Nos. 13-1464, 13-1583

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LITTLE RIVER BAND OF OTTAWA INDIANS

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

MEREDITH L. JASON
Deputy Assistant General Counsel

JILL A. GRIFFIN
Supervisory Attorney

KIRA DELLINGER VOL
Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2949
(202) 273-0656

LAFE E. SOLOMON
Acting General Counsel
CELESTE J. MATTINA
Acting Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

TABLE OF CONTENTS

Headings **Page(s)**

Headings-Cont'd **Page(s)**

Headings-Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases-Cont'd **Page(s)**

Cases-Cont'd **Page(s)**

Cases-Cont'd **Page(s)**

Cases-Cont'd **Page(s)**

Cases-Cont'd **Page(s)**

Cases-Cont'd **Page(s)**

Cases-Cont'd **Page(s)**

Statutes: **Page(s)**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 13-1464, 13-1583

LITTLE RIVER BAND OF OTTAWA INDIANS

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition of the Little River Band of Ottawa Indians ("the Band") for review, and the cross-application of the National Labor Relations Board for enforcement, of a Board Order against the Band. The Board had jurisdiction over the unfair-labor-practice proceedings below under Section 10(a), 29 U.S.C. § 160(a), of the National Labor Relations Act, as amended ("NLRA"), 29 U.S.C. §§ 151, et seq. The Decision and Order, issued on

March 18, 2013, and reported at 359 NLRB No. 84 (D&O 1-7),[1] is final under Section 10(e) and (f) of the NLRA, 29 U.S.C. § 160(e) and (f).

The Band petitioned for review of the Board's Order on April 15, 2013, and the Board cross-applied for enforcement on May 8. The Court has jurisdiction over the application and cross-petition pursuant to Section 10(e) and (f) of the NLRA because the unfair labor practices occurred in Michigan. The appeals were timely filed, as the NLRA imposes no time limit for such filings.

ORAL ARGUMENT STATEMENT

The Board believes that oral argument would assist the Court in evaluating the issue presented, which is one of first impression in the Sixth Circuit.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board has jurisdiction over a tribally created, owned, and controlled gambling, hospitality, and entertainment complex which is located on tribal lands but employs 85% non-Indians, has mostly non-Indians patrons, and competes in interstate commerce against similar non-Indian enterprises.

[1] "A" refers to the Joint Appendix, filed with the Band's brief. This brief will cite directly to the Board's Decision and Order, located at A 12-18, as "D&O." Where applicable, references preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

STATEMENT OF THE CASE

This case came before the Board on a complaint issued by the General Counsel, pursuant to charges filed by Local 406 of the International Brotherhood of Teamsters ("the Union"). (D&O 1 n.1; A 23-27.) The complaint alleged that the publication and maintenance of code provisions and related regulations governing resort employees' organizational and bargaining rights violated Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1). (D&O 1; A 25-26.) On August 3, 2011, the Band, the Union, and the Acting General Counsel filed a stipulation of facts with the Board, agreed upon the contents of the record, and waived presentation to an administrative law judge. (D&O 1 n.1; A 28-56.) The Board approved the parties' stipulation on December 20, and transferred the proceeding to the Board for briefing. (D&O 1 n.1.)

Before the Board, the Band contested the Board's jurisdiction over its gaming operations at the Little River Casino Resort ("the Resort") but conceded that, if the Board had jurisdiction, its conduct violated the NLRA as alleged. (D&O 1-2, 4.) On March 18, 2013, the Board (Chairman Pearce, Members Griffin and Block) issued a Decision and Order holding that it had jurisdiction over the Resort, and finding the violations alleged. (D&O 1, 5.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background – the Little River Band of Ottawa Indians

The Band is a federally recognized Indian tribe, with approximately 4000 members. The Band's government consists of three branches: the Tribal Ogema (executive), the Tribal Council (legislature), and the Tribal Court (judiciary). The Band's constitution, supplemented by tribal laws and regulations, defines the branches' powers and governs their conduct and proceedings. (D&O 1; A 28-29, 63-70.)

The Band has the use of over 1200 acres of land in Michigan, held in trust by the federal government. (D&O 1; A 29.) It provides a variety of governmental programs and services on its lands and to its members, including health and community/behavioral health programs, educational, family, and housing services, police and other public-safety services, natural-resource management, and economic development. (D&O 2; A 31-32.)

B. The Little River Casino Resort

The Band established the Resort to raise revenue, acting pursuant to a state gaming compact and the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, et seq. ("IGRA"). (D&O 1; A 30-34, 65-66, 164-89.) The Band owns and controls the Resort, which is located on tribal lands. The Tribal Council has delegated

management authority over the Resort to a Board of Directors, all of whom are either elected tribal officials or appointed by the Ogema and approved by the Council. The Directors' delegated authority is limited: they report regularly to the Tribal Council, which closely oversees resort operations along with the Tribal Ogema, must approve the Directors' proposed budget and operating plans and ratify certain contracts, and may review and modify various other decisions. (D&O 2; A 30, 36-40.)

The Resort comprises a casino with over 1500 slot machines, gaming tables, a high-stakes gaming area, and bingo, as well as a 1700-seat event center, a 292-room hotel, a 95-space RV park, 3 restaurants, and a lounge. (D&O 1; A 30.) It employs 905 people, including 107 Band members and 27 members of other Indian tribes: most resort employees are not members of any Indian tribe, and live outside of the Band's tribal lands. Most resort customers visit from other parts of Michigan, other states, and Canada. The Resort advertises for business in Michigan and other states, competing with other Indian and non-Indian casinos. (D&O 1; A 31.)

The Resort's annual gross revenues exceed $20 million. Pursuant to tribal law, and in compliance with IGRA, those revenues may be used only to fund the tribal government, the general welfare of the Band and its members, tribal economic development, or support for local governmental or charitable

organizations. (D&O 1-2; A 30); *see* 25 U.S.C. § 2710(b)(2)(B). Resort revenue provides over half of the Band's total budget and substantially funds many key tribal-government departments. (D&O 2; A 32-33.)

C. Restrictions on Resort Employees' Organizational Rights

The Tribal Council has enacted a Fair Employment Practices Code ("FEPC"), and associated regulations, to govern a variety of employment and labor matters. (D&O 2; A 40, 79-113.) Articles XVI and XVII govern labor organizations and collective bargaining in the public sector; the Band has 1150 employees total, 905 at the Resort. (D&O 1 n.2; A 34.) Article XVI defines a covered "public employer" as "a subordinate economic organization … of the Band engaged in any Governmental Operation of the Band," specifying as one such operation "the generation of revenue to support the Band's governmental services and programs, including the operation of ... [the Resort]." (D&O 2; A 40-41, 96-97.) Article XVII requires exhaustion of the FEPC's processes. (D&O 5 n.10; A 48-49, 112-13.)

The FEPC – which applies by its terms, and in practice, to the Resort, resort employees, and any union that seeks to represent those employees – is inconsistent with the NLRA in many respects, including provisions that: authorize the Band to determine "the terms and conditions under which collective bargaining may or may not occur" (§ 16.01); bar strikes and other protected activities (§16.02, 16.03,

16.06(b) & (c), 16.15(b)(5), and 16.24(a)); require unions doing business within the Band's jurisdiction to obtain a license, and agree to restrictions on their organizing activities (§ 16.08(a) and 16.24(c)); except certain subjects from the duty to bargain in good faith, including any matter that would conflict with the laws of the Band, drug and alcohol testing, hiring and firing, and reorganization of work duties (§ 16.12(a)(1)(B) and (b), 16.18, 16.20(b)); place a time limit on certain employee petitions (§ 16.13(e)); and mandate arbitration without the consent of both parties (§ 16.16 and 16.17). (D&O 2, 4-5 n.10; A 42, 46-48, 95-111.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board asserted jurisdiction (D&O 1-2, 5) pursuant to the test announced in *San Manuel Indian Bingo & Casino*,[2] and found (D&O 1, 4-5 & n.10) that the publication and maintenance of the FEPC provisions, and related regulations, expressly applicable to the Resort, resort employees, and their (prospective) labor organizations, violated Section 8(a)(1) of the NLRA to the extent they grant the Band authority to regulate when collective bargaining may occur, prohibit or penalize strikes or other protected concerted activity, impose restrictions on union organization and representational duties, restrict the scope of mandatory bargaining under the NLRA, or limit access to the Board's processes.

[2] 341 NLRB No. 138 (2004), *enforced*, 475 F.3d 1306 (D.C. Cir. 2007).

The Board's remedial Order requires the Band to: cease and desist from applying to the Resort, employees of the Resort, or any labor organization that may represent those employees, provisions of the FEPC that violate the NLRA as described above; and from, in any like or related manner, interfering with, restraining, or coercing employees of the Resort in the exercise of the rights guaranteed them by Section 7 of the NLRA, 29 U.S.C. § 157. (D&O 6.) Affirmatively, the Order requires the Band to: notify all current and future resort employees that it will not apply to them, to the Resort, or to any labor organization that may represent them, those provisions of the FEPC and associated regulations that are unlawful in the manner described above; post a remedial notice, and distribute it electronically if it customarily communicates with its employees by such means. (D&O 6-7.)

SUMMARY OF ARGUMENT

The Board here asserted jurisdiction over a large tribal gambling and entertainment complex employing mostly non-Indians, competing with other similar commercial enterprises in interstate commerce, and catering to a mostly non-Indian clientele. It did so pursuant to its established *San Manuel* framework. *San Manuel* begins with the Board's reasonable determination that the NLRA's definition of "employer" covers Indian tribes. But, before the Board may assert jurisdiction over a tribal enterprise, *San Manuel* requires an involved, case-specific

inquiry designed to accommodate the "unique and important position" tribes occupy in our Nation's law and history.

The Board's jurisdictional standard is modeled on an analysis derived from Supreme Court precedent, used by several courts of appeals, and augmented by a prudential Board inquiry giving additional consideration to the balance of federal Indian and labor policies in each case. It strikes the appropriate balance between sometimes competing tribal and federal concerns by respecting Indian tribes' core sovereignty, Congress' strong policy in support of tribal self-government, and federal treaty obligations, but acknowledging the superior sovereignty of the federal government and other important congressional goals, such as those embodied in the NLRA. The Band's critiques of the standard are unavailing and its proposed approach would, as several courts have held, essentially prevent the application of any federal law to Indian tribes in the absence of explicit congressional direction.

Finally, the Board's application of the standard in this case is well-supported in the record and comports with relevant caselaw. The Band's objection to jurisdiction – and particularly its assertion that it can effectively exempt itself from otherwise applicable federal laws – is untenable.

STANDARD OF REVIEW

"[T]he Board's interpretation of the NLRA must be upheld if reasonably defensible."[3] Its findings of fact and application of law to facts are conclusive if supported by substantial evidence in the record considered as a whole.[4] The Court does not defer to the Board's interpretation of statutes other than the NLRA.[5]

ARGUMENT

The Band's sole challenge to the Board's Order is jurisdictional. It conceded before the Board, and does not contest on appeal, that if it is subject to the NLRA, the FEPC provisions and associated regulations at issue violate Section 8(a)(1) of the NLRA, either because they explicitly restrict activity protected under Section 7 of the NLRA, or because employees would reasonably construe them to restrict such activities.[6] Accordingly, the Board is entitled to enforcement of its Order if it properly asserted jurisdiction.

---

[3] *NLRB v. Main St. Terrace Care Ctr.*, 218 F.3d 531, 537 (6th Cir. 2000); *see Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984) (applying reasonably defensible standard to interpretation of "employee"). *See also Holly Farms Corp. v. NLRB*, 517 U.S. 392, 409 (1996) (Board's construction of NLRA need not be "the *best* way to read the statute; rather, courts must respect the Board's judgment so long as its reading is a reasonable one").

[4] *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *accord Main St.*, 218 F.3d at 537.

[5] *See Painting Co. v. NLRB*, 298 F.3d 492 (6th Cir. 2002).

[6] *See Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-47 (2004) (standard for assessing whether rule violates Section 8(a)(1)). *Accord Cintas Corp. v. NLRB*,

THE BOARD REASONABLY ASSERTED JURISDICTION OVER THE RESORT, A TRIBAL COMMERCIAL ENTERPRISE ON TRIBAL LANDS, EMPLOYING AND SERVING PRIMARILY NON-INDIANS, AND COMPETING IN INTERSTATE COMMERCE

The Board applied its established standard for determining when to assert jurisdiction over Indian tribes and tribal enterprises, developed in *San Manuel Indian Bingo & Casino*.[7] In *San Manuel*, the Board first determined that the plain language of Section 2(2) of the NLRA encompasses Indian tribes and tribal enterprises. It then set forth the appropriate inquiries for determining whether federal Indian policy requires, or prudential considerations indicate, that it should nonetheless decline jurisdiction in a particular case. Specifically, it adopted a presumption of applicability derived from the Supreme Court's *FPC v. Tuscarora Indian Nation* decision,[8] modified by three exemptions developed by the Ninth Circuit in *Donovan v. Coeur d'Alene Tribal Farm*,[9] and augmented by a Board-specific discretionary inquiry.

As demonstrated below, the Board's interpretation of the NLRA as applying to Indian tribes is reasonable and well within its broad discretion (Part A). Its

---

482 F.3d 463 (D.C. Cir. 2007). Mere maintenance of an unlawful rule is an unfair labor practice; application or enforcement is unnecessary. *See Beverly Health & Rehab. Servs., Inc. v. NLRB*, 297 F.3d 468, 478 (6th Cir. 2002).

[7] 341 NLRB 1055 (2004), *enforced*, 475 F.3d 1306 (D.C. Cir. 2007).

[8] 362 U.S. 99 (1960).

[9] 751 F.2d 1113 (9th Cir. 1985).

approach to determining whether federal Indian policy nonetheless precludes jurisdiction over a particular tribal enterprise is consistent with relevant precedent and respects and balances the policies underlying both labor and Indian law (Part B). And, finally, ample evidence supports its application of *San Manuel* to find jurisdiction over the Resort, a gaming, hospitality, and entertainment complex which indisputably operated comparably to similar non-tribal enterprises and competed in interstate commerce (Part C).

A. A Tribal Commercial Enterprise Operating in Interstate Commerce Satisfies the NLRA's Broad Definition of Employer and Does Not Qualify for Any of the Statute's Limited Exclusions from Coverage

1. The definition of "employer" is broad, subject to limited exceptions

The Supreme Court "has consistently declared that in passing the ...[NLRA], Congress intended to and did vest in the Board the fullest jurisdictional breath constitutionally permissible under the Commerce Clause."[10] And this Court has recognized that the Board's statutory jurisdiction "extends to all representation questions and unfair labor practices 'affecting commerce.'"[11] That jurisdiction

---

[10] *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963); *accord San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1316 (D.C. Cir. 2007); *Glen Manor Home for Jewish Aged v. NLRB*, 474 F.2d 1145, 1148 (6th Cir. 1973).

[11] *Glen Manor*, 474 F.2d at 1148. *See also Elec. Contractors, Inc. v. NLRB*, 245 F.3d 109, 118 (2d Cir. 2001) (Board's jurisdiction extends to any unfair labor practices committed by an employer engaged in commerce).

encompasses the labor relations of gaming enterprises (and their associated dining, lodging, and entertainment operations) like the Resort.[12]

The NLRA's definition of "employer" in Section 2(2), 29 U.S.C. § 152(2), "on its face clearly vests jurisdiction in the Board over 'any' employer doing business in this country save those Congress excepted with careful particularity."[13] That provision defines "employer" in very general terms, including any person acting as a direct or indirect agent of an employer, and expressly excludes only a few specific types of entities: "the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act…, or any labor organization (other than when acting as an employer)…."[14] In cases discussing the statutory definition of "employee," which is similarly broad, and subject to a limited number of specific exceptions, the Supreme Court has made

---

[12] *NLRB v. Harrah's Club*, 362 F.2d 425, 427-29 (9th Cir. 1966) (upholds Board jurisdiction over gambling industry in case involving stagehand and other staff in entertainment department).

[13] *State Bank of India v. NLRB*, 808 F.2d 526, 531 (7th Cir. 1986). *See also San Manuel*, 475 F.3d at 1316 ("[B]y listing certain entities that are not employers, the NLRA arguably intends to include everything else that might qualify as an employer.") (citing *NLRB v. E.C. Atkins & Co.*, 331 U.S. 398, 403 (1947)).

[14] 29 U.S.C. § 152(2). *See also San Manuel*, 475 F.3d at 1316 (measuring Board's definition of employer against "generic" definition, i.e., "[a] person who controls and directs a worker under an express or implied contract of hire and who pays the worker's salary or wages") (quoting Black's Law Dictionary 565 (8th ed. 2004)).

clear that Congress tasked the Board with construing the NLRA's definitions,[15] and has admonished the Board to "take care that exemptions from [Board] coverage are not so expansively interpreted as to deny protection to workers the [NLRA] was designed to reach."[16] Indeed, beyond the express exclusions contained in the statutory definition of employer, the Supreme Court has refused to find Board jurisdiction in only two exceptional circumstances, neither of which was based on expanding the exclusions to the definition of "employer" in Section 2(2).[17]

---

[15] *Sure-Tan, Inc.*, 467 U.S. at 891 (citation omitted); *see NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 90-91 (1995); *Crestline Mem'l Hosp. Ass'n v. NLRB*, 668 F.2d 243, 244-45 (6th Cir. 1982) (Board has primary responsibility to weigh all relevant factors in interpreting definitions in Section 2 of NLRA) (citing *Atkins*, 331 U.S. at 414).

[16] *Holly Farms*, 517 U.S. at 399; *accord Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 305 (6th Cir. 2012).

[17] *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500-07 (1979) (construing NLRA to exclude jurisdiction over teachers in religious schools, to avoid First Amendment issues stemming from their critical role in schools' mission); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 13, 17-22 (1963) (finding Board lacked jurisdiction over maritime operations of foreign ship employing non-Americans due to potentially serious adverse effects on international relations). *But see Catholic Bishop, supra* at 500 (describing *McCulloch* as "case involving the Board's assertion of jurisdiction over foreign seamen") *and ILA Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195, 199-200 (1970) (holding, subsequent to *McCulloch*, that Board had jurisdiction over labor disputes involving foreign ships and American employees).

2. The NLRA's definition of "employer" encompasses commercial tribal enterprises

Exercising its discretion with respect to both the NLRA's definitions and its own jurisdiction, the Board reasonably held in *San Manuel*, that nothing suggests Congress intended to exclude tribal commercial enterprises, operating as employers in interstate commerce, from the Board's comprehensive, national jurisdiction. To the contrary, Indian tribes plainly fit none of the categories of entities expressly exempted from the NLRA's definition of employer. And, to the extent the Band's amici suggest (Congress A-Br. 7, 9, 11, 19, 27; Navajo A-Br. 6-11; *see also* Br. 41, 49, 54) that it might qualify as a state or that it should benefit, like states, from a Section 2(2) exemption, the Board in *San Manuel* reasonably rejected any such argument, as discussed below.

a. Indian Tribes do not fit any Section 2(2) exemption

The Supreme Court has long held that an Indian tribe is "not a state of the Union."[18] It has also recognized that tribal sovereignty – unlike that of states – "exists only at the sufferance of Congress and is subject to complete defeasance."[19]

---

[18] *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831); *cf. id.* at 18 (noting Commerce Clause of Constitution expressly distinguishes Indian tribes from states). *Accord White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43 (1980).

[19] *United States v. Wheeler*, 435 U.S. 313, 323 (1978). *See also Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153 (1980) ("*Colville*") (tribal sovereignty divested where "inconsistent with the overriding

Supreme Court precedent is inconsistent with the classification of tribes as political subdivisions of states within the meaning of Section 2(2). The Court has, for example, recognized that tribal sovereignty predates the formation of any state, whereas political subdivisions of states have never been sovereign.[20] Finally, the Court has made clear that, while tribes are subordinate to the federal government, they are not subordinate to the states.[21]

Congress itself considers Indian tribes different from states and their subdivisions. As originally enacted, the definition of "employer" in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*., expressly excluded "an Indian tribe, *or* state or political subdivision thereof …."[22] The specific reference to Indian tribes would have served no purpose if the term "State or political subdivision thereof" were broad enough to encompass them. And the distinction between the two was confirmed by Congress' subsequent decision to repeal the

---

interests of the National Government"); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) ("Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.").

[20] *See, e.g., Wheeler*, 435 U.S. at 322-23 (Indian tribes "were self-governing sovereign political communities" before Europeans arrived in America.); *Reynolds v. Sims*, 377 U.S. 533, 575 (1964) (Political subdivisions of states "never were and never have been considered as sovereign entities.").

[21] *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987) ("*Cabazon*").

[22] Pub. L. No. 88-352 § 701(b), 78 Stat. 253, 253 (emphasis added).

exemption for states and political subdivisions while leaving the tribal exemption in place.[23] Accordingly, the *San Manuel* Board reasonably determined that Indian tribes do not satisfy any of the Section 2(2) exemptions.[24]

The Board in *San Manuel* further reasonably rejected its prior caselaw holding that, when operating on tribal lands, tribes are entitled to an "exemption by analogy" to the states.[25] As the Board then explained, and as the Title VII exemption – and an identical one in the Americans with Disabilities Act – demonstrates, Congress knows how to exclude Indian tribes from the coverage of

---

[23] The Equal Employment Opportunity Act of 1972 repealed Title VII's exemption for states and political subdivisions. Pub. L. No. 92-261 § 2(1), (2), (5), (6), 86 Stat. 103, 103 (codified as amended at 42 U.S.C. § 2000e(a), (b), (f), (h) (2011)). *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 449 n.2 (1976). The explicit exemption for Indian tribes remains unchanged. 42 U.S.C. § 2000e(b).

[24] *San Manuel*, 341 NLRB at 1058 (collecting cases holding that Indian tribes and tribal enterprises are not states or political subdivisions thereof), *enforced*, 475 F.3d at 1316-17 (finding permissible Board's reading of Section 2(2)'s exception as confined to "its ordinary and plain meaning"). *See also Menominee Tribal Enters. v. Solis*, 601 F.3d 669, 670 (7th Cir. 2010) (summarily rejecting tribe's argument that it was like a state or local government and thus entitled to OSHA's express exemption for such governments).

[25] 341 NLRB at 1058 (rejecting reasoning of *Fort Apache*, 226 NLRB 503 (1976), and *Southern Indian*, 290 NLRB 436 (1988)); *see Smart v. State Farm Ins.*, 868 F.2d 929, 933 n.3, 936 (7th Cir. 1989) (rejecting argument that tribe benefitted by analogy from statutory exemption for "federal and state governments, as well as agency and political subdivisions thereof") (citation omitted). *Cf. TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.").

generally applicable workplace statutes when that is its intent.[26] Likewise, when Congress wishes to require or authorize the treatment of Indian tribes as states, it does so explicitly. The Clean Water Act, for example, expressly requires that Indian tribes be treated as States for purposes of one provision,[27] and permits their treatment as such for several others.[28] Several other statutes expressly require or allow, and impose conditions on, tribes' qualification as "States" for particular purposes.[29]

Finally, the Board's rejection of an exemption by analogy is supported by the fact that the NLRA has been held not to exempt all employers which might in some sense be considered "governments."[30] It does not, for example, exempt the

---

[26] *See San Manuel*, 341 NLRB at 1058 (quoting Title VII, 42 U.S.C. § 2000e(b) ("The term 'employer' ... does not include ... an Indian tribe…."), and citing ADEA 42 U.S.C. § 12111(5)(B)(i) (same)).

[27] 33 U.S.C. §§ 1377(a), 1251(g).

[28] 33 U.S.C. § 1377(e) (listing provisions).

[29] *See, e.g.*, Clean Air Act, 42 U.S.C. § 7601(d); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9626; Safe Water Drinking Act, 42 U.S.C. § 300j-11; Indian Tribal Government Tax Status Act, 26 U.S.C. § 7871(b) & (e).

[30] Amicus National Congress of American Indians also argues (Congress A-Br. 9-10, 19) that Indian tribes are analogous to territories, and asserts that the Board considers territories analogous to states for purposes of the Section 2(2) exemption. No party made any such arguments to the Board in this case, so the Court does not have jurisdiction to consider them. *See* NLRA Section 10(e), 29 U.S.C. § 160(e) ("[T]he Court of Appeals lacks jurisdiction to review objections that were not urged before the Board."); *see also Woelke & Romero Framing, Inc. v. NLRB*, 456

commercial activities of a bank in the United States merely because a foreign government owns the bank.[31] Here, the Band does not dispute that, like commercial casinos, restaurants, and hotels covered by the NLRA, the Resort is an employer as that term is commonly understood, and employs individuals who perform the same functions that statutory employees perform at comparable non-tribal enterprises.

b. The pro-Indian canon does not require a construction of the NLRA excluding Indian tribes

Faced with the plain language of the NLRA, the Band contends (Br. 24-25; *see also* Congress A-Br. 5-6; Scholars A-Br. 8, 11) that the Court must apply a special, pro-Indian canon to construe the NLRA in favor of tribal interests, essentially creating an additional exception to Section 2(2). That canon, however, applies to statutory ambiguities and, as discussed below (Part B.1), statutory silence is distinct from statutory ambiguity. Moreover, it applies principally to the interpretation of treaties and statutes explicitly addressing Indian affairs, not to general statutes like the NLRA.

U.S. 645, 665-66 (1982). In any event, *San Manuel* specifically noted that no Board decision has ever explained the jurisdictional treatment of territories. 341 NLRB at 1058 n.11.

[31] *See State Bank of India*, 808 F.2d at 530-34.

The pro-Indian canon developed to ensure that Indian treaties be interpreted in a manner consistent with the circumstances of their signings (rather than as true arms-length contracts),[32] and to effectuate Congress' plenary authority over Indian tribes accurately when construing statutes explicitly intended to address Indian affairs. Indeed, this Court stated in *United States v. Dakota*, and the District of Columbia Circuit held in *San Manuel*, that the pro-Indian canon is not applicable to the interpretation of general federal laws that do not address tribal interests.[33] And, interpreting IGRA – a statute directly concerning Indian affairs, the Supreme Court in *Chickasaw Nation v. United States* held that the pro-Indian canon was not "inevitably stronger" than another canon of interpretation relating to tax exemptions, "particularly where the interpretation of a congressional statute rather than an Indian treaty is at issue."[34]

---

[32] *See Choctaw Nation v. Okla.*, 397 U.S. 620, 630-31 (1970) (pro-Indian canon applied to treaties because "Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent.").

[33] *San Manuel*, 475 F.3d at 1312 ("We have found no case in which the Supreme Court applied this principle of pro-Indian construction when resolving an ambiguity in a statute of general application."); *Dakota*, 796 F.2d 186, 189 (6th Cir. 1986). *But see NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1191-91 (10th Cir. 2002) (en banc); *Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490, 494 (7th Cir. 1993).

[34] 534 U.S. 84, 87-88, 93-95 (2001) (rejecting argument that IGRA entitled tribe to Internal Revenue Code tax exemption for certain state-operated gambling); *see also id.* at 94 (pro-Indian and other canons of interpretation will not support

The cases the Band and its amici cite respecting the pro-Indian canon are not to the contrary. Nearly all of them involve the interpretation of Indian treaties or laws specifically directed at, or explicitly addressing, Indian affairs.[35] The one exception is *Iowa Mutual Insurance Co. v. LaPlante*, and it is inapposite because it does not apply the pro-Indian canon to interpret a statutory ambiguity.[36]

In *Iowa Mutual*, the Supreme Court held that the federal diversity-jurisdiction statute, silent as to Indians, does not override the specific federal

---

"interpretation that we conclude would conflict with the intent embodied in the statute Congress wrote").

[35] *See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 194 n.5, 200, 206 (1999) (treaties); *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985) (statutes governing tribal-land leases); *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 246-47 (1985) (Indian treaties); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 n.14, 152 & n.18 (1982) (tribal constitution, federal statute addressing status of tribal severance taxes); *Bryan v. Itasca County*, 426 U.S. 373, 375, 392 (1976) (statute conferring limited civil jurisdiction over tribes on certain states; noting pro-Indian canon applies to "statutes passed for the benefit of dependent Indian tribes"); *Ex parte Kan-gi-shun-ca (otherwise known as Crow Dog)*, 109 U.S. 556, 559, 564-65, 570, 572 (1883) (declining to find Indian treaties implicitly repealed statute excluding certain Indian crimes from federal jurisdiction); *Memphis Biofuels, LLC v. Chickasaw Nation Indus.*, 585 F.3d 917, 918, 921 (6th Cir. 2009) (Oklahoma Indian Welfare Act, a federal statute expanding the Indian Reorganization Act); *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of U.S. Atty. for W. Dist. of Mich.*, 369 F.3d 960, 971 (6th Cir. 2004) (IGRA exemption and correct characterization of tribe's federal recognition).

[36] 480 U.S. 9 (1987). Likewise, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), which involved a statute directed at Indian affairs, does not explicitly apply the pro-Indian canon. The Court declined to infer a private civil right of action into the Indian Civil Rights Act, based on significant evidence that Congress intentionally declined to create one.

policy of promoting Indian self-governance through deference to tribal courts, which play a "vital role" in such governance and retain presumptive jurisdiction over reservation affairs.[37] The Court did not hold that federal courts have no jurisdiction over such cases. Rather, it found that well-established principles of comity required federal courts to allow a tribal court that is already adjudicating a dispute the "full opportunity to determine its own jurisdiction."[38] Accordingly, a federal court cannot consider the federal question of the tribal court's jurisdiction until the parties to the ongoing tribal-court lawsuit have first exhausted their tribal-court remedies. But, at that time, the federal court may review the tribal court's jurisdictional ruling.[39]

Because there was no asserted ambiguity in the diversity-jurisdiction statute, the pro-Indian canon did not play a role in the Court's analysis. *Iowa Mutual* thus does not support a broad rule that any ambiguity, much less silence, in even the most general federal statute must be interpreted to favor Indians. To the extent this Court determines that application of a pro-Indian canon is appropriate, however, the Ninth Circuit has explained that the *Coeur d'Alene* doctrine, which the Board applied in this case, is just the sort of specific doctrine, developed in light of

---

[37] 480 U.S. at 14-15, 17-18.

[38] *Id.* at 16-17.

[39] *See id.* at 11, 16-17 & n.8, 19.

federal Indian policy, that prevails over standard canons of statutory construction in cases involving Indian affairs.[40]

B. The *San Manuel* Jurisdictional Standard, Derived from Supreme Court and Circuit Court Precedent, Accommodates Federal Labor and Indian Policies

The Board did not end its analysis in *San Manuel* with its determination that the NLRA's definition of "employer" encompasses Indian tribes. Instead, consistent with the Supreme Court's admonition that "the Board has not been commissioned to effectuate the policies of the ... [NLRA] so single-mindedly that it may wholly ignore other and equally important Congressional objectives," [41] the Board expressly recognized the principle of tribal sovereignty. Specifically, it acknowledged that "'Indian tribes consistently have been recognized ... by the United States, as distinct, independent political communities qualified to exercise powers of self-government, not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty.'"[42] Noting, as well, "the Federal Government's superior sovereignty," the Board sought an approach that would

---

[40] *EEOC v. Karuk Tribe Housing Auth.*, 260 F.3d 1071, 1082 (9th Cir. 2001). As explained below (page 39), the facts of *Iowa Mutual* also fit *Coeur d'Alene*.

[41] *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942).

[42] *San Manuel*, 341 NLRB at 1056 (quoting Cohen's Handbook of Federal Indian Law, 232 (1982) (internal quotations and citations omitted)).

accommodate federal labor policy and federal Indian policy, including Congress' strong policy in favor of tribal self-government and self-sufficiency.[43]

Accordingly, the Board adopted the *Tuscarora/Coeur d'Alene* test – developed by the Ninth Circuit, and used (*see* pages 32-34) by nearly every circuit court to have considered the applicability of workplace and other generally applicable federal laws to Indian tribes – which it supplemented with its own, fact-intensive evaluation of the interplay of federal labor and Indian policies. As discussed below, the Board's jurisdictional standard accommodates both federal Indian policies and the important congressional goals embodied in the NLRA. Moreover, the Board, like the courts that developed the *Tuscarora/Coeur d'Alene* framework, reasonably rejected a notion of tribal sovereignty – advocated here – that would bar, in the absence of express congressional authorization, federal regulation of multi-faceted tribal commercial enterprises competing in interstate commerce, and employing and serving primarily non-Indians.

1. As a federal statute of general application, the NLRA presumptively applies to tribal enterprises

As the Supreme Court observed in *Tuscarora*, "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons

---

[43] *San Manuel*, 341 NLRB at 1056. *See Cabazon*, 480 U.S. 202, 216 (1987) (describing "congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development") (internal quotation omitted).

includes Indians and their property interests."[44] Several circuit courts, drawing on the Supreme Court's statement, have concluded that generally applicable federal statutes presumptively apply to Indian tribes, and the Board in *San Manuel* reasonably determined that the NLRA qualifies as such.[45]

As the Board found in *San Manuel*, Congress' clear intent for the NLRA "to have the broadest possible breadth permitted under the Constitution" qualifies it as a general statute entitled to the *Tuscarora* presumption of applicability to Indian tribes.[46] Two circuit courts agree with the Board on that point.[47] As the Ninth Circuit observed, "[t]he NLRA is not materially different from the statutes that we have already found to be generally applicable. Its exemptions are relatively limited

---

[44] 362 U.S. at 116. Although the Band (Br. 45) criticizes the *Tuscarora* statement as *dicta*, the Supreme Court decided *Tuscarora* on the explicit ground that the general federal law in that case applied to tribal lands, rejecting the tribe's contrary assertion. *Id*. at 115-18. That holding may not be characterized as *dicta* merely because the Court could have, but did not, rest its decision on the narrower ground that the statute expressly referred to tribal lands. *See Massachusetts v. United States*, 333 U.S. 611, 622-23 (1948); *Richmond Co. v. United States*, 275 U.S. 331, 340 (1928); *Whetsel v. Network Prop. Servs.*, 246 F.3d 897, 903 (7th Cir. 2001).

[45] 362 U.S. 99 (1960); *see, e.g., Florida Paraplegic, Ass'n v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126 (11th Cir. 1999) (Americans with Disabilities Act ("ADA")); *Smart*, 868 F.2d 929 (ERISA); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996) (Occupational Safety and Health Act ("OSHA")).

[46] *San Manuel*, 341 NLRB at 1059.

[47] *NLRB v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995, 998 (9th Cir. 2003); *Navajo Tribe v. NLRB*, 288 F.2d 162, 164-65 & n.4 (D.C. Cir. 1961) (citing "broad and comprehensive scope" of NLRA's jurisdictional provisions and of NLRA's definitions of key terms like "employer," "employee," and "commerce").

... and it is clear that the statute's reach was intended to be broad."[48] Several courts have also cited characteristics shared by the NLRA when classifying other workplace statutes (including the ADA, ERISA, and OSHA) as "general" for purposes of *Tuscarora*.[49] Those cases defeat the Band's argument (Br. 48) that the few, narrow exclusions from the NLRA's definition of "employer" – similar to exclusions in other qualifying statutes – prevent it from being a statute of general applicability.

Contemporaneous events, moreover, support the application of *Tuscarora* to the NLRA and leave little doubt that Indian sovereignty was on Congress' radar when it wrote Section 2(2). The Court in *Tuscarora* cited, in support of the general-applicability principle, its prior decisions holding federal tax laws applicable to Indians without explicit language including them. Most of those

---

[48] *Chapa De*, 316 F.3d at 998 (footnote and citation omitted).

[49] *See, e.g.*, *Fla. Paraplegic*, 166 F.3d at 1128-29 & n.3 (ADA intended to have broad applicability; key definitions are "broad"); *Smart*, 868 F.2d at 933 & nn.1-3 (Employee Retirement Income Security Act ("ERISA") "is clearly a statute of general application, one that envisions inclusion within its ambit as the norm. The exemptions from coverage [for church and governmental plans] are explicitly and specifically defined, as well as few in number."); *Coeur d'Alene*, 751 F.2d at 1115 & n.1 (OSHA designed to protect all workers in the nation; definition of "employer" is broad with only a few governmental exclusions.); *see id.* at 1115-16 (giving examples of federal statutes applied to tribes without explicit inclusion language).

decisions preceded the 1935 enactment of the NLRA.[50] One of them – *Superintendent of Five Civilized Tribes v. CIR*, decided a few weeks before passage of the NLRA – expressly rejected the proposition that statutes apply to Indians only when they specifically say so.[51] And the Band and its amicus further point out (Br. 37; Congress A-Br. 11, 14-16) that when Congress enacted the NLRA in 1935, it had just firmly committed to promoting tribal self-government by passing the Indian Reorganization Act of 1934, and was actively debating the Oklahoma Indian Welfare Act of 1936.

Combined, those circumstances undermine any suggestion that Congress' failure to exclude Indian tribes from the NLRA's definition of "employer" was inadvertent. Accordingly, the arguments (Br. 33, Chickasaw A-Br. 22-23, 26; Congress A-Br. 19, 26; Navajo A-Br. 12-15) that the policy reasons underlying Congress' decision to exempt federal and state governments in Section 2(2) – including codification of many states' ban on public-employee strikes – *could* also be applied to tribes are not dispositive. At a time when not only those labor-policy and general sovereignty considerations, but also issues surrounding tribal self-government, were paramount, Congress decided not to exclude tribes expressly from the NLRA.

---

[50] *Tuscarora*, 362 U.S. at 116-17.

[51] 295 U.S. 418, 419-20 (1935).

The Tenth Circuit's decision in *NLRB v. Pueblo of San Juan* does not support the Band's contrary argument (Br. 48).[52] That case held that an Indian tribe was privileged to enact a right-to-work law affecting union-security agreements where Congress had "embrace[d] a diversity of legal regimes respecting" such agreements by enacting Section 14(b) of the NLRA, 29 U.S.C. § 164(b), which expressly authorizes states and territories to enact right-to-work statutes.[53] As the court noted, right-to-work laws represent a limited exception to the general rule that the NLRA preempts any inconsistent state or territorial laws.[54] That rationale is inapplicable to the rest of the NLRA because, as the Supreme Court has explained, the NLRA's preemption doctrine is "necessary to obtain uniform application of [the NLRA's] substantive rules and to avoid ... diversities and conflicts likely to result from a variety of local ... attitudes toward labor controversies."[55] Accordingly, as the Board here noted (D&O 4), the Tenth

---

[52] 276 F.3d 1186 (10th Cir. 2002) (en banc).

[53] *Id.* at 1197.

[54] *Id.* at 1197-98. *See also Retail Clerks v. Schermerhorn*, 375 U.S. 96, 101-05 (1963).

[55] *Garner v. Teamsters Local 776*, 346 U.S. 485, 490 (1953).

Circuit began its analysis in *Pueblo of San Juan* by highlighting that "the general applicability of federal labor law [wa]s not at issue."[56]

2. *San Manuel* explicitly protects tribal sovereignty, Indian treaties, and congressional authority over Indian affairs, and balances federal labor and Indian policies

a. The three *Coeur d'Alene* jurisdictional exemptions, adopted by several circuits, protect tribal sovereignty

When evaluating the applicability of a general federal statute like the NLRA to Indian tribes, *Tuscarora* is the beginning, not the end, of the analysis. In recognition of federal Indian policy, the courts of appeal have established three exceptions to the *Tuscarora* principle. As the Ninth Circuit explained in *Coeur d'Alene*, a generally applicable federal statute will not apply to Indian tribes if: (1) it interferes with "exclusive rights of self-governance in purely intramural matters"; (2) its application to a tribe "would abrogate rights guaranteed by Indian treaties"; or (3) either the statute's legislative history, or something else, proves a congressional intent not to apply the law to Indians on their reservations.[57] In

---

[56] 276 F.3d at 1991. The Board (D&O 4 n.8) does not accept the Tenth Circuit's analysis. But, for the reasons explained above and in the Board's decision (D&O 4), *Pueblo of San Juan* does not control this case.

[57] 751 F.2d at 1116 (internal quotations omitted). Since the *Coeur d'Alene* exceptions result in exemption from an otherwise governing statute, the Band has the burden of proving their applicability. *See NLRB v. Kentucky River Cmty. Care*, 532 U.S. 706, 711 (2001); *Smart*, 868 F.2d at 936.

those three circumstances, "Congress must *expressly* apply a statute to Indians before [the court] will hold that it reaches them."[58]

Coeur d'Alene strikes an appropriate balance between federal Indian policy and other federal policies by balancing the federal government's superior sovereignty with the subordinate, but not insignificant, sovereignty of Indian tribes. It recognizes the presumptive applicability of federal law, but its exemptions protect tribes' core sovereign power "to make their own laws and be ruled by them,"[59] honor the federal government's treaty commitments, and respect Congress' plenary authority over Indian affairs. As discussed below, many circuit court decisions have applied *Tuscarora*, as limited by *Coeur d'Alene*, to employment-related statutes. Still others have applied the general-applicability rule to general federal laws outside the workplace.[60] And most, if not all, of the decisions declining to apply general employment-related federal statutes to Indian

---

[58] 751 F.2d at 1116.

[59] *Nevada v. Hicks*, 533 U.S. 353, 361 (2001) (quotation and citations omitted).

[60] *See, e.g.*, *Cook v. United States*, 86 F.3d 1095, 1097 (Fed. Cir. 1996) (excise tax); *Lazore v. CIR*, 11 F.3d 1180, 1183, 1188 (3d Cir. 1993) (income tax); *Nero v. Cherokee Nation of Okla.*, 892 F.2d 1457, 1462-63 (10th Cir. 1989) (applying *Tuscarora* to civil rights claims under 42 U.S.C. §§ 1981 and 2000d, but finding self-governance exception); *Phillips Petroleum Co. v. EPA*, 803 F.2d 545, 556 & n.14 (10th Cir. 1986) (applying "presumption that Congress intends a general statute applying to all persons to include Indians and their property interests" to Safe Drinking Water Act, and collecting cases applying presumption to other laws.); *but see Pueblo of San Juan*, 276 F.3d at 1199 & n.11 (*Tuscarora* does not apply when Indian tribe acts in sovereign, rather than proprietary, capacity).

tribes fit factually within *Coeur d'Alene*'s exceptions, even those that do not adopt – or affirmatively reject – the test.[61]

Coeur d'Alene itself held that the OSHA applied to a farm wholly owned and operated by a tribe, located on its reservation, and employing Indians and non-Indians.[62] The court rejected the contention that all tribal commercial activity comes within the "tribal self-government" exception to *Tuscarora*, which it viewed as applying to "purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations …."[63] Rather, it concluded that "[t]he operation of a farm that sells produce on the open market and in interstate commerce is not an aspect of tribal self-government," highlighting the fact that the farm was virtually identical to non-tribal commercial farms and employed both Indians and non-Indians.[64] Crucially, the Ninth Circuit held that the right to operate such a typical commercial enterprise in interstate commerce *free from federal health and safety regulations* is "neither profoundly intramural ... nor essential to self-government."[65]

---

[61] *See infra,* notes 89-92 (and accompanying text).

[62] *Id.* at 1116-18.

[63] *Id.* at 1116.

[64] *Id.*

[65] *Id.* (internal quotations omitted).

By contrast, in *EEOC v. Karuk Tribe Housing Authority*, the Ninth Circuit held that the ADEA did not cover the claims of a tribal member working for the tribal housing authority.[66] The court held that the tribe met the *Coeur d'Alene* self-government exception because it was providing government services (ensuring safe and affordable housing on tribal lands) rather than running a commercial enterprise. The court highlighted that the employment dispute involved only tribal members (as employer and employee) and further noted that the authority's housing had a 99-percent Indian occupancy rate.[67]

Other circuit courts have followed the Ninth Circuit. In *Reich v. Mashantucket Sand & Gravel*, the Second Circuit concluded, pursuant to *Coeur d'Alene*, that OSHA applied to a construction firm wholly owned and operated by a tribe and working only on the reservation, where the firm employed Indians and non-Indians, participated in building tribal roads and homes, and in the expansion of the tribe's principal source of income, a hotel-casino designed to attract out-of-state customers.[68] The court expressly rejected as unworkable the tribe's argument – very similar to the Band's and amici's arguments here (Br. 3, 15-16, 18-28, 37-39; Chickasaw A-Br. 3, 21, 28-30; Navajo A-Br. 2, 18) – that courts should

---

[66] 260 F.3d 1071, 1073 (9th Cir. 2001).

[67] *Id.* at 1073-74, 1080-81.

[68] *Mashantucket*, 95 F.3d at 175, 177, 180-81.

presume no federal statute affecting tribal sovereignty applies to Indian tribes "unless Congress expressed its specific intent to abrogate tribal sovereignty."[69] Such a test, the court held "would almost invariably compel the conclusion that every federal statute that failed expressly to mention Indians would not apply to them."[70] It declared such a result "inconsistent with the limited sovereignty retained by Indian tribes," citing Supreme Court cases describing the dependent and subordinate nature of that sovereignty.[71] Rather, like the Ninth Circuit, the Second Circuit concluded that, pursuant to the first *Coeur d'Alene* exception, "[t]he question is not whether the statute affects tribal self-governance *in general*, but whether it affects tribal self-government *in purely intramural matters*."[72]

The Seventh and Eleventh Circuits have both also followed *Coeur d'Alene*, and have reached the same conclusion regarding the proper breadth of its first, self-governance exception.[73] The Seventh Circuit pointed out, in *Smart v. State Farm*

---

[69] *Id.* at 177.

[70] *Id.* at 178.

[71] *Id.* at 178-79. *See also id.* at 178 (acknowledgement of retained sovereignty "is not to imply that Indian sovereignty is exclusive, any more than the sovereignty of a state is").

[72] *Id.* at 181.

[73] *See Fla. Paraplegic*, 166 F.3d at 1127, 1129 (quoting *Coeur d'Alene* and holding tribal restaurant, entertainment, and gaming facility open to non-Indians subject to ADA accessibility requirements); *Smart*, 868 F.2d at 935 (rejecting broad interpretation of self-governance exception as inconsistent with subordinate

Insurance Co., that other statutes of general application, with the same type of arguable effects on general (not intramural) tribal sovereignty, were already applied to tribes without controversy.[74]

Although the D.C. Circuit declined to adopt *Coeur d'Alene* when enforcing *San Manuel*,[75] it nonetheless determined, like its sister circuits, that tribal sovereignty is entitled to less deference the further it strays from intramural questions of self-governance, and from functions typically recognized as governmental. As the court concluded, "tribal sovereignty is not absolute autonomy, permitting a tribe to operate in a commercial capacity without legal constraint."[76]

The numerous court decisions cited in this brief distinguishing commercial from governmental operations in the tribal context negate any argument (Br. 51-52; Chickasaw A-Br. 2-3, 17-21, 23-24; Congress A-Br. 23, 27-28) that such a

---

nature of Indian sovereignty, given that "[a]ny federal statute applied to ... a Tribe has the arguable effect of eviscerating self-governance since it amounts to a subordination of the Indian government.").

[74] 868 F.2d at 935 (citing Cohen's Handbook of Federal Indian Law 399 (1982) for proposition that federal employment withholding taxes apply to Indians as employers and as employees and without tribal objection).

[75] *San Manuel*, 475 F.3d at 1315.

[76] *Id.* at 1314.

distinction is "unworkable."[77] As the Board recently observed, neither it nor the courts have "had ... difficulty in distinguishing between the two categories."[78] Moreover, the fact that Congress has codified such a distinction into various statutes exempting Indian tribes from, or affording them special treatment under, federal law indicates the relevance of the inquiry.[79]

b. Not all attributes of Indian sovereignty require explicit abrogation

The Band objects to the Board's adoption of *Coeur d'Alene* as the foundation of its jurisdictional analysis. It contests, in particular, the consensus of the Second, Ninth, Seventh, Eleventh, and D.C. circuits that not all attributes of sovereignty are inviolate. Asserting (Br. 22, 56-58) that "[e]ach attribute of

---

[77] *See, e.g.*, *Mashantucket*, 95 F.3d at 180; *Great Lakes*, 4 F.3d at 495. *Cf. Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 200 (1985) (finding tribal tax on mineral extraction consistent with federal regulation of tribal oil and gas leases, noting Court has "emphasized the difference between a tribe's 'role as commercial partner [e.g., in leasing mineral rights],' and its 'role as sovereign [e.g., in imposing tax on minerals extracted]'") (quoting *Merrion*, 455 U.S. at 145-46).

[78] *Chickasaw Nation*, 360 NLRB No. 1, 2013 WL 3809177, *8 n.15 (July 12, 2013), *petition for review filed*, 10th Cir. No. 13-9578.

[79] *See, e.g.*, 29 U.S.C. §§ 1321(b), 1002(32) (exempting tribal-government benefit plans from ERISA only when enrolled employees performed almost exclusively "essential governmental functions but not ... commercial activities (whether or not an essential government function)"); 26 U.S.C. § 7871(b) & (e) (limiting tribes treatment as states for excise taxes to "transaction[s] involv[ing] the exercise of an essential governmental function of the Indian tribal government," excluding functions "not customarily performed by State and local governments with general taxing powers.").

inherent tribal power is critical to the ability of Indian tribal governments to maintain authority over their members and their territories," the Band disputes that any "hierarchy" can be discerned. The cases it cites, however, do not support its argument that sovereignty is undifferentiated. They do demonstrate that tribal sovereign authority extends past intramural matters of intramural self governance, but not that every element of sovereignty is inviolate absent express congressional waiver.[80]

Indeed, one case, *New Mexico v. Mescalero Apache Tribe*, tends to support the proposition that there *is* a hierarchy.[81] In *Mescalero*, the Supreme Court stated that tribes retain all aspects of their inherent sovereignty not inconsistent with overriding federal interests. But it also recognized that not all tribal sovereignty is entitled to the same protection. The Court explained that a State may not infringe on reservation Indians' power "to prescribe the conduct of tribal members," or

---

[80] *See generally White Mountain Apache Tribe*, 448 U.S. at 145 (relevant inquiry for evaluating state assertions of authority over non-Indians' on-reservation activities "is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but [calls] for a particularized inquiry into the nature of the state, federal, and tribal interests at stake").

[81] 462 U.S. 324 (1983); *see also Cabazon*, 480 U.S. at 215-16 & n.17 (quoting *Mescalero* in support of proposition that states may sometimes assert jurisdiction over non-member – and, exceptionally, even over tribal-member – activities on reservations without express congressional authorization; drawing contrast with *per se* rule against state taxation of tribes and their members without express congressional authorization).

right "to make their own laws and be ruled by them" without express congressional authorization.[82] It characterized as "[m]ore difficult," however, the issues surrounding a State's assertion of authority over non-members' on-reservation activities despite tribes' "equally well established" power to exclude non-members from, or condition their presence on, a reservation.[83] Moreover, in finding that New Mexico could not assert its authority over non-member hunting on the reservation in that case, the Court based its holding in part on the federal government's express authorization of, participation in, and supervision of the tribe's conflicting, comprehensive wildlife-management program.[84]

Like most of the Band's and amici's cases, *Mescalero* did not concern an alleged conflict between tribal sovereignty and a *federal* law.[85] *Mescalero*

---

[82] *Mescalero*, 462 U.S. at 332 (citations omitted).

[83] 462 U.S. at 333 (alteration in original) (internal quotation and citation omitted).

[84] *Id.* at 328-41.

[85] *See, e.g.*, *Plains Commerce Bank v. Long Family & Cattle Co.*, 554 U.S. 316 (2008) (no tribal-court jurisdiction over dispute concerning non-Indian bank's sale of fee land within reservation boundaries to non-Indians; no conflict asserted with federal law); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991) (tribal immunity from state lawsuit to enforce state tax law); *Blackfeet Tribe*, 471 U.S. 759 (state taxation of tribal royalties from on-reservation mineral leases); *Merrion*, 455 U.S. 130 (federal statute authorizing state taxation of mineral lessees on tribal lands does not preclude tribal taxation of same; no conflict between federal law and tribal sovereignty, as two sovereigns may tax same transaction); *Bryan*, 426 U.S. 373 (state power to tax on tribal lands); *United States v. Mazurie*, 419 U.S. 544, 556-58 (1975) (Congress validly delegated to Indian tribe authority to regulate alcohol on tribal lands, even those owned by non-

involved a conflict between tribal and *state* authority and, as the Board pointed out (D&O 4 n.9), states – unlike the federal government – are not superior to Indian tribes.[86] While the Supreme Court has recognized the various retained sovereign tribal powers beyond internal self-governance described by the Band, it has also consistently stressed the unique nature of tribal sovereignty and its defeasibility by invocation of the superior sovereignty of the United States.[87] And although the Court has consistently required express tribal or congressional waiver of sovereign *immunity* from suit, the aspect of tribal sovereignty discussed in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe* (*see* Br. 22), such immunity is distinct from sovereign authority, further evidence that not all attributes of sovereignty are equal.[88]

Indians; does not decide whether tribe could regulate without congressional delegation); *Worcester v. Georgia*, 31 U.S. 515 (1832) (state assertion of complete authority over Indians and tribal lands).

[86] *Cabazon*, 480 U.S. at 207 ("[T]ribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.'") (quoting *Colville*, 447 U.S. at 154); *United States v. Dakota*, 796 F.2d 186, 188 (6th Cir. 1986) (distinct issues involved when evaluating assertion of federal, rather than state, authority over Indian tribe).

[87] *See, e.g.*, *Cabazon*, *supra*; *Santa Clara*, 436 U.S. at 56-58 (describing Congress' "plenary authority to limit, modify or eliminate" tribal sovereignty).

[88] 498 U.S. 505, 514 (1991) (rejecting state's argument that tribal sovereign immunity left it with a right – to collect taxes on tribal cigarette sales to non-Indians – without a remedy, citing other approaches including off-reservation cigarette seizures and voluntary tax-collection agreements with tribes). *See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 755 (1998) (stressing distinction

Notably, the Court has never held that a tribe may require forfeiture of substantive federal statutory rights as a condition of non-Indians' presence on tribal lands. Such a holding would amount to a determination that tribal sovereignty is equal, or superior, to that of the federal government. The law is just the opposite. Most – if not all – cases where courts have resolved conflicts between tribal sovereignty and general federal laws in favor of Indian tribes fit neatly into the space *Coeur d'Alene* carves out for exclusive sovereignty over self-government, even when the courts have rejected that test.

In *Iowa Mutual, supra* pages 21-23, for example, the Supreme Court declined to infer that the federal diversity-jurisdiction statute overrode tribal-court jurisdiction, but the tribal justice system is, as the Board noted in *San Manuel*, a critical attribute of internal self-governance.[89] Similarly, the Seventh Circuit in

---

between immunity from suit and exemption from substantive laws, while declining to limit immunity to governmental activities); *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1161 (9th Cir. 2002) (distinguishing sovereign authority, "the extent to which a tribe may exercise jurisdiction," from sovereign immunity, the court's "authority and the extent of our jurisdiction over Indian Tribes"); *Fla. Paraplegic*, 166 F.3d at 1130 (noting tribal immunity entitled to greater protection than some other aspects of tribal sovereignty). *Cf. Nero*, 892 F.2d at 1459, 1461 (rejecting argument that limitation of tribe's sovereign power entails corresponding limitation of its sovereign immunity).

[89] *San Manuel*, 341 NLRB at 1061. The Tenth Circuit explicitly applied *Tuscarora/Coeur d'Alene* in *Nero*, finding that a challenge to the definition of tribal membership fell within the self-governance exception. 892 F.2d at 1463.

Reich v. Great Lakes Indian Fish & Wildlife Commission, declined to apply the FLSA to employees performing law enforcement functions for an Indian tribe, traditionally a key governmental function.[90] Other cases involved purely intramural on-reservation employment disputes between Indian tribes and member employees (*see* first *Coeur d'Alene* exception),[91] while still others turned on treaty rights (*see* second exception).[92] The Board is unaware of any court decision holding that tribal operation of a large commercial enterprise – like the gambling and entertainment complex at issue – that competes with similar non-tribal enterprises in interstate commerce, employs mostly (here about 85%) non-Indians, directs its advertising to non-Indians, and caters almost exclusively to non-Indians,

---

[90] 4 F.3d 490, 495 (7th Cir. 1993); *accord Snyder v. Navajo Nation*, 382 F.3d 892, 895-96 (9th Cir. 2004). *See also Karuk Tribe*, 206 F.3d at 1080 (employer was tribal government "acting in its role as provider of a governmental service: ensuring adequate housing for its members").

[91] *See, e.g., Karuk Tribe*, 206 F.3d at 1081; *EEOC v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246, 249 (8th Cir. 1993).

[92] *See, e.g., EEOC v. Cherokee Nation*, 871 F.2d 937, 938 (10th Cir. 1989); *Donovan v. Navajo Forest Prods. Indus.*, 692 F.2d 709, 711-12 (10th Cir. 1982). *Coeur d'Alene*'s treaty exception is consistent with cases like *United States v. Dion*, 476 U.S. 734, 738 (1986), and *Mille Lacs*, 526 U.S. at 202, which reaffirmed that clear congressional intent is required to abrogate Indian treaty rights. The existence of such a right was undisputed in *Dion*, but the Court relied on legislative history and a statutory provision specifically addressing Indian concerns to find it abrogated. 476 U.S. at 737, 740-43. In *Mille Lacs*, the Court held that the Enabling Act, admitting Minnesota to the union on equal footing with other states, was not a clear abrogation of specific treaty rights that were "reconcilable with" or "not inconsistent with state sovereignty." 526 U.S. at 203-08.

constitutes an exercise of tribal sovereign authority presumptively exempt from the NLRA and other general federal laws.

c. The Board's discretionary inquiry considers tribal interests weighing against jurisdiction even when *Coeur d'Alene* would not preclude jurisdiction

The foregoing discussion demonstrates that the Board, in *San Manuel*, reasonably adopted *Coeur d'Alene*.[93] Having adopted that standard, the Board further held that, even in cases where *Coeur d'Alene* does not suggest any impediment to Board jurisdiction, the Board will nonetheless undertake an additional, discretionary jurisdictional analysis "to balance the Board's interest in effectuating the policies of the NLRA with its desire to accommodate the unique status of Indians in our society and legal culture."[94] That inquiry focuses on determining whether the enterprise in question (1) participates in the national economy as would a typical commercial enterprise, employing and catering to substantial numbers of non-Indians – thereby deliberately engaging in and affecting interstate commerce in a manner strongly implicating the Board's duty to effectuate the policies of the NLRA, or (2) primarily fulfills functions that are either traditionally tribal or customarily governmental, such that protection of those

---

[93] *San Manuel*, 341 NLRB at 1059-60 (noting that it had already been applying *Coeur d'Alene* in cases involving off-reservation tribal enterprises).

[94] *San Manuel*, 341 NLRB at 1062.

core sovereign functions will most likely outweigh any Board interest in effectuating the NLRA.

In *San Manuel*, the Board held that those policy considerations weighed in favor of jurisdiction because the casino was a typical commercial enterprise, employing and catering to non-Indians, and assertion of jurisdiction would not affect all aspects of the casino's relationship with its employees, or extend past the casino to regulate intramural tribal matters.[95] It then determined that the casino's on-reservation location was insufficient to outweigh the many factors favoring jurisdiction.

In contrast, in *Yukon Kuskokwim Health Corp.*, issued the same day, the Board declined to assert jurisdiction pursuant to the same discretionary inquiry, after finding that no *Coeur d'Alene* factor precluded jurisdiction.[96] The enterprise in that case was a hospital run by a non-profit corporation controlled by Native Alaskan tribes, but not on a reservation and employing few Native Alaskans. The Board declined jurisdiction because: (1) the hospital's impact on interstate commerce was "relatively limited" given that 95-percent of its patients were Native Alaskans and that it did not compete with other hospitals clearly subject to the Board's jurisdiction; and (2) the hospital fulfilled a unique governmental

---

[95] 341 NLRB at 1063-64.

[96] *Yukon Kuskokwim*, 341 NLRB 1075, 1076 (2004).

function, as a federal contractor "fulfilling the Federal Government's trust responsibility to provide free health care to Indians."[97] The juxtaposition of *San Manuel* and *Yukon Kuskokwim* demonstrates that the Board takes seriously its obligation to respect tribal sovereignty and to balance federal Indian and labor policies, even in cases where relevant precedent does not preclude application of the NLRA.

C. The Board Properly Asserted Jurisdiction over the Band's Resort

As noted above, the Board (D&O 2-4) reaffirmed and applied *San Manuel*, finding the analysis in that case dispositive here. It reasonably held that none of the *Coeur d'Alene* exceptions governed, and that the additional *San Manuel* discretionary analysis confirmed that Board jurisdiction is appropriate. The Band's arguments that it satisfies the first and third *Coeur d'Alene* exceptions are inconsistent with relevant caselaw, and its claim, in particular, that an Indian tribe can exempt itself from otherwise applicable federal law is untenable.[98] Accordingly, as described below, jurisdiction is appropriate here as it was *San Manuel*.

---

[97] *Id.* at 1075-77.

[98] The Board (D&O 3) found the second *Coeur d'Alene* exception inapplicable, noting that the Band had not identified any relevant treaties.

1. The Band's enactment of a labor code does not remove this case from the *San Manuel/Coeur d'Alene* framework

As an initial matter, the Board specifically rejected (D&O 3-4) the Band's contention (Br. 28-32, 38-41, 43-48, 59; Scholars A-Br. 32-33) that the *San Manuel/Coeur d'Alene* test is inapposite – or that an Indian tribe is more appropriately understood to be acting as a sovereign, rather than as a commercial proprietor in interstate commerce – whenever the validity of tribal law is at issue, as certain articles of the FEPC are. The Band's contention that it can avoid application of the NLRA to its commercial gaming and entertainment complex by labeling the Resort "governmental" and promulgating the Resort's labor policies through tribal ordinances, elevates form over substance and, if taken to its logical extreme, would enable tribal governments to exempt themselves from all federal laws not expressly applicable to them. Such a result is contrary to relevant precedent.

As the Board explained (D&O 4; *see also supra*, Part B.1), *Pueblo of San Juan* cannot carry the weight the Band places on it. The tribal law challenged there was a right-to-work provision, governed by a particular exception in the NLRA. The court noted that the challenged tribal ordinance did "not attempt to nullify the NLRA or any other provision of federal law," and that there was nothing in the record before it to support the Board's suggestion that tribes might

"enact ordinances allowing precisely what generally applicable federal law prohibits."[99]

As the Board further found (D&O 4), federal scrutiny of the FEPC here does not interfere with core tribal self-government within the meaning of *Coeur d'Alene* because the offending FEPC provisions are not "directed toward tribal intramural matters over which the [Band] retains exclusive rights of self-government." They do not concern tribal membership, inheritance, or domestic relations, and do not affect only, or even mostly, tribal members, given that fully 85 percent of the Resort's workforce is non-Indian.

Nor, as the Board determined (D&O 4), are the FEPC provisions "addressed exclusively to employment relationships between the [Band] and its governmental employees, such as employees of the Tribal Court system or Tribal Police." To the extent they do cover purely governmental employees, the Board's Order does not affect them. It is strictly confined (D&O 5-6, Remedy & Order) to preventing the Band's application of the challenged FEPC provisions to the Resort, its employees, and labor organizations that seek to represent them. While the FEPC may designate the Resort a government entity, and thus resort employees as governmental employees, the relevant consideration for purposes of the NLRA and

---

[99] 276 F.3d at 1191 (noting also that tribe "does not challenge the supremacy of federal law").

Indian policy is the nature of their job functions, not how the Band characterizes them.[100]

In *San Manuel*, an Indian tribe violated the NLRA by discriminating against a union in the workplace.[101] The Band here enacted a law stripping the mostly non-Indian employees of its commercial gaming and entertainment enterprise of their NLRA rights. In other words, the Band as a sovereign authorized itself, as an employer in interstate commerce, to violate the NLRA. The result is equally unlawful in both cases, and the fact that the Band violated its employees' rights by enacting an ordinance in lieu of, for example, publishing a personnel handbook with the same rules, is immaterial.[102] The Band cannot, as the Board held

---

[100] *See Great Lakes*, 4 F.3d at 494-95 (exempting tribal law-enforcement officers from FLSA because they performed traditionally governmental functions). *See also Frenchtown*, 683 F.3d at 305 (classifying employee as statutory supervisor unprotected by the NLRA depends on actual job responsibilities; "employee's title does not confer supervisory authority. . . [and s]tatements by management purporting to confer authority do not alone suffice") (internal quotations and citations omitted).

[101] 475 F.3d at 1309-10 (tribe violated NLRA by favoring one union over another).

[102] *Menominee*, 601 F.3d at 674 (rejecting implicit tribal authority to preempt federal law); *United States v. Santee Sioux Tribe of Neb.*, 254 F.3d 728, 736-37 (8th Cir. 2001) (holding tribe lacked authority to pass referendum contrary to federal court order, and thus "in contravention of federal law"); *Mashantucket*, 95 F.3d at 178-79 ("Nobody questions that an Indian tribe may, in the absence of a federal statute, act on its inherent sovereign power to adopt regulations for its tribe. It is quite different to hold, however, that this broad sovereign power essentially preempts the application of a federal regulatory scheme which is silent on its application to Indians."); *Lumber Indus. Pension Fund v. Warm Springs Forest*

(D&O 4), avoid its obligations under the NLRA by enacting procedurally legitimate legislation – even a public-sector labor code ostensibly based on other such codes – declaring that it is not subject, when acting as an employer in interstate commerce, to the same requirements that federal employment laws impose on employers nationwide.[103] Any such ability would effectively nullify the presumption, described above, that federal laws of general applicability encompass Indian tribes unless they interfere with core self-government, explicit treaty rights, or clear contrary congressional intent.[104] It would, moreover, contradict the bedrock principle, recognized repeatedly by the Supreme Court and circuit courts,

---

Prods. Indus., 939 F.2d 683, 685 (9th Cir. 1991) (rejecting argument that tribal enterprise need not comply with ERISA because it was complying with tribal ordinance, holding "[f]ederal law does not give way to a tribal ordinance" unless it falls within *Coeur d'Alene* exceptions). *Cf. Dakota*, 796 F.2d at 186-87 (finding casino, owned and operated on tribal lands by tribal members and licensed pursuant to tribal code approved by Secretary of the Interior, violated state and federal law).

[103] To the extent it analogizes the FEPC to state law, the Band does not fit the state exclusion in Section 2(2), as discussed above. Moreover, state regulation of activity arguably subject to the NLRA is generally preempted. *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244-46 (1959).

[104] The fact that other tribes have enacted and applied alternate labor-law regimes similar to the Band's (*see* Navajo A-Br. 5, 18-26) does not demonstrate the validity of the FEPC. Moreover, just as the Board has asserted jurisdiction over the FEPC only as applied to the Resort, it is not at all clear that the Board would assert jurisdiction in every case involving such tribal laws. *See, e.g.*, Navajo A-Br. 20 (describing application of Navajo labor laws to tribal Department of Head Start, Division of Public Safety, and Blue/White Collar Executive Branch, all of which might qualify for *Coeur d'Alene* self-government exception).

that "tribal sovereignty is dependent on, and subordinate to, ... the Federal Government."[105]

2. The intramural, self-government exception does not apply

The Board held (D&O 3) that the first *Coeur d'Alene* exception does not preclude assertion of jurisdiction over the Resort because it would not interfere with the Band's exclusive rights to intramural self-governance, as defined in the *Coeur d'Alene* line of cases (*see* Part B.2). It pointed out (D&O 3): that the Resort, like the casino in *San Manuel*, is a typical commercial gambling enterprise; that the Resort competes with like enterprises and substantially affects interstate commerce; and, finally, that the great majority of both the Resort's employees and of its patrons, for whom it advertises off the reservation and out-of-state, are non-Indian. That combination of a commercial function – akin to that of any large casino with associated lodging, dining, and entertainment venues – and a mostly non-Indian staff and clientele take the Resort outside the domain of "purely intramural" self-governance.[106]

---

[105] *Cabazon*, 480 U.S. at 207 (quoting *Colville*, 447 U.S. at 154); *Santa Clara*, 436 U.S. at 56-58 (describing Congress' "plenary authority to limit, modify or eliminate" tribal sovereignty).

[106] *See, e.g.*, *Menominee*, 601 F.3d at 671, 673-74 (tribal "sawmill is just a sawmill, a commercial enterprise," not part of tribe's governance structure, and sells product in interstate commerce, in competition with non-Indian sawmills); *Mashantucket*, *supra* page 32; *Fla. Paraplegic*, *supra* note 73; *Coeur d'Alene*, *supra* page 31.

Contrary to the Band's implication (Br. 18, 29-30), the fact that 107 of the Resort's 905 employees are band members does not suffice to satisfy the self-government exception. Courts have not required that all, or even a majority, of an enterprise's workforce be non-Indians to consider non-Indian employment as weighing against finding an enterprise purely intramural. As discussed above, the core of Indian sovereignty is governance of tribal members; the employment of any non-members, particularly in a non-governmental capacity, lies outside of that key area.

The Band's related assertion (Br. 30-31, 49), that its member employees' labor issues are "inextricably intertwined" with those of non-member coworkers, favors rather than detracts from Board jurisdiction. Under Section 7 of the NLRA, 29 U.S.C. § 157, employees have a right to act concertedly for mutual aid and protection when dealing with their employer respecting issues that affect their terms and conditions of employment. Any individual resort employee – tribal member or non-Indian – thus has a right to act collectively with his coworkers in dealing with the Resort. Consequently, under the NLRA, the Band does not have an intramural labor (as opposed to employment) relationship with each of its member employees at the Resort, severable from its relations with his or her non-member coworkers. Its labor relationship is with the Resort's employees as a

collective group. The Resort's labor relations, *even with member employees*, thus cannot be described as exclusively intramural.

Nor does the fact that resort revenues fund tribal governmental services (Br. 22, 27, 32; Chickasaw A-Br. 6-9; Congress A-Br. 24-25; Navajo A-Br. 10-11) preclude Board jurisdiction under the first *Coeur d'Alene* exception. In the state-law context, the Supreme Court has rejected the contention that a law infringes on "the right of reservation Indians to 'make their own laws and be ruled by them' ... merely because [its] result ... will be to deprive the [t]ribes of revenues which they currently are receiving."[107] And caselaw applying *Coeur d'Alene* supports the Board's determination (D&O 3 n.5) that a tribe's use of revenues from a commercial venture to address intramural needs and fund traditional governmental functions does not transform the commercial enterprise into an exercise in purely intramural self-governance.[108] A contrary interpretation of the self-government exception would eviscerate the *San Manuel* (and *Tuscarora/Coeur d'Alene*) rule.

---

[107] *Colville*, 447 U.S. at 156 (citation omitted) (allowing state taxation of on-reservation smokeshops' cigarette sales to non-Indians).

[108] *See U.S. Dept. of Labor v. OSHRC*, 935 F.2d 182, 184 (9th Cir. 1991) (applying OSHA to on-reservation, tribal sawmill with nearly half non-Indian employees, and almost entirely non-Indian clientele, despite fact that "revenue from the mill [wa]s critical to the tribal government"); *San Manuel*, 475 F.3d at 1313 (rejecting argument that any tribal activity "aimed at raising revenue that will fund governmental functions" is "governmental"). *Cf. Mashantucket*, 95 F.3d at 175, 181 (applying OSHA to tribal construction firm partly because it performed work on hotel-casino that was tribe's principal source of income).

The Supreme Court's decision in *California v. Cabazon Band of Mission Indians* is not to the contrary.[109] In *Cabazon*, the Court held (before the enactment of IGRA) that a State could not regulate or ban tribal bingo games when it permitted regulated non-tribal bingo. In doing so, it cited affirmative federal support for tribal self-sufficiency generally and Indian gaming in particular, as well as the tribes' reliance on tribal gaming revenues to fund governmental services.[110] But the State there sought to bar, or severely restrict, the tribe's gaming enterprise, effectively eliminating it as a revenue source, and the Court found the State's alleged interest in doing so insufficiently established to support such radical constraints.[111] Here, by contrast, Board jurisdiction will effectuate well-established, *federal* labor policy, expressed in the NLRA. Moreover, the Board does not seek to eliminate, regulate, or affect the Band's gaming operations.[112]

The Band and its amici (Br. 7, 22, 27, 32, 40, 50, 58; Chickasaw A-Br. 2-3, 10-17; Congress A-Br. 25) emphasize that the Band established and operates the Resort pursuant to IGRA, but that does not satisfy the *Coeur d'Alene* self-governance exception or otherwise immunize the Resort from all other applicable

---

[109] 480 U.S. 202 (1987).

[110] *Id.* at 218-20.

[111] *Id.* at 221.

[112] *See San Manuel*, 475 F.3d at 1315 (describing NLRA's effect on tribal-casino revenues as "unpredictable, but probably modest").

federal law. As an initial matter, the Resort in fact comprises a number of interrelated enterprises, many of which (dining establishments, a campground, a hotel, and an event center) do not directly involve gaming. And, as the Board explained, and the D.C. Circuit agreed, in *San Manuel*, nothing in IGRA's regulation of tribal gaming activities precludes the Board's assertion of jurisdiction over labor relations.[113] Likewise, nothing in the NLRA interferes with tribal management of IGRA gaming.

Congress enacted IGRA in 1988 in response to the Supreme Court's holding in *Cabazon, supra*.[114] The statute was designed not to endow Indian tribes with exclusive authority over gaming and all associated commercial enterprises on tribal lands but "'to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme.'"[115] As the D.C. Circuit found in *San Manuel*, "IGRA certainly permits tribes and states to regulate gaming activities, but it is a considerable leap from that

---

[113] 341 NLRB at 1064, *enforced* 475 F.3d at 1318 ("We find no indication that Congress intended to limit the scope of the NLRA when it enacted IGRA, and certainly nothing strong enough to render the Board's interpretation of the NLRA impermissible.").

[114] 480 U.S. at 221. *See Cabazon Band of Mission Indians v. Nat'l Indian Gaming Comm'n*, 14 F.3d 633, 634 (D.C. Cir. 1994)

[115] *In Re Indian Gaming Related Cases*, 331 F.3d 1094, 1096 (9th Cir. 2003) (citation omitted).

bare fact to the conclusion that Congress intended federal agencies to have no role in regulating employment issues that arise in the context of tribal gaming…."[116]

The NLRA, in turn, is confined to regulating statutory employers' labor relations, by protecting statutory employees' right to act concertedly for mutual aid and protection and imposing on employers a duty to bargain with their employees' chosen representative. Contrary to the Band's and its amicis' suggestions (Br. 34-35; Chickasaw A-Br. 13, 15-17, 25-26; Navajo A-Br. 15-17), the NLRA does not dictate any particular terms of employment (e.g., respecting drug and alcohol testing or Indian hiring preferences),[117] or prevent employers from making basic personnel decisions,[118] much less affect tribes' control over their gaming operations. Accordingly, the NLRA is no more inconsistent with IGRA gaming

---

[116] 475 F.3d at 1318. *See also Chapa De*, 316 F.3d at 1000 ("[W]hile Chapa-De argues that providing for the *health* needs of its members is an intramural activity related to self-governance, it does not argue that its *labor relations* are."). *Cf. Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1192 (9th Cir. 2008) (holding IGRA is not comprehensive enough scheme to preempt state taxation of construction materials for tribal-casino construction: "Simply put, IGRA is a gambling regulation statute, not a code governing construction contractors, the legalities of which are of paramount state and local concern").

[117] *See H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103-09 (1970). *Accord San Manuel*, 341 NLRB at 1064 n.23.

[118] *Palace Sports & Entm't, Inc. v. NLRB*, 411 F.3d 212, 224 (D.C. Cir. 2005) (NLRA does not prevent employer from "discharge[ing] an employee for a good reason, a bad reason, or no reason, so long as it is not for an unlawful reason.") (citation omitted).

enterprises than it is with other commercial operations, whose proprietors are subject to the NLRA yet retain ultimate control over their employment policies.

3. There is no evidence Congress intended to exempt Indian tribes operating in interstate commerce from the NLRA

The Board also reasonably determined (D&O 3) that the third *Coeur d'Alene* exception has not been satisfied. As detailed above (Part A & Part B.1), nothing in the statutory language or legislative history of the NLRA suggests that Congress intended to foreclose Board jurisdiction over Indian tribes operating commercial enterprises like the Resort. The Band asserts (Br. 52-55; *see also* Congress A-Br. 17) that Congress' failure to abrogate tribal sovereign immunity with respect to private Section 301 lawsuits to enforce certain collective-bargaining agreements and rights under the NLRA demonstrates an intent to remove tribes from the Board's jurisdiction. But, as the Board stated (D&O 3 n.6) and the Band concedes (Br. 55), Indian tribes enjoy no such immunity against the Board, which effectuates the policies of the NLRA on behalf of all statutory employees, including those working for covered tribal employers.[119] Thus, assuming without deciding that tribes are immune from Section 301 suit, the Board (D&O 3 n.6) held that such immunity "would not affect the Board's authority to effectuate the public policies of the [NLRA]."

---

[119] *See Karuk Tribe*, 260 F.3d at 1075.

The Band's argument fails, moreover, to account for the distinction between sovereign authority and sovereign immunity (*see supra*, note 88). Consistent with that distinction, courts – including the Supreme Court – have recognized that Congress can, and occasionally does, impose legal obligations on Indian tribes without necessarily subjecting them to private causes of action to enforce those obligations.[120] That is particularly true where other avenues of relief are possible, as they are here in Board proceedings under the NLRA.[121] Consequently, the absence of language explicitly waiving tribal sovereign immunity with respect to private Section 301 lawsuits – even if Congress assumed that meant tribes would be immune – does not suggest, much less dictate, the conclusion that Congress intended to exclude tribes from the NLRA's coverage. Categorically exempting tribes from the NLRA, even when they operate as typical commercial employers in

---

[120] *See Okla. Tax Comm'n*, 498 U.S. at 512-14 (holding state can require tribal retail store to collect state sales tax on reservation sales to non-Indians but cannot enforce right in court due to tribal sovereign immunity); *Santa Clara*, 436 U.S. 49, 58-72 (declining to imply civil cause of action or waiver of sovereign immunity into Indian Civil Rights Act to enforce restrictions it imposes on tribal governments); *Fla. Paraplegic*, 166 F.3d at 1134 ("The juxtaposition of [ADA] Title III's applicability to the [tribe] with the tribe's sovereign immunity from suit by disabled individuals to enforce their right to accommodations may be troubling, but it is not unprecedented.") (citing *Santa Clara*).

[121] *See Santa Clara*, 436 U.S. at 65-66 (rejecting reasoning of lower court that right of action was required to effectuate statutory purpose, noting remedies were available in tribal courts and before non-judicial tribal institutions). *See also Okla. Tax Comm'n*, 498 U.S. at 514 (rejecting argument that immunity resulted in right without remedy, citing alternatives).

interstate commerce, would be the "absurd" outcome that would, in the Band's words (Br. 54), "destroy the uniformity that is so central to the NLRA."

4. As in *San Manuel*, the Resort is a typical commercial enterprise, affirmatively and primarily engaging with non-Indians and in interstate commerce

Having determined that the Band failed to demonstrate that any *Coeur d'Alene* exception applies, the Board turned to its final, discretionary analysis and found (D&O 4) that, for the reasons discussed in *San Manuel*, policy considerations weigh in favor of Board jurisdiction. That determination is well founded. As discussed, the nature of the Resort's business, its competition with other similar enterprises for non-Indian patrons, and the fact that its labor policy applies primarily to non-Indians combine to "affect interstate commerce in a significant way," implicating the policies underlying the NLRA.[122] And, conversely, those same aspects of the Resort's operations mean that Board jurisdiction will not interfere unduly with the Band's autonomy, particularly because it will not entail application of the NLRA beyond the Resort to purely intramural tribal concerns.[123]

In conclusion, the Board's *San Manuel* standard, derived from a broadly accepted circuit-court approach, accommodates the effectuation of the

---

[122] *San Manuel*, 341 NLRB at 1062-63.

[123] *See id.*

congressional policies embodied in the NLRA to the unique sovereign status of Indian tribes, recognizing the superiority of the federal government, and the importance and validity of both its Indian and its labor policies. The Board reasonably applied that standard to assert jurisdiction here, rejecting the Band's attempt to exempt its commercial gaming, hospitality, and entertainment complex from federal regulations applicable to all such enterprises.

CONCLUSION

The Board respectfully requests that the Court enter a judgment enforcing in full the Board's Order, and denying the Band's petition for review.

s/ Meredith L. Jason
MEREDITH L. JASON
Deputy Assistant General Counsel

s/ Jill A. Griffin
JILL A. GRIFFIN
Supervisory Attorney

s/ Kira Dellinger Vol
KIRA DELLINGER VOL
Attorney

National Labor Relations Board
1099 14th St., NW
Washington, D.C. 20570
(202) 273-2949
(202) 273-0656

LAFE E. SOLOMON
Acting General Counsel
CELESTE J. MATTINA
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel
National Labor Relations Board

August 2013
g:/acbcom/Little River-final brief-jgkv

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LITTLE RIVER BAND OF OTTAWA INDIANS	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 13-1464
	*	13-1583
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	7-CA-051156
	*	
Respondent/Cross-Petitioner	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,922 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 12th day of August, 2013

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LITTLE RIVER BAND OF OTTAWA INDIANS	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 13-1464
	*	13-1583
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	7-CA-051156
	*	
Respondent/Cross-Petitioner	*	

CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

I certify foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Kaighn Smith, Jr.
Drummond Woodsum
84 Marginal Way
Suite 600
Portland, ME 04101

Dan Himmelfarb
Mayer Brown
1999 K Street, N.W.
Washington, DC 20006

Kimberly G. McGrath
375 River Street
Manistee, MI 49660

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 12th day of August, 2013