No. 15-1034

In the

# Supreme Court of the United States

SOARING EAGLE CASINO AND RESORT, AN ENTERPRISE OF THE SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN,
*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## AMICUS BRIEF IN SUPPORT OF PETITIONER BY CALIFORNIA NATIONS INDIAN GAMING ASSOCIATION, SOUTHERN CALIFORNIA TRIBAL CHAIRMEN'S ASSOCIATION, AND THE CALIFORNIA ASSOCIATION OF TRIBAL GOVERNMENTS

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## QUESTION PRESENTED

1. Whether the National Labor Relations Board exceeded its authority by ordering an Indian tribe not to enforce a tribal labor law that governs the organizing and collective bargaining activities of tribal government employees working on tribal lands.

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## STATEMENT OF INTEREST

*Amici* are three California Tribal Associations comprised of 81 federally-recognized Tribes. Member Tribes of the associations include gaming and non-gaming Tribes, all of whom have a strong interest in the continuing viability and undisturbed operations of tribal government gaming in California, whether directly, through the operation of tribal government gaming facilities, 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 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]

*Amici* California Nations Tribal Indian Gaming Association ("CNIGA)" is a non-profit organization founded in 1988 and comprised of 32 California federally-recognized 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

[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. Respondent consented by letter dated March 9, 2016.

members and serves as an industry forum for information and resources.

*Amici* 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, education, 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).

*Amici* California Association of Tribal Governments ("CATG") is a non-profit organization consisting of 32 California federally-recognized 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.

## 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]

Tribal government gaming in California has a long, and at times, contentious history that produced this 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. section 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-Reservation gaming and tribal efforts to resist erosion of the rights recognized in *Cabazon* culminated in the passage of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. section 2701 *et. seq.*, which President Reagan signed into law on October 17, 1988.

The IGRA has been described as *"cooperative federalism,"* because it recognized and balanced the re-

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

spective 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 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 the U.S. Court of Appeals for the Ninth Circuit held that 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 an initiative statute ("Proposition 5") 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 National Labor Relations Board ("Board") disclaimed jurisdiction over tribes as employers. In order to protect the organizational and representational rights of tribal gaming employees, 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 for protecting those

rights.[3] The only procedure that the State would approve was a model Tribal Labor Relations Ordinance. *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 Tribal Labor Relations Ordinance (the "TLRO") that met the requirements of Section 10.7. *In re Indian Gaming Related Cases*, 331 F.3d 1094 at 1106.

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

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[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-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.

the Compacts took effect. 65 Fed. Reg. 31189 (Mar. 16, 2000).

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*, the Ninth Circuit 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. section 2710(d)(3)(C)(vii), and thus was an appropriate topic for compact negotiations. Further, the 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. The Ninth Circuit made clear 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. The 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, is a material term of the California 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 Compacts. This intrusive interference directly harms the jurisdictional, political, legal and economic interests of California tribes, whether gaming or not, as well as the State's interests that include not only receiving the benefit of the bargain that it struck with California Tribes, but also is dependent on revenue sharing to offset its regulatory costs and receives 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. Without a Definitive Answer to Whether Application of the NLRA Displaces the Labor Relations Regime Negotiated Between California Tribes and Organized Labor, Approved by the State of California and by the Secretary of the Interior Pursuant to IGRA, California Tribes, the State of California and the Secretary of the Interior are Without Any Meaningful Assurance That the TLRO is Final and Binding 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 people.[5] This development was made possible by the Tribes' and the State's mutual understanding at the time that the subject of labor relations was a permissible topic for compact negotiations because it bears a direct relationship to the operation of gaming and falls within the exclusive province 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.

The TLRO and revenue sharing provisions, the Indian Gaming Revenue Sharing Trust Fund ("RSTF") and the Indian Gaming Special Distribution Fund ("SDF"), of the California compacts all are

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[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.

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. 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."
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> *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1106 (2003), *citing* Section 10.7 of the California Tribal-State Gaming Compact, Division of Gambling Control (March 2003).

As described above, to meet the labor 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 California Compact. *In re Indian Gaming Related Cases*, 331 F.3d at 1106. The TLRO that was included in 58 California Compacts indis-

putably proves that California Tribes agreed to major concessions that provide significant protections for organized labor in tribal casinos 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.

However, in two California cases, one of which is on appeal to the Ninth Circuit, the Board has fractured the triad of consideration that supports the California Compacts without a shred of evidence in either the IGRA or National Labor Relations Act ("NLRA") that Congress ever intended that the Board should 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 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

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

to which the Board for the first time opted to exercise jurisdiction over Indian casinos which it had previously declined to do for the historical and policy reasons discussed at length in that decision." *Id.* at 4. The *Casino Pauma* case is now on appeal to the Ninth Circuit, which is likely to result in a tortured analysis attempting to reconcile that court's decisions in *Donovan v. Coeur d'Alene Tribal Farms*,751 F.2d 1113 (1985) that presumes statutes of general applicability (one that is silent as to its application like the NLRA) apply to tribes absent meeting one of three exceptions, and *In re Indian Gaming Related Cases*, that labor relations at tribal casinos 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 the Ninth Circuit were to affirm the Board's decision in *Casino Pauma*, what would still be unclear is whether the Board could assert jurisdiction over a California tribe (in this case, the Rincon Band) that is permitted to conduct Class III gaming pursuant to procedures prescribed by the Secretary of the Interior ("Secretarial Procedures")[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). The TLRO incorporated into the Rincon Band's Secretarial Procedures issued in 2013, expressly reaffirms Section 10.7 found in the Cali-

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[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.

fornia Compacts, that the Tribe shall maintain the agreement that was entered into on or before October 13, 1999, that addresses the organizational rights of casino employees. Through the issuance of the Rincon Band's 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. Moreover, the Secretary has openly notified the Board that the Department of the Interior disagreed with the Board's 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. National Labor Relations Board*, 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."

Congress also apparently agrees with the Secretary. The U.S. House of Representatives passed H.R. 511 last year to amend Section 2(2) of the NLRA to expressly include federally-recognized Indian tribes in the government exception to the definition of "em-

ployer" under the NLRA. H.R. Res. 511, 114th Cong. (2015).

Conflicting appellate court decisions on the application of the NLRA to tribal government gaming facilities, coupled with the Secretary's assertion that the NLRA does not apply to tribal governments, amply justify granting the Petition for a Writ of Certiorari to resolve this issue and bring clarity and uniformity to this aspect of relations among the States, Tribes and the United States.

## II. Unintended Consequences of Reforming or Rescinding Material Terms of Ratified Compacts Disrupts the Funding Scheme and Eliminates the 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' intent that gaming compacts exemplify cooperative federalism. *Artichoke Joe's v. Norton* 216 F.Supp.2d, at 1092.

The California compacts are a package of agreements that include inextricably linked material

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

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 invalidating 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 the purchasing by tribes of licenses from the state to acquire and maintain gaming machines, grants non-gaming tribes in California a maximum of $1.1 million payment each year.[10] The 1999 Compact also established the SDF, which is financed through the tribes' net win from the operation of their gaming machines on a percentage basis tied to the number of machines operated on September 1, 1999. 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

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

[10] The number of machines a tribe can operate is capped at 2,000. There is a one-time license fee per machine of $1250 in addition to a graduated fee scale for licenses: cost per license is $900 per year per machine for the first 400 machines in excess of 350; $1950 per year per machine for the next 500 machines in excess of 750; and $4350 per year per machine for machines in excess of 1250.

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 purposes 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 in the gaming facility. Tribal gaming operations are highly regulated environments with considered and comprehensive licensing procedures 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 areas of the facility for organizational activities, including areas for picketing and strikes. This could potentially deter security and the commission from meeting its charge and substantially increase regulatory costs for the tribes.[12]

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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;

(iii) Application of the NLRA would impair TLRO provisions that preserve important tribal governmental interests, including Native employment preferences for their members, protection from unlimited rights to strike and picket anywhere on the premises and gaming floors which would totally disrupt governmental operations and revenues, but most importantly, the unique and balanced dispute resolution provision. The TLRO established a Statewide Tribal Labor Panel that consists of mutually appointed arbitrators to ensure a minimum of level expertise in Indian law to resolve labor disputes on Indian lands.[13]

(iv) By compelling access to tribal lands, and usurping each tribe's TLRO, there is an associated additional cost for law enforcement. Because of 18 U.S.C. section 1162 (commonly referred to as "Public Law 280") California tribes do not qualify for federal law enforcement funding for contracts awarded under the Indian Self-Determination and Educational Assistance Act as in non-Public Law 280 states, and for that reason some Tribes have limited or skeletal police forces, or are required to rely on San Diego County 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

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http://www.cgcc.ca.gov/documents/compacts/original_compacts/Rincon_Compact.pdf

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

the delicate funding balance crafted in the comprehensive Compacts.

(v) Each tribe has adopted rules separate and distinct from the Casino regarding access to its tribal lands and culturally sensitive areas and for that reason regulates the ingress and egress of non-members onto its tribal lands. Application of the NLRA to Tribes will abrogate tribal authority to limit access to tribal lands, potentially far beyond the actual premises upon which tribal government gaming is conducted, substantially impairing California Tribes' ability to protect the health, safety and welfare of tribal communities.

## III. Without Supreme Court Intervention, California Tribes are At-Risk, Either for Unfair Labor Practices Under the NLRA or Material Breach of the California Compact for Non-Compliance With the TLRO.

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). The current uncertainty of whether the NLRA applies to all tribal gaming facilities, or only tribes in the Sixth and D.C. Circuit, while excluding tribes in the Tenth Circuit, presents California Tribes with a highly unpredictable decision of whether to proceed with law-

ful compliance of the TLRO as mandated by their California compacts.[14]

If a California Tribe were to rely on its TLRO, several provisions of which are in direct conflict with the NLRA, the Tribe inevitably would risk unfair labor practice charges by the Board. If charged with unfair labor practices under the NLRA, the Board has pronounced that the tribe will be foreclosed by the doctrine of issue preclusion from arguing 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 will not only result in a Board "Cease and Desist" order, but also necessitate a direct appeal to a U.S. Circuit Court of Appeals to challenge the Board's jurisdiction. Pending appeal, California tribes would be required to temporarily modify labor practices under the TLRO, including amending internal employee policies, issuing and posting notices to employees announcing new tribal practices solely to conform to the Board's order. Most -- if not all -- of the actions that would likely be demanded by the Board would undoubtedly place the Tribe in conflict with its TLRO.

On the other hand, should a California Tribe seek to avoid Board action by implementing NLRA

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[14] On February 9, 2016 the Pauma Band of Luiseño Mission Indians of the Pauma & Yuima Reservation filed a Petition for Review with the Ninth Circuit Court of Appeals challenging the Board's decision that the NRLA governs labor relations at the tribe's gaming facility. *Pauma Band of Luiseño Mission Indians of the Pauma & Yuima Reservation v. NLRB,* Case No. 16-70397

provisions, the Tribe would risk 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 obligations. As readily acknowledged, the California Compacts are intergovernmental agreements, and the product of arm's length government-to-government negotiations. California Compacts must be signed by the Governor and ratified by the Legislature, placing the Compacts on par with other statutory enactments.

Specific to the adoption of and compliance with the TLRO, the California 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 this scheme falls totally outside of this procedure, and is contrary to both California and Federal Law.

## CONCLUSION

Given Whether the Board has 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 gaming regulatory infrastructure of the State of California. The unique history of tribal government gaming in California included a failed legislative effort (Proposition 5), contentious negotiations between tribes, the Governor and organized labor that ultimately produced the Compact and TLRO that was subsequently ratified by a constitutional amendment prior to securing Secretarial approval. The TLRO exemplifies a delicate balance between the state's public policy interest of protecting workers' rights in tribal gaming facilities and preservation of tribal sovereign authority to regulate labor relations on 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 protection of tribal interests administered by an agency without any expertise in federal Indian law.

Absent intervention and review of the critical question presented by Petitioners, California Tribes are exposed to complaints for unfair labor practices under the NLRA, or alternatively, at risk of material breach of the California Compact for non-compliance with the provisions of the TLRO. Amici strongly urge the Supreme Court to grant Petitioners' Writ of Certiorari to bring certainty to the issues now in conflict among the Circuit Courts and between federal agencies, the Board and Department of Interior, on whether the NLRA applies to tribal government gaming on Indian lands.

Respectfully submitted.

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