UNITED STATE OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

CHICKASAW NATION operating
WINSTAR WORLD CASINO

Respondent

Cases 17-CA-025031
and 17-CA-250121

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS LOCAL 886,
Affiliated with THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

Charging Party

BRIEF OF AMICUS CURIAE
NATIONAL CONGRESS OF AMERICAN INDIANS

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The National Congress of American Indians, founded in 1944, is the nation's oldest and largest association of Indian tribal governments, representing 252 governments and many individuals. NCAI serves as a forum for consensus-based policy development among its members, which include both gaming (*i.e.*, casino-operating) and non-gaming Tribes from every region of the country. Its mission is to inform the public and all branches of the federal government about tribal self-government, treaty rights, and a broad range of federal policy issues affecting tribal governments.

ARGUMENT

The core issue in this case—as in *San Manuel Indian Bingo & Casino*, 341 NLRB 1055 (2004)—is whether the Board may and should exercise jurisdiction over an Indian tribal government that operates a commercial enterprise on land over which the Tribe exercises governmental jurisdiction. As the Board and the courts have long recognized, the answer to that question turns in the first instance on an evaluation of whether Congress intended the term "employer" in the National Labor Relations Act, 29 U.S.C. § 152(2), to apply to a tribal government in these circumstances. *See San Manuel*, 341 NLRB at 1056-1057 (recounting history of Board's interpretations in this context); *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1315-1316 (D.C. Cir. 2007) (reasoning that Act is ambiguous on this point); *cf. NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 506 (1979) (concluding that "Congress did not contemplate" treating church-operated schools as employers under the Act). If the Act confers jurisdiction, then the question is whether the Board should assert it in these circumstances as a matter of discretion.

With respect, NCAI submits that the Board reached the wrong conclusion as to each of these questions in *San Manuel*. When the NLRA is considered in historical context, it is clear

that Congress did not contemplate its extension to Indian tribal governments. If it had adverted to the issue, Congress would have prescribed that tribal governments be treated *as governments*, and thus outside the scope of the Act. The development of federal Indian law since 1935 reinforces that conclusion.

Even if that is wrong and the Board has the discretion to assert jurisdiction over tribal governments, it should not do so. The differentiation the Board has posited between "governmental functions and proprietary ones" (*San Manuel*, 341 NLRB at 1063) has been rejected in other contexts, and is *especially* inapposite with respect to tribal governments. Since 1934—a year before enactment of the NLRA—federally-recognized Indian Tribes have operated primarily in a special legal framework put in place by the Indian Reorganization Act, 25 U.S.C. §§ 461 *et seq*., under which the recognition and fostering of tribal governments and the goals of tribal economic development and self-sufficiency are inextricably intertwined. In this special context, it is unsound to rest an assertion of Board jurisdiction on the proposition that "[r]unning a commercial business is not an expression of sovereignty in the same way that running a tribal court system is"—and quite wrong to maintain that doing so will cause "little harm to the Indian tribes' special attributes of sovereignty or the statutory schemes designed to protect them." *San Manuel*, 341 NLRB at 1062-1063. Rather than asserting power to *regulate* federally-recognized Indian tribal governments in their relations with private parties, the Board should align itself with the United States' strongly-expressed commitment to dealing with Tribes on a government-to-

government basis.[1] In that regard, there are many ways in which Tribes and the Board could usefully *collaborate* to advance the common goal of promoting peaceful and unobstructed commerce through fair labor relations. *See* 29 U.S.C. § 151.

I. Asserting Jurisdiction Over Tribal Governments Is Inconsistent With The Historical Context And Purpose Of The NLRA And With Established Law Protecting Tribal Self-Government

A. The NLRA Was Drafted To Cover Ordinary Private-Sector Employers, Not Governments Or Special Entities That Congress Did Not Consider

The Supreme Court has explained that the "very broad terms" Congress used to define the Board's jurisdiction in the NLRA must be understood in light of the historical context of the Act's adoption in 1935. *Catholic Bishop*, 440 U.S. at 504. "The concern that was repeated throughout the debates was the need to assure workers the right to organize to counterbalance the collective activities of employers which had been authorized by the National Industrial Recovery Act." *Id*. Thus, "congressional attention focused on employment in private industry." *Id*. Indeed, the Court has observed that, even after the Act had been in operation for twelve years, congressional debate over a 1947 amendment revealed a "consensus … that nonprofit institutions in general did not fall within the Board's jurisdiction because they did not affect commerce." *Id*. at 505. While any such broad understanding of limits on the Board's jurisdiction has been

[1] *See, e.g.*, U.S. Dep't of Justice, Solicitation of Comments on Request for United States Assumption of Concurrent Federal Criminal Jurisdiction, 77 Fed. Reg. 64,547, 64,548 (Oct. 22, 2012) ("For more than two centuries, the Federal Government has recognized Indian tribes as domestic sovereigns that have unique government-to-government relationships with the United States."); U.S. Dep't of Labor, Request for Comments, 77 Fed. Reg. 23,283, 23,284 (Apr. 18, 2012) ("The United States, in accordance with treaties, statutes, executive orders, and judicial decisions, has recognized the right of Indian tribes to self-government and maintains a government-to-government relationship with federally recognized tribes. Indian tribes exercise inherent sovereign powers over their members and territory…. Based on this government-to-government relationship, DOL will continue to work with Indian tribes on its programs involving tribes in a manner that respects tribal self-government and sovereignty, honors tribal treaty and other rights, and meets the Federal Government's tribal trust responsibilities.").

superseded, the Court has made clear that, as a statutory matter, Congress did not intend the Act to cover every entity that could be described as an "employer." Thus, given reason to pause by the special First Amendment status of religious institutions, the Court reasoned that "Congress simply gave no consideration to church-operated schools," *id*. at 504, and certainly "did not contemplate" that their labor relations would be regulated by the Board, *id*. at 506. Under those circumstances, the Court construed the term "employer" not to include such schools. *Id*. at 507.

One category of potential employers Congress did consider was governments. Section 2(2) of the Act expressly excludes from the coverage of the Act "the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof." 29 U.S.C. § 152(2). That exclusion reflects Congress's unwillingness to seek to subject non-federal governments to direct regulation, and in particular its unwillingness to extend to the employees of *any* governmental employer a federal right to strike—a right that is otherwise "part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." *NLRB v. Insurance Agents Int'l Union*, 361 U.S. 477, 488-489 (1960); *see also, e.g.*, *Division 1287 of Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emps. of Am. v. Missouri*, 374 U.S. 74, 82 (1963) ("Collective bargaining, with the right to strike at its core, is the essence of the federal scheme.").

At the time the NLRA was enacted, "governmental employees did not usually enjoy the right to strike." *NLRB v. Natural Gas Util. Dist. of Hawkins Cnty.*, 402 U.S. 600, 604 & n.3 (1971). Such strikes were barred at common law, *Virgin Islands Port Authority v. SIU de Puerto Rico*, 354 F. Supp. 312, 313 (D.V.I. 1973), *aff'd*, 494 F.2d 452 (3d Cir. 1974), and generally remain so today in the case of federal and most state employees, *see* 5 U.S.C. §§ 7116(b)(7), 7311; M. 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). The legislative history of the NLRA includes a 1934 letter to the *New York Times* from Senator Walsh, Chairman of Senate Committee on Education and Labor, emphasizing the importance of precluding public employees from striking. 1 *Legislative History of the National Labor Relations Act* 1117, 1117 (1949) (reprinting letter dated June 3, 1934). Similarly, in 1937, just three years after he signed the NLRA, President Roosevelt argued forcefully that strikes by public employees were inconsistent with effective government:

> [M]ilitant tactics have no place in the functions of any organization of Government employees …. [A] strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of Government until their demands are satisfied. Such action, looking toward the paralysis of Government by those who have sworn to support it, is unthinkable and intolerable.

Norwalk Teachers' Ass'n v. Bd. of Educ., 83 A.2d 482, 484 (Conn. 1951) (quoting letter to the National Federation of Federal Employees, Aug. 16, 1937 (alteration in original)).

In general, then, Congress clearly accepted the proposition that public-employee strikes are "contrary to the notion of government," in part because a governmental activity

> is usually undertaken by the government precisely because it is critically important to a large segment of the public, and the public is therefore especially vulnerable to "blackmail" strikes by workers in this field.

Virgin Islands, 354 F. Supp. at 313 (enjoining strike by port authority employees). In any event, it declined to enact a federal law imposing either collective bargaining or related rights, including the right to strike, on other governments within the federal system. Instead, it left those other governments free to make these significant policy choices through their own laws.

The NLRA's governmental exclusion makes express reference only to the most common governments in the American system—the United States and "any State or political subdivision

thereof." 29 U.S.C. § 152(2). Federal courts have nonetheless interpreted that provision to reach the governments of Puerto Rico and the Virgin Islands. *See Chaparro-Febus v. Int'l Longshoremen Ass'n, Local 1575*, 983 F.2d 325, 328-330 (1st Cir. 1993); *Virgin Islands*, 354 F. Supp. at 313; *cf. San Manuel*, 341 NLRB at 1070 (Member Schaumber, dissenting); *but see id.* 1058 n.11; *see also* 29 C.F.R. § 102.7 (current Board regulation defining "State" to include the District of Columbia and all U.S. territories and possessions (promulgated Apr. 18, 1936, *see* 1 Fed. Reg. 208)). And until 2004, the Board likewise recognized it as "clear beyond peradventure that a tribal council … is a government both in the usual meaning of the word, and as interpreted and applied by Congress, the Executive, and the Courts," and thus outside the intended coverage of the Act, at least when operating on land over which the Tribe exercises governmental authority. *Fort Apache Timber Co.*, 226 NLRB 503, 506 (1976) (internal footnote omitted); *see also Sac & Fox Indus., Ltd.*, 307 NLRB 241, 243-244 (1992) (distinguishing off-reservation activities). Not until its *San Manuel* decision in 2004 did the Board conclude that its statutory jurisdiction extends to cover the governments of federally-recognized Indian Tribes.[2]

The Board should reconsider that decision. The construction of the Act on which it rests is not plausible when the Act's adoption in 1935 is considered in conjunction with the immediately preceding and succeeding enactment of the Indian Reorganization Act in 1934 and the Oklahoma Indian Welfare Act in 1936. The adoption of those Indian-specific Acts was driven by the desperate state of tribal affairs at that time; reflected a sharp turning point in

[2] Seven years before *Fort Apache*, the Board affirmed without opinion a district director's decision finding no jurisdiction over a hydroelectric facility owned by the Metlakatla Indian Community because the Tribe was implicitly included in the government exemption. *Metlakatla Indian Cmty. v. Local Union No. 1547*, No. 19-RC-5180 (Reg'l Dir. Oct. 7, 1969), *review denied* (Nov. 13, 1969). Similar opinions were later issued with respect to the Mississippi Band of Choctaw Indians (Aug. 13, 1998) and Eastern Band of Cherokee Indians (Mar. 8, 2002).

federal Indian policy; and embodied a renewed commitment by the United States to deal with Tribes on a government-to-government basis.

B. Between 1934 And 1936, Congress Would Have Thought Of Indian Tribes As Governments In The Process Of Reconstruction, Intended To Promote The Political And Economic Rehabilitation Of Indian Wards Rendered Destitute By Previous Federal Policies—Not As Private-Sector Employers To Be Integrated Into A National Structure Of Federally Regulated Collective Bargaining

As the Board and the courts have long recognized, "Indian tribes occupy a unique position in the Nation's political and legal history," with "sovereignty [that] actually predates that of the Federal government" and a "rightful claim to respect." *San Manuel*, 341 NLRB at 1056; *see also, e.g., Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008) ("For nearly two centuries now, we have recognized Indian tribes as 'distinct, independent political communities,' qualified to exercise many of the powers and prerogatives of self-government." (quoting *Worcester v. Georgia*, 31 U.S. (6. Pet.) 515, 559 (1832))). A brief review of the relevant legal history is critical to a proper understanding of Congress's failure to deal with Tribes expressly in the NLRA. *See Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 337 (1988) (emphasizing importance of considering "Congress' silence … in the appropriate historical context"); *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 487 (1999) (concluding Tribes should be treated like States under Price-Anderson Act because Act's silence on issue was probably inadvertent); *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1196 (10th Cir. 2002) (*en banc*) (citing *Neztsosie*).

The United States originally conducted its legal relations with Tribes as a matter of treaties with independent Nations. *See, e.g., Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 542-548 (1832); *Cohen's Handbook of Federal Indian Law* 23-30 (N. Newton *et al.* eds. 2012 ed.) ("*Cohen's Federal Indian Law*"). Eventually, however, it "began to consider the Indians less as

foreign nations and more as part of our country." *Organized Village of Kake v. Egan*, 369 U.S. 60, 72 (1962). In 1871, Congress ended the practice of dealing with Tribes by treaty. 25 U.S.C. § 71. Moreover, contrary to the government's many existing promises of protection, officials "tried to substitute federal power for the Indians' own institutions by imposing changes in every aspect of native life." S. Rep. No. 101-216, at 3 (1989) (report of special investigative committee on federal mismanagement of Indian affairs).

One particularly important attack on tribal governments was the General Allotment Act of 1887, 24 Stat. 388, which formally implemented policies of "allotment and assimilation" and envisioned "elimination of tribal institutions, sale of tribal lands, and assimilation of Indians as individuals into the dominant culture." *Duro v. Reina*, 495 U.S. 676, 691 (1990). An avowed goal was "the dissolution of tribal affairs and jurisdiction" and "the ultimate destruction of tribal government." *Montana v. United States*, 450 U.S. 544, 559 n.9 (1981). These policies, however, "proved to be a disastrous failure." *Hagen v. Utah*, 510 U.S. 399, 425 (1994). Eventually, federal policy began to shift back toward respect for Tribes as distinct communities and the promotion of tribal self-government and community-based economic development. *Cohen's Federal Indian Law* 79-81.

A critical turning point was the 1928 Meriam Report, which described the deplorable conditions created by the assimilation policy and quickly became a "primary catalyst for change." *Cohen's Federal Indian Law* 80; Institute for Government Research, *The Problem of Indian Administration* (L. Meriam *et al*. eds. 1928) ("Meriam Rep."). It detailed how "[a]n overwhelming majority of the Indians [were] poor" and "living below any reasonable standard of health and decency." Meriam Rep. 1, 433-434. They "generally eke[d] out an existence," largely "through unearned income from leases of land, the sale of land, per capita payments from

tribal funds, or in exceptional cases through rations given by the [federal] government." *Id.* at 5. "Little [was] done on the reservations," and many Indians had "no resources but their labor," which was mostly "temporary" and "unskilled." *Id.* at 15, 519. They were "not adjusted to the economic and social system of the dominant white civilization," *id.* at 1, and experience as business owners and employers was "almost entirely wanting," *id.* at 430.

After the 1932 election, Congress concluded that "[t]he overly paternalistic approach of prior years had proved both exploitative and destructive of Indian interests," and "institutional changes were required." *Morton v. Mancari*, 417 U.S. 535, 553 (1974). Proper fulfillment of the Nation's trust obligations required a complete shift in approach, "turning over to the Indians a greater control of their own destinies." *Id.* This led to the "sweeping" statutory changes embodied in the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. §§ 461 *et seq.*, whose "overriding purpose" was "to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton*, 417 U.S. at 542. Importantly, the 1934 Act aimed to promote self-determination by Indian communities through both renewed political recognition and economic development. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 n.5 (1987); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151-152 (1973). The IRA encouraged Tribes both to "reorganize"—to "revitalize their self-government" (*id.* at 152) through the adoption of tribal constitutions (IRA § 16, 25 U.S.C. § 476)—and to invigorate their economies through the creation of federally-chartered tribal corporations (IRA § 17, 25 U.S.C. § 477). These changes all emphasized "the expression of retained tribal sovereignty." *Duro*, 495 U.S. at 690-92; *see Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 174-175 n.24 (1982) (IRA "confirmed … the inherent sovereign powers of the Indian tribes"); 78 Cong. Rec. 11125 (1934) (co-sponsor Sen. Wheeler) (IRA sought "to give the

Indians the control of their own affairs and of their own property"). Instead of "forcing the assimilation of individual Indians, the IRA was intended to enable the tribe to interact with and adapt to modern society as a governmental unit." *Cohen's Federal Indian Law* 81.

Thus, focusing specifically on its power and responsibilities with respect to Indian affairs, Congress fundamentally changed federal policy in an effort to achieve two distinct but inseparable objectives for Tribes: political self-governance and economic self-sufficiency. By promoting both, the Act sought to "'rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" *Mescalero Apache*, 411 U.S. at 152 (quoting H.R. Rep. No. 73-1804, at 6 (1934)). Renewed support for tribal governments was directly linked to the policy of promoting economic development through which a Tribe could "generate substantial revenues for the education and the social and economic welfare of its people." *Id*. at 151.

Oklahoma Tribes, such as respondent Chickasaw Nation, were not initially covered by the IRA. Soon after passage of the Act, however, Senator Elmer Thomas met with the Oklahoma Tribes and came to support their inclusion.[3] As it considered passage of the ensuing Oklahoma Indian Welfare Act (OIWA), Congress held hearings focused specifically on the condition of those Tribes. Commissioner of Indian Affairs John Collier explained that, as a result of the allotment policy, members of the Oklahoma Tribes were "at present wholly landless" and their poverty had become "very great." *To Promote the General Welfare of the Indians of Oklahoma: Hearings Before the H. Comm. on Indian Affairs on H.R. 6234*, 74th Cong. 9-10 (1935). "The per capita per annum income of the Five Civilized Tribes, excluding a

[3] *See* G. Rice, *The Indian Reorganization Act, the Declaration on the Rights of Indigenous Peoples, and a Proposed* Carcieri *"Fix": Updating the Trust Land Acquisition Process*, 45 Idaho L. Rev. 575, 596 n.124 (2009).

few who are rich from zinc or oil or other minerals, runs around $48, a figure arrived at by totaling all that they consume. I mean all they wear and eat in a year. They are very poor, desperately poor." *Id.*[4] In 1936 Congress enacted the OIWA, extending most provisions of the IRA to the Oklahoma tribes. *See* 25 U.S.C. § 501 *et seq.*; *Morris v. Watt*, 640 F.2d 404, 409 n.11 (D.C. Cir. 1981).

Against this backdrop, it is inconceivable that Congress in 1935—the year between adoption of the IRA and the OIWA—intended to include Indian tribal governments within the coverage of the new NLRA, establishing a national regime of collective bargaining "focused on employment in private industry and on industrial recovery" (*Catholic Bishop*, 440 U.S. at 504).

First, given the picture that had been graphically painted of the economic devastation visited on Tribes by the federal policies of the previous decades, the most reasonable explanation for the lack of any specific mention of Tribes in the NLRA's text and legislative history is that reached by the D.C. Circuit: "[T]he NLRA was enacted by a Congress that in all likelihood never contemplated the statute's potential application to tribal employers." *San Manuel*, 475 F.3d at 1310.[5]

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[4] The "Five Civilized Tribes," which included the Creeks, Cherokees, Choctaws, Chickasaws, and Seminoles (*see Choctaw Nation of Indians v. United States*, 318 U.S. 423, 425 n.5 (1943)), were so known "because of their adaptability in developing institutions comparable in many respects to the European models." *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1441 n.2 (D.C. Cir. 1988). While the Five Civilized Tribes were initially excluded from the United States' allotment policy "because of Treaty provisions, and, more importantly, because those tribes held their land in fee simple," *id.* at 1441, the United States forced allotment upon the Tribes after they resisted voluntary compliance with the policy, *id.* at 1442.

[5] In making this statement, the D.C. Circuit clearly rejected the reasoning of the Board majority in *San Manuel*, 341 NLRB at 1058, that Congress "purposely chose" not to exclude Tribes from the Act's coverage. NCAI is aware of no legislative history or other evidence that would support a conclusion that Congress adverted to the question of tribal governments and decided they should be covered by the Act. The fact that some federal statutes passed much later include specific exclusions for Tribes, *see id*. (citing the Civil Rights Act of 1964 and the Americans with Disabilities Act), indicates only that by the time of those enactments the

Second, the whole thrust of Congress's Indian-specific enactments in 1934 and 1936 was to return to a federal policy of recognizing and dealing with Tribes *as governments*. Thus, the only reasonable assumption is that if Congress *had* contemplated the special case of Indian Tribes in the context of the NLRA, it would have included them within the list of governments expressly excluded from coverage by that Act. Indeed, in a regulation promulgated in 1936 to prescribe procedures under the new Act, the Board uncontroversially defined the term "State" to include other governments not expressly mentioned in the text of Section 2(2): "the District of Columbia and all States, Territories, and possessions of the United States." 29 C.F.R. § 102.7 (promulgated Apr. 18, 1936, *see* 1 Fed. Reg. 208). Moreover, in view of the federal government's plenary authority over all Indian affairs—notably including tribal lands or territory—and the paternalistic way in which the Bureau of Indian Affairs had dealt with Indian "wards" for many years, the 1935 Congress would most likely have thought of Tribes as essentially federal instrumentalities, territories, or protectorates, much like the District of Columbia or perhaps Puerto Rico or American Samoa: special political entities that were either parts of, or subordinate affiliates of, the government of the United States itself.[6]

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renewed policy of recognizing Tribes as special government entities and taking care to deal with them as such had become more established and had some success. Those later express references cannot support any negative inference based on congressional silence in 1935.

[6] For example, Congress reserved the territory of the Chickasaw Nation, and the territory of other Tribes, as federal territory when Oklahoma was admitted to the Union in 1906: "[N]othing contained in the said [state] constitution shall be construed … to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise," and "the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title in or to … all lands … owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States." Oklahoma Enabling Act, ch. 3335, §§ 1 and 3(Third), 34 Stat. 267, 270 (1906); *see also Tiger v. Western Inv. Co.*, 221 U.S. 286, 309 (1911) ("In passing the enabling act for the admission of the state of Oklahoma, … Congress was careful to preserve the authority of the government of the United

Third, the fact that some Tribes now conduct successful commercial activities along with their other functions does not detract from the conclusion that Congress would have viewed Tribes as governments in 1935, because undertaking activities to promote economic development and self-sufficiency was one of the things that Congress in 1934 and 1936 specifically intended tribal *governments* to do.[7] Indeed, if Congress had thought of these fragile and often fledgling entities in terms of the right to strike—one of the signal reasons for distinguishing between private and governmental employers under the Act—it would no doubt have had *special* concern about their vulnerability to disruption and the choking off of public funds.

In sum, there should be no doubt that Indian Tribes fall outside the expected and intended reach of the term "employer" as used by the 1935 Congress in the NLRA.

C. The Further Development Of Federal Indian Law Since 1936 Strongly Supports Construing The NLRA Not To Reach Indian Tribes

Since 1936, the Political Branches have strengthened the policies of tribal self-determination and economic self-sufficiency embodied in the IRA and the OIWA. *See*

States over the Indians, their lands and property, which it had prior to the passage of the act."). The Constitution grants Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," U.S. Const., art. IV, sec. 3, cl. 2; even today Chickasaw Nation land is held in trust for the Nation by the United States and is subject to a broad array of federal statutes governing tribal territories. *See generally, e.g.*, 25 U.S.C. §§ 311 *et seq*.; 18 U.S.C. § 1151 (defining "Indian country" to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government" and "all dependent Indian communities within the borders of the United States … whether within or without the limits of a state"). And under the IRA, adopted in 1934, no tribal constitution or bylaw could be adopted or amended without the approval of the Secretary of the Interior. 25 U.S.C. § 476(a)(2).

[7] Tribal governments have in fact undertaken an array of development initiatives in many areas, including agriculture, oil and gas, timber, construction, and retail sales, among others. *See, e.g.*, *Menominee Tribal Enters. v. Solis*, 601 F.3d 669, 670 (7th Cir. 2010) (saw mill); *Quantum Entmnt., Ltd. v. U.S. Dep't of Interior*, 848 F. Supp. 2d 30, 34 (D.D.C. 2012) (gas station); *Fort Apache*, 226 NLRB at 503 (timber company).

McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 172 (1973) (recounting history).[8] "Both the tribes and the Federal Government are now firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986). Congress has repeatedly declared that "there is a government-to-government relationship between the United States and each Indian tribe" and that "the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government." Indian Tribal Justice Act, 25 U.S.C. § 3601.[9] Contemporary federal statutes consistently treat Indian Tribes as governments. *See, e.g.*, Indian Tribal Government Tax Status Act of 1982, 26 U.S.C. § 7871; Clean Water Act, 33 U.S.C. § 1377; Safe Drinking Water Act, 42 U.S.C. § 300j-11; Clean Air Act, 42 U.S.C. § 7601(d); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9626. And through enactments such as the Indian Financing Act, 25 U.S.C. § 1451, and the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq*., Congress has sought to facilitate, among other things, the development of tribal enterprises on Indian lands as a means of improving the economic circumstances and stability of tribal communities. *See, e.g.*, 25 C.F.R. §§ 101.1 (defining revolving loan fund) and 101.2(b)(1) (authorizing loans "[t]o eligible tribes … to finance economic enterprises operated for profit, the operation of which will contribute to the improvement of the economy of a reservation and/or the members thereon."); 25 U.S.C. § 2702 (Act intended "to provide a statutory basis for the operating of gaming by

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[8] A temporary post-war revival of termination policies was later "repudiated by the President and Congress." *City of Roseville v. Norton*, 348 F.3d 1020, 1022 (D.C. Cir. 2003).

[9] *See also, e.g.*, Tribal Self-Governance Act of 1994, 25 U.S.C. §§ 450a, 458aa *et seq.*; Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 *et seq*.

Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments").

The Executive Branch has likewise strongly supported tribal self-government. Presidential Orders expressly acknowledge the government-to-government relationship between the United States and the Tribes and require federal agencies to "consult and coordinate" with Tribes on matters affecting them. *See, e.g.*, Memorandum from the President for the Heads of Executive Departments and Agencies: Government-to-Government Relationship with Tribal Governments, 74 Fed. Reg. 57,881, 57,881 (Nov. 5, 2009); Exec. Order 13084 ("Consultation and Coordination with Indian Tribal Governments"), 63 Fed. Reg. 27,655 (May 14, 1998). And the Supreme Court has consistently recognized the "traditional understanding" that each Tribe is "a distinct political society, separated from others, capable of managing its own affairs and governing itself." *United States v. Lara*, 541 U.S. 193, 204-205 (2004); *see also, e.g.*, *Kiowa Tribe of Okl. v. Manufacturing Techs., Inc.*, 523 U.S. 751, 754-755 (1998); *Merrion*, 455 U.S. at 141-144; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978); *Fisher v. District Ct.*, 424 U.S. 382, 386-391 (1976); *Williams v. Lee*, 358 U.S. 217, 223 (1959).[10] All these declarations and embodiments of federal law and policy run directly counter to the Board's decision in *San Manuel*, 341 NLRB at 1064, to treat Indian Tribes *not* as governments but "just as it treats any other private sector employer."

[10] In *Duro*, the Court held that when Tribes came under the superior jurisdiction of the United States they lost their inherent criminal jurisdiction over visiting members of other Tribes. 495 U.S. at 685. Notably, Congress disagreed and expressly reaffirmed that Tribes inherently have that jurisdiction. 25 U.S.C. §1301(2). The Court upheld that congressional affirmation of tribal governmental power in *Lara*, 541 U.S. at 199-207.

D. Canons Of Construction Likewise Require Resolving Any Ambiguity In Favor Of Respecting Tribal Sovereignty

Finally, two powerful canons of statutory construction require that any remaining ambiguity concerning the proper interpretation of the NLRA be resolved in favor of Tribes and against the assertion of Board jurisdiction. First, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *see, e.g., San Manuel*, 475 F.3d at 1311 (collecting cases). Second, "a clear expression of Congressional intent is necessary before a court may construe a federal statute so as to impair tribal sovereignty." *San Manuel*, 475 F.3d at 1311 (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-144 (1980), and *Santa Clara Pueblo*, 436 U.S. at 59-60; *Pueblo of San Juan*, 276 F.3d at 1196 (the "correct presumption is that [congressional] silence does not work a divestiture of tribal power"). As the Tenth Circuit recently explained, reflecting upon these two canons: "In this circuit, respect for Indian sovereignty means that federal regulatory schemes do not apply to tribal governments exercising their sovereign authority absent express congressional authorization." *Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1283 (10th Cir. 2010).[11]

The Board did not address the first of these canons in its decision in *San Manuel*. The D.C. Circuit recognized the canon but did not apply it, observing that the NLRA was a "statute of general application" rather than one "enacted specifically for the benefit of Indians or for the regulation of Indian affairs." 475 F.3d at 1312. But the principles of trust responsibility

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[11] *See also, e.g., Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 112 (2005) ("[T]he doctrine of tribal sovereignty … requires us to reverse the general rule that exemptions from tax laws should ... be clearly expressed." (internal quotation marks and citations omitted)); *Bryan v. Itasca Cnty., Minn.*, 426 U.S. 373, 388 (1976) (statute construed not to allow imposition of state regulatory authority within reservations absent clear expression of congressional intent); *Morton*, 417 U.S. at 548 (general federal non-discrimination provisions construed not to work implied repeal of Indian employment preferences).

underlying this fundamental "Indian canon" are not limited to the construction or application of laws specifically directed at Indian affairs. *Cf. HRI, Inc. v. EPA*, 198 F.3d 1224, 1245 (10th Cir. 2000) (adopting reasoning that "'strict fiduciary standards'" imposed by federal trust responsibility "'would seem to govern all executive departments that may deal with Indians, not just those … which have special statutory responsibilities for Indian affairs'" (quoting F. Cohen, *Handbook of Federal Indian Law* 225 (1982 ed.))). Indeed, as the second canon reflects, there is every reason to apply the same principles of caution and deference in assessing *whether* a statute framed in general terms was intended to reach into this unique and sensitive area. *Cf. Catholic Bishop*, 440 U.S. at 504-508 (avoiding First Amendment questions by declining to read NLRA's general terms as intended to cover employment of teachers by church-operated schools).

As to the second canon, both the Board and the D.C. Circuit concluded that subjecting an Indian Tribe's operation of a casino to direct federal regulation under the NLRA would not impinge significantly on tribal sovereignty—largely on the ground that the activity is "commercial," not "governmental." *See San Manuel*, 341 NLRB at 1063; *San Manuel*, 475 F.3d at 1315; *contra Donovan v. Navajo Forest Prods. Indus.*, 692 F.2d 709, 714 (10th Cir. 1982) (Occupational Safety and Health Act does not apply to business operated by an Indian tribe in part because its application would dilute principles of tribal self-government). This reasoning is incorrect for many reasons, but NCAI will focus here on two. First, as discussed above, under the IRA (and later IGRA), for an Indian tribal government "the operation of a casino"—or any other activity promoting economic development and self-sufficiency—absolutely *is* "an exercise of self-governance." *Contra San Manuel*, 341 NLRB at 1063. Second, treating Indian Tribes as within the class of "employers" intended to be covered by the NLRA means that federal law imposes on them, alone among all governments otherwise recognized within the U.S. federal

system, both direct regulation by the NLRB and exposure to strikes through which employees pursuing private economic interests can threaten to cripple public, governmental operations that are critical to the well-being of a Tribe and its members. That is a very direct and serious impingement on tribal sovereignty, and one particularly germane to proper interpretation of the NLRA.

Tribal governments have at least as urgent a need for uninterrupted operation as their national, state, and local counterparts—and just as much of a sovereign prerogative to determine for themselves whether and how to balance that need against the potential desirability of according some categories of public employees the right to strike in some circumstances.[12] Tribes depend uniquely on the revenues generated by economic activities to support the governmental functions and services they provide to their members. While federal contracts and grants typically fund a portion of such services, those sources are often inadequate and sometimes unreliable, and Tribes that can do so depend heavily on their own efforts to supplement federal funds. Thus, strikes against tribal operations that the Board describes as "commercial in nature—not governmental" could easily disrupt a Tribe's ability to provide essential public services—indeed, much more so than in the case of other governments, which typically derive most of their financial support from broad-based taxation (an option not available, as a practical matter, to most Tribes). Moreover, as discussed above, Tribes' reliance on economic development activities to fund government operations and the social and economic betterment of Tribe members has been specifically envisioned and encouraged by Congress ever

[12] Some Tribes, like some States and some local or other governments, forbid strikes by public employees. *See, e.g.*, Eastern Cherokee Code § 95-41; Mississippi Band of Choctaw Code § 30-1-7. Other Tribes have adopted tribal labor ordinances that allow strikes in some situations. *See, e.g.*, *San Manuel*, 341 NLRB at 1065 (Member Schaumber, dissenting) (describing ordinance).

since enactment of the IRA in 1934.[13] It is unreasonable to believe that the same Congress that adopted the IRA and OIWA's unified strategy for a new era in federal Indian policy—renewed government-to-government relations with the Tribes and encouraging those revived governments to develop and pursue their own plans for community economic development—also intended the general language of the NLRA to subject these same tribal governments to both direct federal labor regulation and a federally-imposed threat of potentially crippling strikes by tribal government employees.

II. If The Board Has Statutory Jurisdiction, It Should Decline To Assert That Jurisdiction Even Over "Commercial" Activities Of A Tribal Government

In *San Manuel*, the Board recognized that *some* exercises of jurisdiction under the NLRA would impinge unduly on tribal sovereignty, and announced that, as a matter of discretion, it would decide whether or not to assert jurisdiction on a "case-by-case basis." 341 NLRB at 1063; *see also Soaring Eagle Casino & Resort*, Case No. 7-CA-53586, 2012 WL 1014659 (A.L.J. Mar. 26, 2012) (applying *San Manuel*). In particular, the Board has indicated that it looks to whether a tribal operation is "commercial in nature—not governmental," on the theory that such operations do not "implicate … critical self-governance issues." *San Manuel*, 341 NLRB at 1061. This purported differentiation between "commercial" and "governmental" activities has been rejected by the Supreme Court in other contexts and is inappropriate under the NLRA, both in general and especially for Indian Tribes. The Board should instead adopt the same framework

[13] With specific respect to casinos, IGRA prescribes that any profits "are not to be used for any purposes other than—(i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies." 25 U.S.C. § 2710(b)(2)(B). A tribal government must be the sole owner of any IGRA gaming facility. *Id*. § 2710(b)(2)(A).

used in other areas of federal law and seek to collaborate with Tribes to pursue shared goals on a government-to-government basis.

A. Attempting To Distinguish Between "Commercial" And "Governmental" Activities Is Inappropriate And Unworkable

To begin with, treating a governmental entity as subject to Board jurisdiction as to any of its activities is inappropriate as a matter of discretion, even if the NLRA is construed to give the Board the choice. No other government is subjected to regulation under the Act as to *any* of its activities. Indeed, while Congress was considering the NLRA, a private business executive wrote to the Senate Labor Committee decrying the bill's exclusion of States and localities from the definition of "employer." 1 *Legislative History of the National Labor Relations Act* 325 (1949) (reprinted letter from J.W. Cowper dated Mar. 13, 1934). Such an exemption, he contended, would give government employers an unfair advantage in competing with private entities to provide goods or services. *Id*. At a minimum, he argued, the "exception may be reasonable enough if it applies purely to governmental agencies *but where these governmental divisions are engaged in pursuits, competing with private enterprise, then there should be no exception* and such agencies should be under the same restrictions as a corporation or private employer." *Id*. (emphasis added). Despite having these arguments before it, Congress exempted governments from the NLRA categorically—looking to the nature of the entity, not the nature of any particular activities it chose to carry on. The same categorical exemption should be extended to tribal governments.

Moreover, for reasons discussed above, distinguishing between "commercial" and "governmental" activity is particularly inappropriate in the context of Indian Tribes. Because of the distinctive patterns of tribal economic life and Congress's avowed policy of linking tribal self-government with economic development and self-sufficiency, tribal involvement in

commercial activities *is* a central and essential tribal government function. The revenues produced by tribal businesses fund utilities, including water, sewer, telecommunications and energy; health care; natural resource management; elders programs; social services; tribal court systems; law enforcement; tribal schools; and adult education. *See, e.g.*, *Grand Traverse Band of Ottawa & Chippewa Indians v. United States Att'y for W. Dist. of Mich.*, 198 F. Supp. 2d 920, 926 (W.D. Mich. 2002), *aff'd*, 369 F.3d 960 (6th Cir. 2004). As one court has put the point, "[r]aising revenue and redistributing it for the welfare of a sovereign nation is manifestly a governmental purpose." *Cohen v. Little Six, Inc.*, 543 N.W.2d 376, 379 (Minn. Ct. App. 1996), *aff'd*, 561 N.W.2d 889 (Minn. 1997).[14] And, given the usual structure and scale of tribal governance, "commercial" activities are inextricably intertwined with "governmental" actions and concerns. Tribal governments both manage and regulate every aspect of a Tribe's collective activities.

All this is particularly clear in the case of a gaming enterprise operated by a Tribe in accordance with IGRA. In that Act, Congress responded to the Supreme Court's holding that "the congressional goal of Indian self-government" supported Tribes' operation of gaming enterprises. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987); *see id*. at 218-219 ("The tribal games at present provide the sole source of revenues for the operation of the tribal governments and the provision of tribal services.… Self-determination and economic

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[14] *See also Allen v. Gold Country Casino*, 464 F.3d 1044, 1046-1047 (9th Cir. 2006) ("[T]he Casino is not a mere revenue-producing tribal business (although it is certainly that)…. The compact that created the Gold Country Casino provides that the Casino will 'enable the Tribe to develop self-sufficiency, promote tribal economic development, and generate jobs and revenues to support the Tribe's government and governmental services and programs.' With the Tribe owning and operating the Casino, there is no question that these economic and other advantages inure to the benefit of the Tribe. Immunity of the Casino directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general.").

development are not within reach if the Tribes cannot raise revenues and provide employment for their members. The Tribes' interests obviously parallel the federal interests."). The Act specifically recognizes Tribes' gaming enterprises—which it requires be owned directly by tribal governments, 25 U.S.C. § 2710(b)(2)(a)(7)—as "a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." *Id.* § 2702(1). Such an operation is not, as the Board would have it, nothing more than a "typical commercial enterprise." *San Manuel*, 341 NLRB at 1063. It is "an exercise of self-governance." *Id*.

Accordingly, the proposed line between Tribes' "commercial" and "governmental" activities that lies at the heart of *San Manuel*'s analysis is badly misconceived. Indeed, in other contexts the Supreme Court has repeatedly experimented with such distinctions but ultimately found them untenable, because no neutral principle limits what roles or activities are properly "governmental" and because that decision is, therefore, one to be made by the constituents of a given government themselves. In the area of inter-governmental tax immunity, for example, the Court declared in 1911 that the provision of a municipal water supply was "no part of the essential governmental functions of a State," and was therefore subject to federal corporate tax. *Flint v. Stone Tracy Co.*, 220 U.S. 107, 172 (1911). Twenty-six years later, without any intervening change in the relevant statutory law, the Court rejected that earlier position and held that a municipal water provider was immune from federal taxation because its activity *was* an essential government function—even though the water works in question had long been privately operated. *See Brush v. Commissioner*, 300 U.S. 352, 370-373 (1937); *see also Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 542 (1985) (discussing these cases). Reflecting on this change of course, Justice Black observed in 1938: "There is not, and there cannot be, any unchanging line of demarcation between essential and non-essential governmental functions.

Many governmental functions of today have at some time in the past been non-governmental." *Helvering v. Gerhardt*, 304 U.S. 405, 427 (1938) (Black, J., concurring). In light of the uncertainty and instability occasioned by its doctrine, in 1946 the Court unanimously concluded that the distinction between "governmental" and "proprietary" functions was "untenable" and must be abandoned. *New York v. United States*, 326 U.S. 572, 583 (1946) (opinion of Frankfurter, J., joined by Rutledge, J.); *id*. at 586 (Stone, C.J., concurring, joined by Reed, Murphy, and Burton, JJ.); *id*. at 590-596 (Douglas, J., dissenting, joined by Black, J.).

The Court undertook a similar experiment some years later, with the same result. In *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Court held that a State was immune from direct federal regulation under the Commerce Clause to the extent it engaged in "traditional governmental functions." *Id.* at 852. Only nine years later, however, the Court again "reject[ed], 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.'" *Garcia*, 469 U.S. at 546-547. While the Court in *Garcia* emphasized the analytical difficulty in distinguishing between traditional and non-traditional government functions, it also explained that the very process of parsing that distinction "disserves principles of democratic self-governance." *Garcia*, 469 U.S. at 547. Self-governing sovereigns, the Court explained, "within the realm of authority left open to them …, must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else—including the judiciary—deems state involvement to be." *Id.* at 546. Sovereign activities—be they "governmental" or "proprietary"—are entitled equally to the immunity that attaches to the sovereign because of its status as a government.

The Court explained this point succinctly in *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), a Commerce Clause challenge to South Dakota's program of limiting state-produced cement to state residents during a shortage. The Court observed that the challenged program embodied "the most unstartling governmental goal: improvement of the quality of life in that State by generating a supply of a previously scarce product needed for local construction and governmental improvements." *Id.* at 442 n.16. With governmental and proprietary interests thus entwined, the Court explained that "commercial" activities could not be distinguished from "traditional" government functions:

> A State's project is as much a legitimate governmental activity whether it is traditional, or akin to private enterprise, or conducted for profit…. A State may deem it as essential to its economy that it own and operate a railroad, a mill, or an irrigation system as it does to own and operate bridges, street lights, or a sewage disposal plant. What might have been viewed in an earlier day as an improvident or even dangerous extension of State activities may today be deemed indispensable.

Id. at 442 n.16 (quoting *New York*, 326 U.S. at 591 (Douglas, J., dissenting)); *see New York*, 326 U.S. at 591 (Douglas, J., dissenting) ("Here a State is disposing of some of its natural resources. Tomorrow it may issue securities, sell power from its public power project, or manufacture fertilizer. Each is an exercise of its power of sovereignty.").

There is no reason to think that it will be any more appropriate for the Board (or reviewing courts) to seek to apply a distinction between "governmental" and "commercial" activities in the current context—or that the Supreme Court would approve of the attempt. *See Kiowa Tribe*, 523 U.S. at 754 (rejecting argument that Tribe lost sovereign immunity when it engaged in off-reservation commercial transaction); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 510 (1991) (rejecting argument that tribal sovereign immunity should be set aside when asserted by Tribe in connection with conduct of

business). Moreover, this situation is different from others in which the Board has developed relatively straightforward case-law standards, based on its own expertise, concerning how it will deploy limited resources as a matter of enforcement discretion.[15] Here, what are genuinely "governmental" activities (especially for tribal governments), and which applications of the NLRA would interfere unduly with the tribal sovereignty, are questions that at least in some cases implicate the Board's *power* to proceed—and ones in which the Board has no statutory mandate or expertise and is entitled to no judicial deference. *See San Manuel*, 475 F.3d at 1312. The Board's new approach thus subjects Tribes (and others) to the uncertainty of *post hoc* enforcement under highly unsettled standards. The Board should abandon it and return to a clear, categorical rule that Tribes' status as governments will be respected as to all their activities, at least on lands over which the Tribe exercises governmental jurisdiction.[16]

B. The Board Should Instead Collaborate With Tribes To Identify And Pursue Common Goals On A Government-To-Government Basis

Return to the Board's traditional interpretation of the limits of the NLRA's intended scope, or adoption of a sound discretionary principle of non-assertion of jurisdiction over any tribal governmental activity, need not mean that there is no role for the NLRB in the evolution of tribal labor law and the protection of workers in tribal government enterprises. On the contrary,

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[15] *See, e.g., In re Morgan's Holiday Mkts., Inc.*, 333 NLRB 837, 841 n.31 (2001) (quoting *Staff Builders Svcs. v. NLRB*, 879 F.2d 1484, 1486 (7th Cir. 1989)). Thus, for example, the Board applies minimum business-volume standards, *see NLRB v. Children's Baptist Home*, 576 F.2d 256, 258 n.1 (9th Cir. 1978), and may assess whether an employer "has sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization as their representative," *NLRB v. Princeton Mem'l Hosp.*, 939 F.2d 174, 177 n.3 (4th Cir. 1991).

[16] Before *San Manuel*, the Board asserted jurisdiction over commercial activities undertaken outside a Tribe's reservation, but not over such activities occurring on land within the Tribe's jurisdiction. *See Sac & Fox*, 307 NLRB at 242. That line, while not based on the text or history of the NLRA, was at least clear and readily applied, and found some grounding in decisions that recognize "a significant territorial component to tribal power." *See, e.g.*, *Merrion*, 455 U.S. at 142.

many Tribes would no doubt welcome the opportunity to consult and cooperate with the Board on a voluntary, government-to-government basis. Such consultation and cooperation would, more than assertion of Board jurisdiction over labor disputes, "respect[] tribal self-government and sovereignty, honor[] tribal treaty and other rights, and meet[] the Federal Government's tribal trust responsibilities."[17]

There is an existing body of tribal labor law. More than 300 Tribes and Alaska Native Villages have enacted employee rights ordinances, typically establishing "principles and guidelines to be followed in recruitment, employment, retention, promotion, training, discipline, and termination of employees" of a Tribe.[18] These ordinances typically establish Indian-preference programs for hiring, in compliance with federal law.[19] They establish minimum wages and conditions for safe, healthy, and harassment-free workplaces;[20] protect employee privacy;[21] provide anti-nepotism and conflict-of-interest guidelines;[22] establish leave policies for

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[17] *Cf.* U.S. Dep't of Labor, Request for Comments, 77 Fed. Reg. 23,283, 23,284 (Apr. 18, 2012) ("The United States, in accordance with treaties, statutes, executive orders, and judicial decisions, has recognized the right of Indian tribes to self-government and maintains a government-to-government relationship with federally recognized tribes. Indian tribes exercise inherent sovereign powers over their members and territory…. Based on this government-to-government relationship, DOL will continue to work with Indian tribes on its programs involving tribes in a manner that respects tribal self-government and sovereignty, honors tribal treaty and other rights, and meets the Federal Government's tribal trust responsibilities.").

[18] *See, e.g.*, Standing Rock Sioux Tribal Employees Code § 18-101; Stockbridge-Munsee Tribal Law Employee Rights Ordinance Preamble.

[19] *See, e.g.*, Eastern Cherokee Code § 95-1; Comanche Tribal Employment Rights Ordinance §§ 1.3, 4.1, 5; Swinomish Indian Tribal Community Employment Code § 14-01.120; Turtle Mountain Band of Chippewa Indians Tribal Employment Rights Ordinance § 32.04.

[20] *See, e.g.*, Oglala Sioux Tribe: Law and Order Code § 18-19; Turtle Mountain Band of Chippewa Indians Tribal Employment Rights Ordinance § 32.014; Little River Band of Ottawa Indians, Fair Employment Practices Code, Ordinance # 05-600-03, art. X; Stockbridge-Munsee Tribal Law Employee Rights Ordinance § 53.3.

[21] *See, e.g.*, Stockbridge-Munsee Tribal Law Tribal Employee Rights Ordinance § 53.3(J).

employees caring for children;[23] prohibit discrimination in employment on the basis of sex, race, color, national origin, religion, age, disability, veteran or marital status, or sexual orientation;[24] establish whistleblower protections;[25] and codify ethical rules for employers and employees.[26] They also establish procedures for handling disciplinary actions and employee grievances,[27] and establish tribal administrative bodies to investigate and adjudicate violations.[28] Administrative determinations are often appealable to a tribal court system.[29] Where non-tribal employers are working on reservation land, ordinances ordinarily require compliance with tribal employment policies.[30]

Laws such as these are quintessential exercises of Tribes' sovereign authority—including the authority to regulate the presence of non-Indians in Indian country and to "exercise …

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[22] *See, e.g.*, Standing Rock Sioux Tribal Employees Code §§ 18-201.9, 18-201.11.

[23] *See, e.g.*, Eastern Cherokee Code § 95-50; Little River Band of Ottawa Indians, Fair Employment Practices Code, Ordinance # 05-600-03, art. VIII.

[24] *See, e.g.*, Little River Band of Ottawa Indians, Fair Employment Practices Code, Ordinance # 05-600-03, § 4.01.

[25] *See, e.g.*, Little River Band of Ottawa Indians, Fair Employment Practices Code, Ordinance # 05-600-03, art. XII.

[26] *See, e.g.*, Standing Rock Sioux Tribal Employees Code § 18-202.

[27] *See, e.g.*, Eastern Cherokee Code § 95-20; Stockbridge-Munsee Tribal Law Employee Rights Ordinance §§ 53.1 ("The Stockbridge-Munsee Tribal Council further recognizes that employees of the Stockbridge-Munsee Community, comprised of all branches of government and business, need protection of their rights including a stable working environment and the right to file a grievance and seek assistance in solving on-the-job problems via the proper, established policies and procedures."); 53.3.

[28] *See, e.g.*, Little River Band of Ottawa Indians, Fair Employment Practices Code, Ordinance # 05-600-03, §§ 6.01-6.09.

[29] *See, e.g.*, Stockbridge-Munsee Tribal Law Employee Rights Ordinance § 53.4; Shoshone and Arapaho Code § 10-1-8.

[30] *See, e.g.*, Shoshone and Arapaho Code § 10-1-5.

sovereign authority over economic transactions on the reservation." *Pueblo of San Juan*, 276 F.3d at 1200 (Tribe's enactment of right-to-work ordinance is exercise of inherent authority).[31] They also reflect tribal governments' commitment to employee health, safety, and well-being, and the same sorts of policy choices made by every government in that regard. Because tribal governments are usually relatively small and often lack substantial resources, there are surely instances in which Tribes could benefit from consultation and cooperation with the Board or its expert staff in reviewing existing laws, enacting new ones, and considering the adoption of substantive or procedural best practices. Conversely, the Board might wish to explore ways in which some tribal authorities could assume jurisdiction, under tribal law, over local disputes that they might be in the best position to resolve. *Cf.* 29 U.S.C. §§ 160(a), 164(c)(2). In any event, discussions and collaboration would occur in the government-to-government context that was reestablished as the appropriate model for relations between Tribes and the United States by enactment of the IRA in 1934, and reflects the federal government's avowed policy preference.

CONCLUSION

The Board should overrule its decision in *San Manuel* and recognize that it lacks statutory jurisdiction over the activities of a federally-recognized Indian tribal government. Alternatively, the Board should make clear that it will decline to exercise any jurisdiction that it may have over such activities, whether characterized as "governmental" or "commercial."

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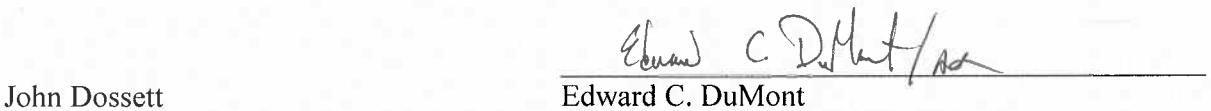
[31] *See also, e.g.*, *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311 (9th Cir. 1990) (Tribe has inherent authority to enforce Indian employment preference law against non-Indian employer on reservation); *Penobscot Nation v. Fellencer*, 164 F.3d 706 (1st Cir. 1999) (Tribe's employment decision to discharge non-Indian health care worker on reservation is "internal tribal matter"); *see also Morton v. Mancari*, 417 U.S. 535, 545-546 (1974) (discussing Congress' exemption of tribes and Indian-preference rules from Title VII employment discrimination provisions in furtherance of tribal self-government within reservations).

Respectfully submitted,



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STATEMENT OF SERVICE

I hereby certify that I have this date served copies of the foregoing Brief of Amicus Curiae National Congress of American Indians on all parties listed below pursuant to the National Labor Relations Board's Rules and Regulations 102.114(i) by electronically filing with the Office of the Executive Secretary of the National Labor Relations Board and by electronic mail to counsel for the Acting General Counsel, counsel for Respondent, counsel for the Charging Party Union, Respondent and Charging Party.

Dated this 13th day of November, 2012.

Alan E. Schoenfeld

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