming commissions, sophisticated surveillance systems, facility security and on-site internal control protocols that would be adversely impacted by permitting organized labor activities, except pursuant to the TLRO, in the gaming facility, much less elsewhere on tribal lands outside the immediate premises of a gaming facility. Tribal gaming operations are highly regulated environments with considered and comprehensive licensing procedures not only for access to key areas of the facility, but also for regulating conduct on the gaming floors and premises to make certain that criminal activities do not occur. Application of the NLRA would expand the limited organizational rights of employees under the TLRO, specifically with regard to eligible employees, access to any areas of the facility for organizational activities, including areas for picketing and strikes outside the gaming facility itself. This could potentially deter security and the commission from meeting its charge, substantially increase regulatory costs for the tribes, and subject Reservation communities to disruption during labor disputes.[12]

(iii) Application of the NLRA would nullify TLRO provisions that preserve important tribal governmental interests, including Native employment preferences for tribal members, protection from unlimited rights to strike and picket

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[11] Section 5.1, 1999 Model Compact; http://www.cgcc.ca.gov/documents/enabling/tsc.pdf.

[12] Section 8: Access to eligible employees; Section 10(e) of the TLRO; http://www.cgcc.ca.gov/documents/compacts/original_compacts/Rincon_Compact.pdf

anywhere on and outside the premises, which would totally disrupt governmental operations and revenues, but most importantly, the unique and balanced dispute resolution provisions created by the Tribes and organized labor under the TLRO.

The TLRO established a Statewide Tribal Labor Panel that consists of mutually appointed arbitrators to ensure a minimum of level expertise in both federal Indian and labor law to resolve labor disputes on Indian lands.[13]

(iv) Compelling access to tribal lands infringes on the significant governmental and property interests of Indian tribes, and usurps each Tribe's TLRO without any consideration for the associated additional costs of law enforcement. Because of 18 U.S.C. section 1162 (commonly referred to as "Public Law 83-280"), California tribes do not qualify for federal law enforcement funding for contracts awarded under the Indian Self-Determination and Educational Assistance Act; for that reason, most Tribes have no actual police forces, and thus must rely on law enforcement agencies of surrounding non-Tribal communities -- assistance that is often not readily available. The Board is not providing any additional funding for tribes to regulate expanded and costly union activities, and invalidation of the TLRO will disrupt the delicate funding balance crafted in the comprehensive Compacts.

(v) Compelling access to tribal lands strips tribal governments of their long-recognized sovereign authority to limit who may enter their reservations, whether for purposes of public safety, law enforcement, cultural and natural resource

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[13] Section 13: Collective Bargaining Impasse of the TLRO., http://www.cgcc.ca.gov/documents/compacts/original_compacts/Rincon_Compact.pdf

protection, or community peace and quiet. Each tribe has adopted rules separate and distinct from its casino regarding access to its tribal lands, and regulates the ingress and egress of non-members onto its tribal lands. Application of the NLRA to labor relations within tribal casinos will abrogate tribal authority to limit access to tribal lands, far beyond the actual premises upon which tribal government gaming is conducted, substantially impairing California Tribes' inherent sovereign authority to protect the health, safety and welfare of tribal communities.

III. California Tribes are At Risk, Either for Unfair Labor Practices Charges Under the NLRA or For Material Breach of the 1999 Compacts for Non-Compliance With the TLRO or Both.

There is little dispute that "an underlying fundamental purpose of any legal system" is the establishment of "a certainty of legal rule, and a predictability of outcome in its application in the event of litigation, upon which men regulated by that system of laws can rely in their everyday dealings." Albert Tate, Jr., *Techniques of Judicial Interpretation in Louisiana*, 22 La. L. Rev. 727, 748 (1962). Currently California Tribes are confronted with either complying with NLRA in violation of the TLRO mandated by 1999 Compacts or vice versa, an untenable position.

If California Tribes rely on their TLRO, several provisions of which are in direct conflict with the NLRA, they inevitably risk unfair labor practice charges by the Board. If charged with unfair labor practices under the NLRA, the Board has pronounced, as in the present case, that the Tribe will be foreclosed by the doctrine of issue preclusion from arguing that the Board lacks jurisdiction on the basis of the TLRO. *Casino Pauma and United Here International Union,* 363 NLRB NO. 60, at footnote 1. (December 3, 2015.) The ensuing consequences of an NLRA violation not only result

in a Board "Cease and Desist" order, but also necessitate a direct appeal to this Court to challenge the Board's jurisdiction. Pending appeal, a California Tribe is required to temporarily modify labor practices under the TLRO, including rescinding casino employee policies, issuing and posting notices to employees announcing new tribal practices to conform to the Board's order and entering into settlement agreements. Most -- if not all -- of the actions demanded by the Board undoubtedly place the Tribe in conflict with its TLRO.

A California Tribe seeking to avoid Board action by implementing NLRA provisions places the Tribe at risk of being accused by the State of California and/or the Department of the Interior of committing a material breach of its Compact or Secretarial Procedures. As readily acknowledged, the 1999 Compacts are intergovernmental agreements, and the product of arm's-length government-to-government negotiations. The California Compacts must be signed by the Governor and ratified by the Legislature, placing the Compacts on par with other statutory enactments and interstate compacts authorized by Congress.

Specific to the adoption of and compliance with the TLRO, the 1999 Compact, currently in effect for 58 of the 73 gaming tribes in the state provides:

> In compliance with Section 10.7 of the Compact, the Tribe agrees to adopt an ordinance identical to the Model Tribal Labor Relations Ordinance attached hereto, and to notify the State of that adoption no later than [DATE] 1999. If such notice has not been received by the State by [DATE] 1999, this Compact shall be null and void. *Failure of the Tribe to maintain the Ordinance in effect during the term of this Compact shall constitute a material breach entitling the State to terminate this Compact. No*

> *amendment of the Ordinance shall be effective unless approved by the State.*

http://www.cgcc.ca.gov/documents/compacts/original_compacts/Rincon_Compact.pdf (Emphasis added).

The amendment process provided for under the California Compact again requires execution by the Governor, ratification by the Legislature and approval by the Department of Interior. If ratification is by less than a 2/3 vote of the Legislature, an amendment could be subject to voter referendum. The Board's *ultra vires* interference with the comprehensive scheme of the TLRO falls totally outside of this procedure, and is contrary to both California and federal law.

CONCLUSION

The Board's assertion of jurisdiction over labor relations in tribal gaming facilities has a major impact on tribal sovereign authority, with unintended consequences for every California Tribe, whether gaming or not, as well as impacts to the Class III gaming regulatory infrastructure of the State of California. The unique history of tribal government gaming in California included an invalidated voter initiative effort (Proposition 5) that was, as of that date, likely the most costly state ballot measure in American history; contentious negotiations between tribes, the Governor and organized labor that ultimately produced the 1999 Compact and TLRO; voter approval of a constitutional amendment that was a major element of the consideration given by the State in exchange for numerous and unprecedented tribal concessions; and affirmative Secretarial approval of the Compacts to which the TLRO was appended. The TLRO exemplifies a delicate balance between the state's public policy interest in protecting the rights of its citizens employed in tribal gaming facilities, and the Tribes' sovereign authority to regulate

labor relations on and control access to their Indian lands. Allowing the Board's overreach of jurisdiction undermines the significant concessions California Tribes agreed to extend to organized labor in the TLRO and denies tribes the benefit of the bargained-for exchange by substitution of the NLRA, a federal labor framework that lacks any recognition or protection of tribal interests, administered by an agency that concedes that it lacks any expertise or experience in federal Indian law.

California Tribes, which have not waived their sovereign immunity to suit except as provided in their Compacts and the TLRO, are exposed to petitions for representation elections and complaints for unfair labor practices under the NLRA, or alternatively, at risk of material breach of the 1999 Compact for non-compliance with the provisions of the TLRO. Amici strongly urge the Court to find the TLRO to be the final, binding and exclusive labor framework applicable to tribal casinos in California pursuant to the IGRA, consistent with the Supreme Court's jurisprudence, suggestions by Congress, and the opinion of the Secretary of the Interior.

Respectfully submitted on this 7th day of November, 2016.

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STATEMENT OF RELATED CASES

Appellants are aware of no related cases pending in this Court.

CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2016, I electronically filed the foregoing Amicus Brief with the Clerk of the Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

11/7/16 /s Dorothy Alther

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 29-2(c)(2) and (3), 32-2 or 32-4[1] for Case Number 16-70397 & 16-7

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Signature of Attorney or Unrepresented Litigant: /s/Dorothy Alther Date: 11/7/16

("s/" plus typed name is acceptable for electronically-filed documents)

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