

Nos. 13-1569, 13-1629

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN

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**

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

RICHARD F. GRIFFIN, JR.
General Counsel

JENNIFER ABRUZZO
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)
Statement of jurisdiction	1
Oral argument statement	2
Statement of the issue presented	2
Statement of the case.....	2
I. The Board’s findings of fact.....	4
A. Background – the Saginaw Chippewa Indian Tribe	4
B. The 1855 and 1864 Treaties	4
C. The Soaring Eagle Casino and Resort.....	5
D. The Casino’s no-solicitation rule	6
E. Discipline and discharge of Susan Lewis.....	6
II. The Board’s conclusions and order.....	7
Summary of argument.....	8
Standard of review	10
Argument.....	12
The Board properly asserted jurisdiction over the Casino, an employer competing interstate commerce, with mostly non-Indian employees and customers	13

Headings – Cont’d

Page(s)

- A. The Board reasonably held that its broad statutory jurisdiction extends to tribal employers operating in interstate commerce15
 - 1. The NLRA’s definition of “employer” encompasses tribal businesses engaged in the national economy, which do not fit any of the statutory exemptions.....16
 - 2. The Board’s interpretation of its statutory jurisdiction is consistent with the history and structure of the NLRA21
 - a. The context of the NLRA’s enactment does not undermine the Board’s statutory construction21
 - b. Congress’ 1947 amendments to the NLRA do not demonstrate an intent to exclude tribes from the Board’s jurisdiction24
 - 3. Indian law does not mandate a different interpretation of the NLRA26

- B. The *San Manuel* standard, derived from Supreme Court and Circuit Court precedent, accommodates federal labor and Indian policies29
 - 1. As a federal statute of general application, the NLRA presumptively applies to tribal enterprises30
 - 2. *San Manuel* applies Indian-law canons of construction to protect core tribal sovereignty, Indian treaties, and congressional authority.....33
 - a. The self-governance exception34
 - b. The treaty-rights exception38
 - c. The congressional-intent exception40
 - d. The Board’s policy-balancing inquiry40

Headings – Cont’d

Page(s)

- 3. *San Manuel’s* framework conforms to Supreme Court precedent42

- C. The Board properly asserted jurisdiction over the Casino46
 - 1. The Casino’s operations are not intramural self-governance47
 - 2. Application of the NLRA to the Casino will not impair the Tribe’s specific treaty rights56
 - 3. There is no evidence Congress intended to exempt tribes from the NLRA.....58
 - 4. The balance of labor and Indian policies favors Board jurisdiction58

- D. The Board’s assertion of jurisdiction is not unconstitutional59

- Conclusion60

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Barnhart v. Walton</i> , 535 U.S. 212 (2002).....	12
<i>Beth Israel Hosp. v. NLRB</i> , 437 U.S. 483 (1978).....	13
<i>Beverly Health & Rehab. Servs., Inc. v. NLRB</i> , 297 F.3d 468 (6th Cir. 2002)	13
<i>Boilermakers v. NLRB</i> , 858 F.2d 756 (D.C. Cir. 1988).....	55
<i>Bryan v. Itasca County</i> , 426 U.S. 373 (1976).....	43
<i>Buffalo Forge Co. v. United Steelworkers</i> , 428 U.S. 397 (1976).....	54
<i>California v. Cabazon Band of Mission Indians</i> , 480 U.S. 202 (1987).....	18,42,43,50
<i>Charles Dowd Box Co. v. Courtney</i> , 368 U.S. 502 (1962).....	25
<i>Cherokee Nation v. Georgia</i> , 30 U.S. (5 Pet.) 1 (1831).....	17,37
<i>Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.</i> , 467 U.S. 837 (1984).....	10,11,12
<i>Chickasaw Nation operating Winstar World Casino</i> , 359 NLRB No. 163, 2013 WL 3809177 (July 12, 2013).....	48,57
<i>Chickasaw Nation v. United States</i> , 208 F.3d 871 (10th Cir. 2000)	39,48,50

Cases-Cont'd	Page(s)
<i>Chickasaw Nation v. United States</i> 534 U.S. 84 (2001).....	27
<i>Choctaw Nation of Indians v. United States</i> , 318 U.S. 423 (1942).....	57
<i>Choctaw Nation v. Okla.</i> ,, 397 U.S. 620 (1970).....	27
<i>City of Arlington, Tex. v. FCC</i> , 133 S.Ct. 1863 (2013).....	11
<i>Cook v. United States</i> , 86 F.3d 1095 (Fed. Cir. 1996)	30
<i>Crestline Mem'l Hosp. Ass'n v. NLRB</i> , 668 F.2d 243 (6th Cir. 1982)	11
<i>Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.</i> , 276 F.3d 1150 (9th Cir. 2002)	26
<i>Delaware Coca-Cola Bottling Co. v. Teamsters Local 326</i> , 624 F.2d 1182 (3d Cir. 1980)	54
<i>Dobbs v. Anthem Blue Cross & Blue Shield</i> , 600 F.3d 1275 (10th Cir. 2010)	28,45
<i>Donovan v. Coeur d'Alene Tribal Farm</i> , 751 F.2d 1113 (9th Cir. 1985)	14,29,30,32-34,36,38,40-42,44-47,53,58
<i>Donovan v. Navajo Forest Prods. Indus.</i> , 692 F.2d 709 (10th Cir. 1982)	46,56
<i>EEOC v. Cherokee Nation</i> , 871 F.2d 937 (10th Cir. 1989)	28,45

Cases-Cont'd	Page(s)
<i>EEOC v. Fond du Lac Heavy Equip. & Constr. Co.</i> , 986 F.2d 246 (8th Cir. 1993)	31,38,46
<i>EEOC v. Karuk Tribe Housing Auth.</i> , 260 F.3d 1071 (9th Cir. 2001)	25,29,35,45,46
<i>Elec. Contractors, Inc. v. NLRB</i> , 245 F.3d 109 (2d Cir. 2001)	15
<i>FCC v. Fox Television Stations, Inc.</i> , 556 U.S. 502 (2009).....	18
<i>Fla. Paraplegic, Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla.</i> , 166 F.3d 1126 (11th Cir. 1999)	25,30,32,36,44,47
<i>Fort Apache</i> , 226 NLRB 503 (1976)	18
<i>FPC v. Tuscarora Indian Nation</i> , 362 U.S. 99 (1960).....	14,22,29,30,31,33,39,45
<i>Frenchtown Acquisition Co. v. NLRB</i> , 683 F.3d 298 (6th Cir. 2012)	19
<i>Gaming Corp. of America v. Dorsey & Whitney</i> , 88 F.3d 536 (8th Cir. 1996)	51
<i>Garner v. Teamsters Local 776</i> , 346 U.S. 485 (1953).....	24
<i>Glen Manor Home for Jewish Aged v. NLRB</i> , 474 F.2d 1145 (6th Cir. 1973)	15
<i>Grand Traverse Band of Ottawa & Chippewa Indians v. Office of U.S. Atty. for W. Dist. of Mich.</i> , 369 F.3d 960 (6th Cir. 2004)	28

Cases-Cont'd	Page(s)
<i>H.K. Porter Co. v. NLRB</i> , 397 U.S. 99 (1970).....	52
<i>Holly Farms Corp. v. NLRB</i> , 517 U.S. 392 (1996).....	10,19
<i>In re Indian Gaming Related Cases</i> , 331 F.3d 1094 (9th Cir. 2003)	50
<i>INS v. Chadha</i> , 462 U.S. 919 (1983).....	59
<i>Iowa Mutual Ins. Co. v. LaPlante</i> , 480 U.S. 9 (1987).....	45
<i>Kerr-McGee Corp. v. Navajo Tribe of Indians</i> , 471 U.S. 195 (1985).....	37
<i>Keweenaw Bay Indian Community v. Naftaly</i> , 452 F.3d 514 (6th Cir. 2006)	44
<i>Kindred Nursing Ctrs. East, LLC v. NLRB</i> , 727 F.3d 552 (6th Cir. 2013)	18
<i>Kiowa Tribe of Okla. v. Mfg. Techs., Inc.</i> , 523 U.S. 751 (1998).....	24,26,38,49
<i>Lazore v. CIR</i> , 11 F.3d 1180 (3d Cir. 1993)	30
<i>Little River Band of Ottawa Indians Tribal Government</i> , 359 NLRB No. 84, 2013 WL 1123814 (March 18, 2013)	47
<i>Louisiana Pub. Serv. Comm'n v. FCC</i> , 476 U.S. 355 (1986).....	59

Cases-Cont'd	Page(s)
<i>Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus.</i> , 939 F.2d 683 (9th Cir. 1991)	53
<i>Mashantucket Pequot Tribe v. Town of Ledyard</i> , 722 F.3d 457 (2d Cir. 2013)	51
<i>Massachusetts v. United States</i> , 333 U.S. 611 (1948).....	31
<i>McClanahan v. State Tax Comm'n of Ariz.</i> , 411 U.S. 164 (1973).....	26
<i>Meijer, Inc. v. NLRB</i> , 463 F.3d 534 (6th Cir. 2006)	13
<i>Memphis Biofuels, LLC v. Chickasaw Nation Indus.</i> , 585 F.3d 917 (6th Cir. 2009)	43
<i>Menominee Tribal Enters. v. Solis</i> , 601 F.3d 669 (7th Cir. 2010)	18,45,47,53
<i>Menominee Tribe of Indians v. United States</i> , 391 U.S. 404 (1968).....	43,44
<i>Merrion v. Jicarilla Apache Tribe</i> , 455 U.S. 130 (1982).....	28,37,43
<i>Minnesota v. Mille Lacs Band of Chippewa Indians</i> , 526 U.S. 172 (1999).....	43,44
<i>Montana v. Blackfeet Tribe</i> , 471 U.S. 759 (1985).....	28
<i>Navajo Tribe v. NLRB</i> , 288 F.2d 162 (D.C. Cir. 1961).....	31,32

Cases-Cont'd	Page(s)
<i>Nero v. Cherokee Nation of Okla.</i> , 892 F.2d 1457 (10th Cir. 1989)	44,46
<i>Nevada v. Hicks</i> , 533 U.S. 353 (2001).....	34
<i>New Mexico v. Mescalero Apache Tribe</i> , 462 U.S. 324 (1983).....	42,43
<i>NLRB v. Chapa De Indian Health Program, Inc.</i> , 316 F.3d 995 (9th Cir. 2003)	31,32
<i>NLRB v. City Disposal Sys. Inc.</i> , 465 U.S. 822 (1984).....	11
<i>NLRB v. E.C. Atkins</i> , 331 U.S. 398 (1947).....	17
<i>NLRB v. Good Shepherd Home, Inc.</i> , 145 F.3d 814 (6th Cir. 1998)	10
<i>NLRB v. Harrah's Club</i> , 362 F.2d 425 (9th Cir. 1966)	15
<i>NLRB v. Kentucky River Cmty. Care</i> , 532 U.S. 706 (2001).....	33
<i>NLRB v. Mackay Radio & Tel. Co.</i> , 304 U.S. 333 (1938).....	54
<i>NLRB v. Main St. Terrace Care Ctr.</i> , 218 F.3d 531 (6th Cir. 2000)	10
<i>NLRB v. New York</i> , 436 F. Supp. 335 (E.D.N.Y. 1977), <i>aff'd mem.</i> , 591 F.2d 1331 (2d Cir. 1978).....	55

Cases-Cont'd	Page(s)
<i>NLRB v. Pentre Elec., Inc.</i> , 998 F.2d 363 (6th Cir. 1993)	10
<i>NLRB v. Pueblo of San Juan</i> , 276 F.3d 1186 (10th Cir. 2002) (en banc)	28,31,32
<i>NLRB v. Reliance Fuel Oil Corp.</i> , 371 U.S. 224 (1963).....	15
<i>NLRB v. Town & Country Elec., Inc.</i> , 516 U.S. 85 (1995).....	11
<i>NLRB v. Webcor Packaging, Inc.</i> , 118 F.3d 1115 (6th Cir. 1997)	10
<i>Oneida County v. Oneida Indian Nation</i> , 470 U.S. 226 (1985).....	28,44
<i>Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.</i> , 498 U.S. 505 (1991).....	25
<i>Painting Co. v. NLRB</i> , 298 F.3d 492 (6th Cir. 2002)	10,12
<i>Palace Sports & Entm't, Inc. v. NLRB</i> , 411 F.3d 212 (D.C. Cir. 2005).....	52
<i>Phillips Petroleum Co. v. EPA</i> , 803 F.2d 545 (10th Cir. 1986)	30-31
<i>Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.</i> , 458 U.S. 832 (1982).....	28
<i>Reich v. Great Lakes Indian Fish & Wildlife Comm'n</i> , 4 F.3d 490 (7th Cir. 1993)	37,45,57

Cases-Cont'd	Page(s)
<i>Reich v. Mashantucket Sand & Gravel</i> , 95 F.3d 174 (2d Cir. 1996)	30,35,47,53
<i>Richmond Screw Anchor Co. v. United States</i> , 275 U.S. 331 (1928).....	31
<i>Ryder Distrib. Res.</i> , 311 NLRB 814 (1993)	52
<i>Salt River Valley Water Users' Ass'n v. NLRB</i> , 206 F.2d 325 (9th Cir. 1953)	55
<i>San Manuel Indian Bingo & Casino</i> , 341 NLRB 1055 (2004) <i>enforced</i> , 475 F.3d 1306 (D.C. Cir. 2007)	7-9,13,14,17-22,24,29-31,33,34,40-42,45,51,52,57,58
<i>San Manuel Indian Bingo & Casino v. NLRB</i> , 475 F.3d 1306 (D.C. Cir. 2007).....	7,13,15,16,17,18,27,37,49,51
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49 (1978).....	26,45
<i>Smart v. State Farm Ins.</i> , 868 F.2d 929 (7th Cir. 1989)	18,30,32,33,36,39,56
<i>Snyder v. Navajo Nation</i> , 382 F.3d 892 (9th Cir. 2004)	45
<i>Solem v. Bartlett</i> , 465 U.S. 463 (1984).....	43
<i>Solis v. Matheson</i> , 563 F.3d 425 (9th Cir. 2009)	39
<i>South Carolina v. Catawba Indian Tribe, Inc.</i> , 476 U.S. 498 (1986).....	28

Cases-Cont'd	Page(s)
<i>Southern Indian</i> , 290 NLRB 436 (1988)	18
<i>Southern S.S. Co. v. NLRB</i> , 316 U.S. 31 (1942).....	29
<i>Southland Royalty Co. v. Navajo Tribe of Indians</i> , 715 F.2d 486 (10th Cir. 1983)	28
<i>State Bank of India v. NLRB</i> , 808 F.2d 526 (7th Cir. 1986)	17,19
<i>Superintendent of Five Civilized Tribes v. CIR</i> , 295 U.S. 418 (1935).....	22-23
<i>Sure-Tan, Inc. v. NLRB</i> , 467 U.S. 883 (1984).....	10,11
<i>U.S. Dept. of Labor v. OSHRC</i> , 935 F.2d 182 (9th Cir. 1991)	38,39,49,57
<i>United States v. Dakota</i> , 796 F.2d 186 (6th Cir. 1986)	27,44,53-54
<i>United States v. Dion</i> , 476 U.S. 734 (1986).....	44
<i>United States v. Mazurie</i> , 419 U.S. 544 (1975).....	43
<i>United States v. Santee Sioux Tribe of Neb.</i> , 254 F.3d 728 (8th Cir. 2001)	53
<i>United States v. Winans</i> , 198 U.S. 371 (1905).....	38

Cases-Cont'd

Page(s)

United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. NLRB,
544 F.3d 841 (7th Cir. 2008)54

Washington v. Confederated Bands & Tribes of the Yakima Indian Nation,
439 U.S. 463 (1979).....28

Washington v. Confederated Tribes of Colville Indian Reservation,
447 U.S. 134 (1980)..... 18,44,49

Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,
443 U.S. 658 (1979).....44

Whetsel v. Network Prop. Servs.,
246 F.3d 897 (7th Cir. 2001)31

White Mountain Apache Tribe v. Bracker,
448 U.S. 136 (1980)..... 28,43

Worcester v. Georgia,
31 U.S. 515 (1832).....28

World Evangelism, Inc.,
248 NLRB 909 (1980) *enforced*,
656 F.2d 1349 (9th Cir. 1981)23

Yukon Kuskokwim Health Corp.,
341 NLRB 1075 (2004)41

Statutes:	Page(s)
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 2 (29 U.S.C. § 152).....	11,19
Section 2(2) (29 U.S.C. § 152(2)).....	13,16,17,18
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	3,15
Section 8(a)(3) (29 U.S.C. § 158(a)(3)).....	3,15
Section 8(g) (29 U.S.C. § 158(g)).....	55
Section 10(a) (29 U.S.C. § 160(a)).....	1,15
Section 10(e) (29 U.S.C. § 160(e)).....	2
Section 10(f) (29 U.S.C. § 160(f)).....	2
Section 14(b) (29 U.S.C. § 164(b)).....	32
Section 301 (29 U.S.C. § 185).....	24,25,26
 Indian Gaming Regulatory Act (25 U.S.C. § 2701, et seq.)	
25 U.S.C. § 2701, et seq.....	5
25 U.S.C. § 2702(1) & (2).....	51,53
25 U.S.C. § 2710(d)(8)(B).....	51
 Other Statutory Provisions	
Americans with Disabilities Act, 42 U.S.C. § 12111(5)(B)(i).....	20
Clean Air Act, 42 U.S.C. § 7601(d)(2).....	21
Clean Water Act, 33 U.S.C. §§ 1251(g), 1377.....	20
Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9626(a).....	21
Employee Retirement Income Security Act, 29 U.S.C. §§ 1321(b), 1002(32).....	20
Indian Tribal Government Tax Status Act, 26 U.S.C. §§ 7871(a)(1) & (d), 7871(b) & (e).....	20-21
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b).....	20
 Regulations:	
29 C.F.R. § 102.7.....	19

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Nos. 13-1569, 13-1629

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN

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 Saginaw Chippewa Indian Tribe of Michigan (“the Tribe”) for review, and the cross-application of the National Labor Relations Board for enforcement, of a Board Order against the Tribe. The Board had jurisdiction over the 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 April 16, 2013, and

reported at 359 NLRB No. 92 (D&O 1-11),¹ is final under Section 10(e) and (f) of the NLRA, 29 U.S.C. § 160(e) and (f). The Court has jurisdiction over both the petition and the cross-application pursuant to Section 10(e) and (f) because the unfair labor practices occurred in Michigan. The NLRA imposes no time limit for such appeals.

ORAL ARGUMENT STATEMENT

The Board believes that oral argument would assist the Court in evaluating the issue presented.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board has jurisdiction over a tribal gambling and entertainment complex which is located on tribal lands but employs over 90 percent non-Indians among its approximately 3000 workers, serves primarily non-Indians customers, and competes in interstate commerce against similar non-tribal enterprises.

STATEMENT OF THE CASE

This case came before the Board on an amended complaint issued by the Acting General Counsel, pursuant to charges filed by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America

¹ “A” is the Joint Appendix, filed with the Tribe’s brief. This brief will cite the Board’s Decision and Order (A 7-17), as “D&O.” “SA” is the Supplemental Appendix, filed with the Board’s brief. Where applicable, references preceding a semicolon are to the Board’s findings; those following, to supporting evidence.

(“the Union”). The complaint alleged that the Soaring Eagle Casino and Resort (“the Casino”), an Enterprise of the Tribe, had violated Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), by maintaining an unlawful no-solicitation policy in its Associate Handbook and by prohibiting employees from discussing the Union in the employee hallway. It further alleged that the Casino had violated Section 8(a)(3) and (1) of the NLRA, 29 U.S.C. § 158(a)(3) and (1), by suspending, then discharging, housekeeper Susan Lewis for engaging in union activities at the Casino. The Tribe denied it was subject to the NLRA. (D&O 3.)

On March 26, 2012, an administrative law judge ruled that the Board has jurisdiction over the Tribe, which had violated the NLRA as alleged. (D&O 8,10.) The Tribe filed exceptions with the Board and the Acting General Counsel cross-expected. The Tribe also challenged two Board members’ recess appointments. On April 16, 2013, the Board (Chairman Pearce, Members Griffin and Block) issued a Decision and Order adopting the judge’s decision, rejecting the recess challenge, and issuing a slightly modified order.² (D&O 1-2&n.1.)

² The Tribe notes (Br.15) that Member Griffin’s and Member Block’s recess appointments have been challenged in another case, pending before the Supreme Court, but makes no substantive argument necessitating a response.

I. THE BOARD'S FINDINGS OF FACT

A. Background – the Saginaw Chippewa Indian Tribe

The Tribe is a federally recognized Indian tribe, with a reservation in Michigan, and over 3000 members. Pursuant to its constitution, its elected Tribal Council enacts laws governing tribal members and enterprises, and manages economic development. (D&O 4.) The Tribe's government comprises 37 departments, with 159 programs, including health, education, fire and safety, economic development, a court system, and utilities. (D&O 4; A 222-24.)

B. The 1855 and 1864 Treaties

The Tribe is a successor to the Chippewa signatories to the 1855 Treaty with the Chippewas, 11 Stat. 633 (A 35-39), and the 1864 Treaty with the Chippewa of Saginaw, Swan Creek, and Black River, 14 Stat. 637 (A 40-43), which created the reservation. (D&O 3-4.) The 1855 Treaty provided that the United States would “withdraw [certain lands] from sale, for the benefit of said Indians,” affirming the Tribe's right to exclusive use and governance of a permanent homeland. (D&O 3; A 35,158-59,263,271-72,275-76.) The Tribe relinquished some lands in the 1864 Treaty, which set aside the present reservation for its “exclusive use, ownership, and occupancy” as a sovereign nation. (D&O 3; A 40.) Exclusive use includes the right to exclude non-Indians from living on the reservation. (D&O 3&n.5; A 161-

62,264-66,272-73,277.) The Tribe has invoked that right on occasion, and enacted its most recent law excluding non-Indians in 2011. (D&O 3&n.6; A 147-51,279.)

C. The Soaring Eagle Casino and Resort

The Tribe established the Casino on its reservation, pursuant to a state gaming compact and the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, et seq. (“IGRA”). The Tribe owns and controls the Casino. The Tribal Council enacted a Gaming Code and hires the Gaming Commission members, who, along with casino management, submit regular reports respecting casino operations. (D&O 4; A 54-146,217-21.) It also decides how to distribute the Casino’s revenue – about 90 percent of all tribal income – among the Tribe’s various programs, including annual revenue-sharing payments to tribal members, which amounted to \$75,000 per adult and \$13,000 per child in 2005-06. (D&O 4; A 253-54,226.)

The Casino is a sprawling operation, one of the five largest casinos in the United States. In addition to bingo, slot machines, and other casino games, the complex houses restaurants, bars, entertainment facilities, and a hotel. It is open 24 hours a day, 7 days a week, has annual revenues of approximately \$250 million, and serves around 20,000 mostly non-Indian customers each year. It advertises throughout Michigan, and competes directly with non-tribal casinos in the Detroit area. (D&O 4; SA 11-18.)

The Casino employs about 3000 employees. Approximately 221 (7.4 percent) are tribal members; of those, about 65 are managers. The Casino's chief executive officer is not a tribal member. (D&O 4; SA 9-11,19.)

D. The Casino's No-Solicitation Rule

The Casino's employee rules are in its Associate Handbook. The no-solicitation policy, which the Tribal Council passed in 2006, prohibits employees "from soliciting in any work area," and from posting materials on the Casino's premises. It defines "working area" as "any place where any employees perform job duties," and "premises" as "all property dedicated to the operations of [the Casino], including the parking lots and roadways." (D&O 5; A 152-54,203¶¶3-5.)

E. Discipline and Discharge of Susan Lewis

Susan Lewis worked in the Casino's housekeeping department from 1998 to 2002, then returned to the same job in 2005. (D&O 5; A 204¶¶6-9.) Each year since, her overall evaluation score met or exceeded performance standards. (D&O 6; A 206¶33, SA 26-54.) In 2009, Lewis contacted the Union, and subsequently participated visibly in its organizing campaign, distributing union-authorization cards, conducting local-media interviews, and signing a group letter to the Tribe's chief that expressed employees' desire to unionize. (D&O 9; SA 1-8,20-21.)

On three different occasions in 2009 and 2010, the Casino formally notified Lewis that she had violated, or would violate, the Handbook by soliciting for the Union, or discussing the Union with fellow housekeepers, in various areas of the Casino. Those areas included the employee break room and the employee hallway, where employees engage in non-work activities, passing through to access other non-work areas and attending casino-sponsored celebrations. (D&O 6; A 204-06¶¶17,19-20,26,36-41, SA 22-24.) In November 2010, Lewis again solicited a fellow housekeeper, this time in a bathroom where the other housekeeper was assigned to work. The Casino fired Lewis for violating the no-solicitation policy. (D&O 5-6; A 206¶¶28-32.) It has never disciplined another employee under that policy. (D&O 6; A 204¶10.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board asserted jurisdiction (D&O 1,6-8) pursuant to the test announced in *San Manuel Indian Bingo & Casino*, 341 NLRB 1055 (2004), *enforced*, 475 F.3d 1306 (D.C. Cir. 2007), and found (D&O 1&n.2,10) that the Tribe had violated the NLRA as alleged. The Board's remedial Order requires the Casino to: cease and desist from the violations found, and from, in any like or related manner, interfering with casino employees' NLRA rights. (D&O 1.) Affirmatively, the Order requires the Casino to offer Lewis reinstatement and make her whole for any losses due to the discrimination against

her, rescind its no-solicitation rule or revise the rule consistent with the Board's Order, and post a remedial notice. (D&O 1-2.)

SUMMARY OF ARGUMENT

The Tribe does not contest that it violated the NLRA if it is subject to Board jurisdiction. The Board asserted jurisdiction over the Tribe's Casino – a vast gaming and entertainment center that employs about 3,000 individuals and annually grosses approximately \$250 million – under its established *San Manuel* framework. In doing so, it carried out its responsibility to interpret the NLRA's definitions broadly, and in light of an evolving economy, to effectuate Congress' intent to protect the nation's employees and commerce, while also considering and accommodating federal Indian policy.

San Manuel begins with the Board's reasonable determination that the NLRA's definition of "employer" covers Indian tribes, rejecting the proposition that all tribal enterprises, no matter how quintessentially commercial or how deeply embedded in interstate commerce, are *per se* exempt from otherwise universal national labor policies. It then conducts an analysis derived from Supreme Court precedent, used by several courts of appeals, and augmented by a prudential Board inquiry further assessing the federal Indian and labor policies in each case. Rather than devaluing either the employee and commercial interests protected by federal labor law, or the national responsibilities to tribes embodied in

federal Indian law, *San Manuel* strikes a balance. It protects labor policies by asserting Board jurisdiction over large commercial enterprises employing scores of workers in operations functionally indistinguishable from those of their covered non-tribal competitors. But it does so only when jurisdiction is compatible with Indian policy because it does not interfere with tribes' core sovereignty, the federal government's treaty obligations, or Congress' plenary authority over Indian affairs.

The Tribe's critiques of *San Manuel* are unavailing. Its claims that Board jurisdiction over labor relations at the Casino would interfere with tribal governance and treaty rights, disrupt tribal gaming, or otherwise undermine congressional Indian policies expressed in IGRA and elsewhere are unsupported. The Tribe's proposed approach would, moreover, effectively prevent the application of even the most universal federal laws to tribes in the absence of explicit congressional direction. Rather than recognizing the coequal status of Indian law and treaties, as the Tribe asserts, such an outcome would elevate them above all other federal enactments and national interests. The Board's jurisdictional framework accommodates the federal government's trust responsibilities towards the tribes, but also acknowledges the superior sovereignty of the federal government. Moreover, *San Manuel* appropriately recognizes other compelling congressional goals, such as those underlying the NLRA, that the Tribe would have this Court brush aside. Finally, the Board's application of its

jurisdictional standard in this case is well-supported in the record and comports with relevant caselaw.

STANDARD OF REVIEW

“[T]he Board’s interpretation of the NLRA must be upheld if reasonably defensible.” *NLRB v. Main St. Terrace Care Ctr.*, 218 F.3d 531, 537 (6th Cir. 2000); accord *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984). The Board’s construction of the 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.” *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 409 (1996); accord *Painting Co. v. NLRB*, 298 F.3d 492, 499-500 (6th Cir. 2002).³

The Board’s interpretation of the NLRA’s jurisdictional and definitional provisions to cover tribes acting as statutory employers is entitled to deference. See *Painting Co.*, 298 F.3d at 499 (when the Board interprets the NLRA, “[i]f Congress has not directly spoken on the precise question at issue, the Court reviews the Board’s decision solely to assess whether the Board’s interpretation is based on a permissible interpretation of the statute,” i.e., “reasonable; it need not be the best interpretation”) (citing *Chevron, infra*; *Holly Farms, supra*). Both this

³ *NLRB v. Good Shepherd Home, Inc.*, 145 F.3d 814, 816 (6th Cir. 1998), which the Tribe cites to assert a *de novo* standard of review, relies on *NLRB v. Pentre Elec., Inc.*, 998 F.2d 363, 371 (6th Cir. 1993), which the Supreme Court overruled on that point in *Holly Farms*, as this Court has recognized. See *NLRB v. Webcor Packaging, Inc.*, 118 F.3d 1115, 1119 & n.2 (6th Cir. 1997).

Court and the Supreme Court have recognized the Board's role in defining the contours of the statute. *See, e.g., NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 89-90, 94 (1995) (Supreme Court affords the Board "leeway when it interprets its governing statute") (listing cases); *Sure-Tan, Inc.*, 467 U.S. at 891 (Board's role to construe term "employee" in Section 2); *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984) (Board defines scope of NLRA-protected activity; entitled to "considerable deference"); *Crestline Mem'l Hosp. Ass'n v. NLRB*, 668 F.2d 243, 244-45 (6th Cir. 1982) (Board has responsibility to weigh relevant factors in interpreting Section 2 definitions; "within the scope of the [NLRA], the [Board] has discretion whether to exercise jurisdiction") (citations omitted).

As the Tribe acknowledges (Br.16), the Supreme Court recently reaffirmed that courts must accord such deference to an agency's interpretation of a statute within the agency's expertise, even as to the scope of the agency's jurisdiction. *City of Arlington, Tex. v. FCC*, 133 S.Ct. 1863 (2013) (reaffirming *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)). The Tribe cannot show, as it must to defeat the deference the Board enjoys when interpreting the NLRA, that "the statutory text forecloses" Board jurisdiction over tribes, *City of Arlington*, 133 S.Ct. at 1871, or that Congress has otherwise "established a clear line[] the agency cannot go beyond," *id.* at 1874. There is, specifically, no merit to the Tribe's assertion (Br.16-19) that Congress, by failing

expressly to state that the NLRA covers tribes, “unambiguously withheld” authority from the Board to determine its jurisdiction over tribal employers. *See id.* at 1874 (noting absence of “a single case in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency’s substantive field”); *see also Barnhart v. Walton*, 535 U.S. 212, 218 (2002) (statutory silence “normally creates ambiguity. It does not resolve it.”).

The Board claims no deference as to the Tribe’s further assertion that Indian law categorically bars Board jurisdiction over tribes, *see Painting Co.*, 298 F.3d at 499-500, but has properly determined, as described below, that relevant precedent supports jurisdiction over tribal employers like the Casino.

ARGUMENT

The Tribe’s sole challenge to the Board’s Order is jurisdictional. It does not contest that, if it is subject to the NLRA, it violated the statute by: promulgating a no-solicitation rule that bars casino employees from soliciting coworkers during nonwork time to support a union, and from distributing union materials during nonwork time in nonwork areas; telling employees that they could not discuss the Union in the employee hallway; and disciplining and discharging housekeeper

Lewis.⁴ Accordingly, the Board is entitled to enforcement of its Order if it properly asserted jurisdiction.

THE BOARD PROPERLY ASSERTED JURISDICTION OVER THE CASINO, AN EMPLOYER COMPETING IN INTERSTATE COMMERCE, WITH MOSTLY NON-INDIAN EMPLOYEES AND CUSTOMERS

The Board applied its established standard for determining when to assert jurisdiction over tribal enterprises, developed in *San Manuel Indian Bingo & Casino*, 341 NLRB 1055 (2004), *enforced*, 475 F.3d 1306 (D.C. Cir. 2007). That standard appropriately accommodates *both* important congressional policies (labor and Indian) implicated in this case.

With respect to the NLRA, the Board in *San Manuel* reasonably determined that the definition of “employer” in Section 2(2) of the NLRA encompasses tribes. In doing so, it rejected its former interpretation of the provision as categorically barring jurisdiction over any on-reservation tribal enterprises, regardless of their impact on employee rights or the national economy, or connection to core tribal governance. Once the Board determined that such enterprises fit the statutory definition of employer, it set forth the appropriate inquiry for assessing whether it

⁴ *See* D&O 8-10 (and cases cited therein); *see also Meijer, Inc. v. NLRB*, 463 F.3d 534, 542-43 (6th Cir. 2006) (absent special circumstances, restricting employee solicitation on nonwork time violates NLRA) (quoting *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 492-93 (1978)); *Beverly Health & Rehab. Servs., Inc. v. NLRB*, 297 F.3d 468, 478 (6th Cir. 2002) (mere maintenance of an unlawful rule violates NLRA).

should nonetheless decline jurisdiction over particular ones. Specifically, it adopted, from the Supreme Court's decision in *FPC v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), a presumption that generally applicable federal statutes like the NLRA apply to Indian tribes. It then adopted three exemptions to that presumption developed by the Ninth Circuit in *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985), to protect core tribal sovereignty and federal trust obligations. And, finally, it augmented the *Tuscarora/Coeur d'Alene* framework with a Board-specific discretionary balancing of the labor and Indian policies implicated in each case.

As demonstrated below, the Board's interpretation of the NLRA's definition of "employer" as encompassing Indian tribes is reasonable, consistent with the statutory language, and calculated to effectuate federal labor policy, thus well within its broad discretion (Part A). Its approach to determining whether federal Indian policy nonetheless precludes jurisdiction over a particular tribal employer comports with relevant precedent and respects tribal sovereignty, federal treaty obligations, and Congress' plenary authority over Indian affairs (Part B). Ample evidence, moreover, supports the Board's application of *San Manuel* to find jurisdiction over the Casino, a large gaming and entertainment complex which indisputably operates comparably to its covered non-tribal competitors (Part C). Finally, the Board acted within its constitutional authority (Part D).

A. The Board Reasonably Held That Its Broad Statutory Jurisdiction Extends to Tribal Employers Operating in Interstate Commerce

Section 10(a) of the NLRA empowers the Board “to prevent any person from engaging in any unfair labor practice [defined in Section 8 of the statute] affecting commerce.” 29 U.S.C. § 160(a). Section 8(a), in turn, defines which conduct by an “employer” constitutes an unfair labor practice. 29 U.S.C. § 158(a). 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.” *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963) (listing cases); *accord San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1316 (D.C. Cir. 2007). This Court, likewise, has recognized that the Board’s jurisdiction “extends to all representation questions and unfair labor practices ‘affecting commerce.’” *Glen Manor Home for Jewish Aged v. NLRB*, 474 F.2d 1145, 1148 (6th Cir. 1973). *See also Elec. Contractors, Inc. v. NLRB*, 245 F.3d 109, 118 (2d Cir. 2001) (jurisdiction covers any unfair labor practices committed by employers engaged in commerce).

That jurisdiction clearly encompasses the labor relations of gaming enterprises, and their associated dining, lodging, and entertainment operations. *NLRB v. Harrah’s Club*, 362 F.2d 425, 427-29 (9th Cir. 1966) (upholding jurisdiction over gambling industry in case involving employees in entertainment department). The Tribe’s and amici’s arguments that it does not extend to

functionally identical tribal enterprises are unavailing. As detailed below, tribes fit the statutory definition of employer, and the NLRA contains no language exempting them. Nor does the legislative history, in which tribes are not mentioned, provide a basis for exclusion. Subjecting them to Board jurisdiction, moreover, both furthers the policies underlying the NLRA and is consistent with the statute's historical context and structure. The Tribe has, at most, pieced together an argument that the statute is ambiguous with respect to Indian tribes. Any such ambiguity, however, would mandate, not preclude, deference to the Board's interpretation of the NLRA.

1. The NLRA's definition of "employer" encompasses tribal businesses engaged in the national economy, which do not fit any of the statutory exemptions

The Board's construction of the term "employer" in NLRA Section 2(2), 29 U.S.C. § 152(2), as encompassing Indian tribes is a reasonable exercise of the Board's interpretive prerogative. Section 2(2) defines "employer" in very general terms, including any person acting as a direct or indirect agent of an employer. *See 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") (citation omitted). That broad definition plainly covers tribal enterprises like the Casino, which employs thousands of workers (e.g., housekeepers, dealers,

waitresses, cashiers), all performing essentially the same functions as employees working similar jobs for non-tribal employers. Understandably, the Tribe does not contest that the Casino is an employer as that term is commonly understood, operationally similar to non-tribal casinos, restaurants, and hotels covered by the NLRA.

The definition of a statutory employer is subject only to exemptions for: “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)...” 29 U.S.C. § 152(2). *See 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*, 331 U.S. 398, 403 (1947)); *State Bank of India v. NLRB*, 808 F.2d 526, 531 (7th Cir. 1986) (Section 2(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.”). As the Board explained in *San Manuel*, Indian tribes do not fit into any of those categories. They do not qualify as states, political subdivisions of states, or any of the other listed entities. Indeed, the Supreme Court has explicitly held that an Indian tribe is “not a state of the Union,” *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831), and that tribes are

subordinate to the federal government, but not to the states, *see California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987) (quoting *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980)). *See also San Manuel*, 341 NLRB at 1058 (collecting cases holding that Indian tribes and tribal enterprises are not states or political subdivisions thereof).

The Board in *San Manuel* further reasonably rejected an expansive construction of Section 2(2)'s enumerated exceptions, advanced here by the Tribe and amici (Br.58-59; Chickasaw A-Br.9-11; NCAI A-Br.6-10), as effectively creating a government exemption encompassing tribes. 341 NLRB at 1058; *see San Manuel*, 475 F.3d at 1316-17 (finding permissible Board's reading of exception as confined to "its ordinary and plain meaning").⁵ *See also Menominee Tribal Enters. v. Solis*, 601 F.3d 669, 670 (7th Cir. 2010) (tribe not entitled to statutory exemption for state or local government by analogy); *Smart v. State Farm Ins.*, 868 F.2d 929, 933 n.3, 936 (7th Cir. 1989) (tribe did not fit statutory

⁵ The Board in *San Manuel* rejected its prior interpretation of Section 2(2) in *Fort Apache*, 226 NLRB 503 (1976), and *Southern Indian*, 290 NLRB 436 (1988), as excluding tribes from the NLRA, consistent with agencies' prerogative to adopt reasoned policy changes. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-16 (2009) (agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one," it need only provide "a reasoned analysis for the change"); *Kindred Nursing Ctrs. East, LLC v. NLRB*, 727 F.3d 552, 560 (6th Cir. 2013) ("An administrative agency may reexamine its prior decisions and may depart from its precedents provided the departure is explicitly and rationally justified.") (citations omitted).

exemption for “federal and state governments, as well as agency and political subdivisions thereof”) (citation omitted). The Board’s interpretation is consistent with the Supreme Court’s specific admonishment that the Board must “take care that exemptions from [Board] coverage are not so expansively interpreted as to deny protection to workers the [NLRA] was designed to reach.” *Holly Farms*, 517 U.S. at 399 (discussing Section 2’s similarly broad definition of “employee,” also subject to specific exceptions); accord *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 305 (6th Cir. 2012). Indeed, the NLRA has been held not to exempt all employers that might in some sense be considered “governmental.” It does not, for example, exempt the commercial activities of a bank in the United States merely because a foreign government owns the bank. See *State Bank of India*, 808 F.2d at 530-34.⁶

Finally, the Board in *San Manuel* found no evidence that Congress intended to exclude tribes from the Board’s jurisdiction when enacting the NLRA. 341 NLRB at 1058. As it noted, the statute’s legislative history is devoid of any

⁶ The amici make much of a few courts’ apparent exemption of U.S. territories by analogy but, as the Board explained in *San Manuel*, both the existence and import of that purported expansion is questionable. 341 NLRB at 1058 n.11. The court decisions the amici cite (*Chickasaw* A-Br.10; *NCAI* A-Br.8-9) assume exempt status without analysis and, as noted in *San Manuel*, *supra*, the Board has never considered, much less resolved, the jurisdictional treatment of territories. Nor has it ever discussed or applied the regulation listing territories as exempt. (*Chickasaw* A-Br.10 (citing 29 C.F.R. § 102.7); *NCAI* A-Br.9,18 (same)).

reference to Indian tribes, and Congress knows how to exclude tribes explicitly from the coverage of general workplace statutes when that is its intent. *See San Manuel*, 341 NLRB at 1058 (quoting Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b) (“The term ‘employer’ ... does not include...an Indian tribe...”), and citing Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12111(5)(B)(i) (same)).

Conversely, when Congress wishes to treat 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, and permits their treatment as such for several others. 33 U.S.C. § 1251(g), 1377. Contrary to the amici (NCAI A-Br.20-21; *see also* Chickasaw A-Br.17), that provision, and similar language in other statutes, does not indicate congressional intent to treat tribes as states for purposes of federal law. They demonstrate that Congress consistently limits such treatment to circumstances when tribes are *acting* as governments, or substantially fulfilling “governmental functions.”⁷ That practice validates the Board’s refusal to

⁷ *See, e.g.*, ERISA, 29 U.S.C. §§ 1321(b), 1002(32) (exemption limited to tribal plans for employees performing almost exclusively “essential governmental functions but not ... commercial activities (whether or not an essential government function)”); Indian Tribal Government Tax Status Act, 26 U.S.C. § 7871(a)(1) & (d) (exemption limited to subdivisions “delegated the right to exercise one or more of the substantial governmental functions of the Indian tribal government”), § 7871(b) (treating tribes as states “only if ... the transaction involves the exercise of an essential governmental function of the Indian tribal government.”); § 7871(b) & (e) (limiting favorable tax treatment to “transaction[s] involv[ing] the exercise of

read an implicit governmental exemption into the NLRA that would categorically remove tribes from Board jurisdiction, even when they act as commercial employers. It is also consistent with the second part of the *San Manuel* framework, *see* pp.34-38, which exempts certain tribal entities from Board jurisdiction, including those performing particularly governmental functions.

2. The Board’s interpretation of its statutory jurisdiction is consistent with the history and structure of the NLRA

a. The context of the NLRA’s enactment does not undermine the Board’s statutory construction

Contrary to the Tribe and amici (Br.61; Chickasaw A-Br.18-20; NCAI A-Br.10,13-15,17), events contemporaneous to the passage of the NLRA do not demonstrate that Congress meant by its silence to exclude tribes from the statute’s coverage. Instead, the evidence lends support to the Board’s construction.

The Tribe and amici point out that when Congress enacted the NLRA in 1935, it had just committed to promoting tribal self-government by passing the Indian Reorganization Act of 1934 (“IRA”), and was actively debating the similar Oklahoma Indian Welfare Act of 1936 (“OIWA”). Congress, they assert, would

an essential governmental function of the Indian tribal government,” excluding functions “not customarily performed by State and local governments with general taxing powers”); Clean Air Act, 42 U.S.C. § 7601(d)(2) (Administrator may treat tribes as States regarding management of tribal air resources, and only if believes tribe capable of fulfilling the statutory functions); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9626(a) (treatment limited to “governing body of an Indian tribe”).

not have undermined its commitment by simultaneously subjecting tribes to the NLRA. That argument rests on the faulty assumption that federal regulation of commercial tribal employers' labor relations with their employees fundamentally undermines tribes' distinct intramural governmental functions.⁸ Moreover, the import of those self-determination statutes on Congress' mind-set is debatable.

Supreme Court cases predating the NLRA – including *Superintendent of Five Civilized Tribes v. CIR*, 295 U.S. 418 (1935), decided a few weeks before enactment – expressly rejected the proposition that statutes apply to Indians only when they so specify. *See Tuscarora*, 362 U.S. at 116-17 (discussing cases supporting “well settled” proposition that general federal laws presumptively apply to Indians). Regardless of any distinctions scholars may now draw between those cases and the issues here (Br.56; Scholars A-Br.21; *see also* Ute A-Br.18), Congress in 1935 may well have understood the cases' broad language as requiring express exemption of tribes when they ostensibly fall within a statute's coverage. *See, e.g., Five Civilized Tribes*, 295 U.S. at 420-21 (reaffirming that “[t]he intent to exclude must be definitely expressed, where, as here, the general language of the act laying the tax is broad enough to include the subject-matter”); rejecting argument that “taxation of income from trust funds of an Indian ward is so

⁸ The *San Manuel* framework exempts tribal enterprises performing intramural governmental functions from Board jurisdiction, *see* pp.34-48.

inconsistent with that relationship that exemption is a necessary implication”) (citation omitted). Combined with the contemporaneous passage of the IRA and OIWA, those cases undermine any conclusion that Congress’ failure to exclude tribes from the coverage of the NLRA was inadvertent. At a time when both labor policy and tribal self-government considerations were paramount – and recent Supreme Court cases suggested explicit language might well be necessary to exclude tribes from Board jurisdiction – Congress enacted the NLRA without a tribal exemption.

Finally, contrary to the claim that Board jurisdiction is properly limited to “private industry,” the Board, with court approval, has long interpreted the NLRA, in light of an evolving economy, to cover less traditional employers engaged in commercial enterprises. *See, e.g., World Evangelism, Inc.*, 248 NLRB 909, 913-14 (1980) (asserting jurisdiction over hotel and retail complex owned by, and used as major funding source for, religious organization; noting, “[a]lthough it is the Board’s general *practice* to decline jurisdiction over nonprofit religious organizations, the Board does assert jurisdiction over those operations of such organizations which are, in the generally accepted sense, commercial in nature”), *enforced*, 656 F.2d 1349, 1353-54 (9th Cir. 1981) (noting Congress’ implicit ratification of Board’s policy through rejection of amendment exempting all nonprofit organizations from NLRA). As the Board found, the type of competitive

tribal enterprises subject to jurisdiction under the *San Manuel* standard “play[] an increasingly important role in the Nation’s economy.” *San Manuel*, 341 NLRB at 1056 & n.4 (citing *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 757-58 (1998)). In addition, where those enterprises employ dozens, sometimes thousands, of workers performing non-governmental tasks – like housekeeping, card-dealing, food preparation, ski-resort services, and retail sales – to maintain operations functionally identical to covered non-tribal enterprises throughout the economy, the objection that jurisdiction does not comport with the regulation of private industry is specious.

b. Congress’ 1947 amendments to the NLRA do not demonstrate an intent to exclude tribes from the Board’s jurisdiction

There is no merit to amici’s argument (Chickasaw A-Br.12-13,21-22; NCAI A-Br.16) that Congress’ failure expressly to abrogate tribal sovereign immunity with respect to Section 301 lawsuits demonstrates an intent to remove tribes from the Board’s jurisdiction. That argument ignores that there are two distinct NLRA-enforcement schemes – one for the Board’s prosecution of unfair labor practices to achieve a public benefit, the other for private breach-of-contract suits.

In passing the Wagner Act in 1935, Congress designated the Board to prevent unfair labor practices on behalf of the public. *See Garner v. Teamsters Local 776*, 346 U.S. 485, 493-94, 501 (1953) (“The Board as a public agency

acting in the public interest, not any private person or group ... is chosen as the instrument to assure protection” from unfair labor practices.) (citation omitted). Congress added Section 301, 29 U.S.C. § 185, to the NLRA in 1947 to create a private-enforcement scheme for collective-bargaining agreements under established contract law. *See Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 509-13 (1962).

No law or logic requires application of sovereign-immunity rules that might bar private claims against a tribe to prevent the federal government from enforcing its generally applicable law. To the contrary, tribes have no sovereign immunity against the United States and its agencies. *See EEOC v. Karuk Tribe Housing Auth.*, 260 F.3d 1071, 1075 (9th Cir. 2001). And, to the extent certain contractual rights actionable under Section 301 may not fall within the Board’s unfair-labor-practice jurisdiction, courts have recognized that Congress can, and occasionally does, impose legal obligations on Indian tribes without necessarily subjecting them to private lawsuits to enforce those obligations. *See, e.g., Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 512-14 (1991) (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); *Fla. Paralegic, Ass’n, Inc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1134 (11th Cir. 1999) (“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 Pueblo v. Martinez*, 436 U.S. 49, 51-53, 57-59 (1978)).⁹ In short, any immunity tribes may claim in private Section 301 suits has no bearing on whether the Board can enforce public rights against tribes under other sections of the NLRA.

3. Indian Law Does Not Mandate a Different Interpretation of the NLRA

The pro-Indian canon does not, contrary to the assertions of the Tribe and amici (Br.21,58-59; Chickasaw A-Br.8,22-24; NCAI A-Br.5; Scholars A-Br.8,1), require construction of the NLRA in favor of tribal interests. That canon, which provides that ambiguities are to be construed in favor of Indians, 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). *See McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 174-76 (1973) (interpreting treaty and statute specifically addressing treatment of Indians);

⁹ *See also Kiowa*, 523 U.S. at 755 (stressing distinction between immunity from suit and exemption from substantive laws; 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”).

Choctaw Nation v. Okla., 397 U.S. 620, 630-31 (1970) (interpreting treaty). It also serves to effectuate Congress' plenary authority over Indian tribes accurately when construing statutes explicitly intended to address Indian affairs. But this Court stated in *United States v. Dakota*, 796 F.2d 186, 188 (6th Cir. 1986), that the pro-Indian canon is not applicable to the interpretation of federal laws (like the NLRA) that do not address tribal interests, and the D.C. Circuit reached the same conclusion in *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."). Moreover, 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." 534 U.S. 84, 87-88, 93-95 (2001) (rejecting argument that IGRA entitled tribe to tax exemption for certain state-operated gambling). Accordingly, the Board applies the pro-Indian canon to construe Indian treaties under its framework for assessing jurisdiction over tribal employers, but did not use it to interpret the NLRA.

Indeed, many of the cases the Tribe and amici cite respecting the pro-Indian canon involve the interpretation of Indian treaties or laws explicitly directed at, or

addressing, Indian affairs.¹⁰ While a few Tenth Circuit cases apply the canon to general federal statutes, they in turn rely exclusively on cases interpreting Indian treaties or statutes specifically directed at Indians.¹¹ Tenth Circuit precedent on this issue is not controlling and, given in-circuit and Supreme Court precedent, is not persuasive.

¹⁰ See, e.g., *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 505-06 (1986) (statute removing federal protections from particular tribe; noting pro-Indian canon “does not permit reliance on ambiguities that do not exist”); *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) (treaties); *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 839-40, 845 (1982) (treaties and statutes creating “comprehensive and pervasive” federal regulation of construction and financing of Indian schools; explaining pro-Indian canon applies to “federal statutes and regulations relating to tribes and tribal activities”); *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); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 138, 145 (1980) (“comprehensive” federal regulation of Indian timber); *Worcester v. Georgia*, 31 U.S. 515, 551-58 (1832) (treaties and statutes “regulat[ing] trade and intercourse with the Indians”); *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).

¹¹ For example, *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1190-91, 1195 (10th Cir. 2002) (en banc), discussing the NLRA, cited *Blackfeet Tribe* and *Catawba Indian Tribe*, *supra* note 10, as well as two other cases interpreting statutes addressing Indian affairs, *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 466-67, 484 (1979) (statute setting conditions under which states could assert jurisdiction over Indian reservations) and *Southland Royalty Co. v. Navajo Tribe of Indians*, 715 F.2d 486, 489-90 (10th Cir. 1983) (interpreting IRA and statute regulating Indian taxation of natural gas). See also *Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1283 (10th Cir. 2010) (ERISA; relying on similar cases); *EEOC v. Cherokee Nation*, 871 F.2d 937, 939 (10th Cir. 1989) (ADEA; same).

The related principle that evident congressional intent is required to abrogate core tribal sovereignty and treaty rights also does not undermine the Board’s NLRA construction. As explained below, the Board’s *San Manuel* standard incorporates that Indian-law canon of interpretation by adopting the *Coeur d’Alene* framework. *See generally Karuk Tribe*, 260 F.3d at 1082 (explaining, after invoking Indian-law canons of construction, that “we do not apply the normal rules of statutory construction here, but, instead, must be guided by doctrine specific to Indian law—the *Coeur d’Alene* exception”).

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

Consistent with its duty to accommodate other congressional objectives when interpreting the NLRA, *see Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942), the Board did not end its analysis in *San Manuel* with its determination that the NLRA’s definition of “employer” encompasses tribes. It sought, instead, an approach that would accommodate federal labor and Indian policies. *San Manuel*, 341 NLRB at 1056. As a result, the Board adopted the *Tuscarora/Coeur d’Alene* test – developed by the Ninth Circuit, and used by nearly every circuit court to have considered the applicability of workplace and other general federal laws to tribes – and supplemented it with a policy-balancing assessment. *See San Manuel*, 341 NLRB at 1059-60 (noting that Board already applied *Coeur d’Alene* in cases involving off-reservation tribal enterprises).

As discussed below, *San Manuel* accommodates Congress' commitment both to tribal self-government and self-sufficiency and to the employee-protection and economic goals embodied in the NLRA. Like the courts that developed the *Tuscarora/Coeur d'Alene* framework, the Board properly rejected the undifferentiated notion of tribal sovereignty advocated here. That sweeping notion would bar, in the absence of express congressional authorization, essentially all federal regulation of tribal employers.

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

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 includes Indians and their property interests.” 362 U.S. at 116. Drawing on that statement, several circuit courts have concluded that generally applicable federal workplace statutes presumptively apply to tribes. *See, e.g., Florida Paraplegic, Ass’n v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126 (11th Cir. 1999) (ADA); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996) (Occupational Safety and Health Act (“OSHA”)); *Smart*, 868 F.2d 929 (Employee Retirement Income Security Act (“ERISA”)). Still others have applied the presumption to federal laws outside the workplace. *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); *Phillips Petroleum Co. v. EPA*, 803

F.2d 545, 556 & n.14 (10th Cir. 1986) (Safe Drinking Water Act; collecting cases applying presumption to other laws); *see also NLRB v. Pueblo of San Juan*, 276 F.3d at 1199 & n.11 (en banc) (acknowledging *Tuscarora* may apply when tribe acts in proprietary capacity, but not when tribe acts as sovereign); *EEOC v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246, 248 (8th Cir. 1993) (acknowledging *Tuscarora* presumption, but finding exception for intramural dispute).

As the Board explained in *San Manuel*, Congress' clear intent for the NLRA "to have the broadest possible breadth permitted under the Constitution" qualifies it for the *Tuscarora* presumption of applicability to tribes. 341 NLRB at 1059.¹² Two circuit courts agree. *See 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). 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 ... and it is clear that the statute's reach was

¹² Although the Tribe and its amici (Br.55; Scholars A-Br.25-26,29,31; Ute A-Br.18) label the *Tuscarora* statement *dicta*, the Supreme Court decided *Tuscarora* on the ground that the general federal law in that case covered tribal lands, rejecting a contrary assertion. *Id.* at 115-18. That holding may not be dismissed as *dicta* merely because the Court could have, but did not, decide on the narrower ground that the statute referred to tribal lands. *See Massachusetts v. United States*, 333 U.S. 611, 622-23 (1948); *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 340 (1928); *Whetsel v. Network Prop. Servs.*, 246 F.3d 897, 903 (7th Cir. 2001).

intended to be broad.” *Chapa De*, 316 F.3d at 998 (footnote and citation omitted); *see also Navajo Tribe*, 288 F.2d at 165 n.4 (citing “broad and comprehensive scope” of jurisdictional provisions and key terms like “employer”). Moreover, several courts have cited characteristics shared by the NLRA when classifying other statutes (including the ADA, ERISA, and OSHA) as generally applicable.¹³

Contrary to the Tribe’s contention (Br.58; *see also Chickasaw A-Br 6-7,14*), the Tenth Circuit’s decision in *Pueblo of San Juan* does not hold otherwise. That case interpreted Section 14(b) of the NLRA, 29 U.S.C. § 164(b), which carves out what the court acknowledged to be a limited exception to the general rule that the NLRA preempts inconsistent laws. *Pueblo of San Juan*, 276 F.3d at 1197-98. The decision’s rationale is thus inapplicable to the rest of the NLRA. Indeed, the court began its analysis by highlighting that “the general applicability of federal labor law [wa]s not at issue.” *Id.* at 1991 (noting also that tribe did “not challenge the supremacy of federal law”).

¹³ *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 (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; “employer” definition broad with only a few governmental exclusions); *see id.* at 1115-16 (citing federal statutes applied to tribes without explicit language).

2. *San Manuel* applies Indian-law canons of construction to protect core tribal sovereignty, Indian treaties, and congressional authority

When evaluating the applicability of a general statute like the NLRA to tribes, *Tuscarora* is only the beginning of the analysis. The courts of appeal have established – and the Board in *San Manuel* adopted – three exceptions to the *Tuscarora* presumption. Those exceptions protect core tribal sovereignty and federal trust responsibilities through application of the Indian-law canon of construction that reserves the power to abrogate such rights to Congress. The second exception also incorporates the pro-Indian canon of construction to define treaty rights. Accordingly, as the Ninth Circuit explained in *Coeur d’Alene*, an otherwise applicable federal statute will not cover Indian tribes in the absence of express congressional direction 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.

751 F.2d at 1116.¹⁴ As detailed below, that nuanced application of the congressional-intent requirement effectively reconciles the presumptive nationwide applicability of general federal law and Supreme Court Indian-law precedent.

¹⁴ The Tribe has the burden of proving the applicability of any exemption from an otherwise governing statute. See *NLRB v. Kentucky River Cmty. Care*, 532 U.S. 706, 711 (2001); *Smart*, 868 F.2d at 936.

a. The self-governance exception

The first *Coeur d'Alene* exception safeguards tribes' sovereign power "to make their own laws and be ruled by them." *Nevada v. Hicks*, 533 U.S. 353, 361 (2001) (quotation and citations omitted). But the consensus of the Second, Seventh, Ninth, Eleventh, and D.C. circuits, adopted by the Board, D&O 7; *San Manuel*, 341 NLRB at 1063, is that intramural self-government defines that untouchable core of tribal sovereignty.

Coeur d'Alene itself held that OSHA applied to an on-reservation farm wholly owned and operated by a tribe. 751 F.2d at 116-18. The court rejected the contention that all tribal commercial activity satisfies the self-governance exception, which it viewed as applying to "purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations" 751 F.2d at 1116. 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," emphasizing that the farm was virtually identical to non-tribal commercial farms and employed both Indians and non-Indians. *Id.* Crucially, the Ninth Circuit held that the right to operate such a business in interstate commerce *free from federal health and safety regulations* is "neither profoundly intramural ... nor essential to self-government." *Id.* (internal quotations omitted).

By contrast, in *EEOC v. Karuk Tribe Housing Authority*, 260 F.3d at 1073, the Ninth Circuit held that the ADEA claims of a tribal member working for the tribal housing authority fell within the exception because the authority was providing governmental services (safe and affordable housing), not running a business. The court also highlighted that the dispute involved only tribal members (employer and employee), and that the authority's housing had 99-percent Indian occupancy. *Id.* at 1073-74, 1080-81.

Similarly, the Second Circuit, in *Reich v. Mashantucket Sand & Gravel*, 95 F.3d at 175, 177, 180-81, concluded that OSHA applied to an on-reservation tribal construction firm that employed Indians and non-Indians, and worked on the expansion of the tribe's principal source of income, a hotel-casino designed to attract out-of-state customers. The court expressly rejected as unworkable the tribe's argument – similar to those here – that courts should presume no federal statute affecting any aspect of tribal sovereignty applies without express congressional authorization. *Id.* at 177. 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.” *Id.* at 178. 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. *Id.* at 178-79.¹⁵ Like the Ninth Circuit, the Second Circuit concluded that “[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.*” *Id.* at 181.

The Seventh and Eleventh Circuits have both reached the same conclusion. *See Fla. Paraplegic*, 166 F.3d at 1127, 1129 (tribal restaurant, entertainment, and gaming facility subject to ADA accessibility requirements); *Smart*, 868 F.2d at 935 (listing general statutes applied to tribes without controversy, despite effects on sovereignty) (citing Cohen’s Handbook of Federal Indian Law 399 (1982)). The Seventh Circuit explained that, under an expansive interpretation of the self-governance exception, “[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,” a result inconsistent with the subordinate nature of tribal sovereignty. *Smart*, 868 F.2d at 935.

Although the D.C. Circuit declined to adopt *Coeur d’Alene*, it 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 typically governmental functions. Enforcing Board jurisdiction over a tribal casino, it

¹⁵ *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”).

concluded, like the Ninth Circuit, that “tribal sovereignty is not absolute autonomy, permitting a tribe to operate in a commercial capacity without legal constraint.”

San Manuel, 475 F.3d at 1314-15.

As just described, the contours of the self-governance exception are more nuanced than a simple commercial-governmental dichotomy, depending also on an employer’s engagement outside the tribe and tribal lands. The numerous court decisions cited in this brief distinguishing commercial operations embedded in the national economy from fundamentally intramural governmental functions focused on the tribal community negate any argument (Br.23-24; NCAI A-Br.22,26-29; Ute A-Br.4,19-22) that the distinction is unworkable in this context or *per se* inapplicable to tribal activities.¹⁶ Moreover, the fact that Congress has codified similar distinctions into many statutes exempting tribes from, or affording them special treatment under, federal law indicates the relevance of the inquiry with respect to those unique, “domestic dependent nations,” *Cherokee Nation*, 5 Pet. at 17, whether or not it applies to states and municipalities in other contexts. *See* pp.20-21.

¹⁶ *See, e.g., Mashantucket*, 95 F.3d at 180; *Reich v. Great Lakes Indian Fish & Wildlife Comm’n*, 4 F.3d 490, 495 (7th Cir. 1993). *Cf. Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 200 (1985) (tribal tax on mineral extraction consistent with federal regulation of mineral leases; 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]’”) (quoting *Merrion*, 455 U.S. at 145-46).

Finally, the Tribe and amici rely on inapposite cases involving sovereign immunity. *See supra* p.25-26, *infra* p.44. In one of their cases, the Supreme Court actually suggested that a distinction similar to the *Coeur d'Alene* self-governance exception might be appropriate, citing “modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities.” *See Kiowa*, 523 U.S. at 757-58 (ultimately deferring to Congress the policy decision of whether to alter established immunity).

b. The treaty-rights exception

The second *Coeur d'Alene* exception protects tribes' treaty rights from implicit abrogation and is, as the Board held (D&O 1,7-8), properly limited to specific treaty rights. As the Tribe and amici state (Br.19-20, 34-35; Scholars A-Br.13), Indian treaties do not create tribal sovereignty, but rather reserve inherent sovereignty not ceded. *See United States v. Winans*, 198 U.S. 371, 381 (1905). General treaty rights, therefore, do not logically carry more legal weight than the inherent rights they describe and reaffirm. *See U.S. Dept. of Labor v. OSHRC*, 935 F.2d 182, 186 (9th Cir. 1991) (“The identical right [to exclude] should not have a different effect because it arises from general treaty language rather than recognized, inherent sovereign rights.”); *accord Fond du Lac*, 986 F.2d at 249 n.4 (quoting *OSHRC*).

Broad inherent sovereign authority does not, as just explained, suffice to preclude application of generally applicable federal statutes. The same is true of broad treaty rights. *See Chickasaw Nation v. United States*, 208 F.3d 871, 884 (10th Cir. 2000) (treaty right of self-government not specific enough, given federal government’s superior sovereignty, to exempt tribal gaming from federal taxes); *Smart*, 868 F.2d at 934-35 (treaty right of use and occupancy puts lands within tribe’s “exclusive sovereignty” but does not bar application of ERISA); *OSHRC*, 935 F.2d at 186 (treaty right to exclude does not preclude application of OSHA, including inspections on tribal lands); *accord Solis v. Matheson*, 563 F.3d 425, 435-37 (9th Cir. 2009) (treaty right to occupy and exclude does not bar application of Fair Labor Standards Act (“FLSA”) overtime provisions to non-tribal on-reservation business, including entry to investigate violation). The Tribe’s contrary position (Br.34-36) would, as the Ninth Circuit has explained, “nullif[y]” the *Tuscarora* presumption of applicability. *See OSHRC*, 935 F.2d at 186-87; *see also id.* at 186 (allowing non-specific treaty rights to bar application of general federal laws would “only necessitate a huge quantity of statutory boilerplate”) (internal quotation and citation omitted).

According protections to broad treaty rights not granted to corresponding inherent rights would also unjustly devalue the sovereignty of tribes without treaties. That result would be incompatible with Supreme Court precedent

establishing that tribal sovereignty does not emanate from, but rather predates, the federal government, and that treaties do not create, but instead reserve, sovereign rights. To satisfy the treaty exception to jurisdiction, therefore, application of the NLRA must impair a tribe's *specific* treaty right.

c. The congressional-intent exception

The third exception defers to Congress' plenary authority over Indians. Accordingly, as *Coeur d'Alene* stated, a general federal statute will not apply to tribes where "either the statute's legislative history, or something else, proves a congressional intent not to apply the law to Indians on their reservations." 751 F.2d at 1116.

d. The Board's policy-balancing inquiry

Finally, the Board in *San Manuel* held that, even in cases where *Coeur d'Alene* is not an impediment to jurisdiction, the Board will "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." *San Manuel*, 341 NLRB at 1062. That discretionary inquiry examines whether the employer: (1) deliberately engages in and affects interstate commerce as a typical commercial enterprise, employing and catering to non-Indians, thus invoking the Board's duty to effectuate the NLRA, or (2) primarily fulfills traditionally tribal or customarily

governmental functions, implicating core sovereignty whose protection will likely take precedence.

In *San Manuel*, the Board held that those considerations weighed in favor of jurisdiction because the casino was a typical business, 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 to intramural tribal matters. *Id.* at 1063-64. It then determined that the casino's on-reservation location was insufficient to outweigh the factors favoring jurisdiction.

By contrast, in *Yukon Kuskokwim Health Corp.*, the Board declined jurisdiction pursuant to the same inquiry. 341 NLRB 1075, 1076 (2004). It cited the facts that the employer, an off-reservation hospital run by Native Alaskan tribes, but employing few Native Alaskans had: (1) a "relatively limited" impact on commerce, with 95-percent Native Alaskan patients and no non-tribal competitors; and (2) a unique governmental function "fulfilling the Federal Government's trust responsibility to provide free health care to Indians." *Id.* at 1075-77. The juxtaposition of *San Manuel* and *Yukon Kuskokwim* demonstrates that the Board takes care to accommodate tribal sovereignty, even when the *Coeur d'Alene* exceptions do not bar jurisdiction.

3. *San Manuel's* framework conforms to Supreme Court precedent

The prevailing circuit-court understanding, adopted by the Board in *San Manuel*, is thus that the application of general federal laws to Indians requires evident congressional intent only when such application would impair core tribal sovereignty or specific treaty rights, or flout congressional purpose. That approach comports with Supreme Court precedent, which recognizes the breadth of retained inherent sovereignty described by the Tribe and amici, but makes clear that not all attributes of that sovereignty require express abrogation.

In *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), for example, the Supreme Court explained, using language reminiscent of *Coeur d'Alene*, that a State may not infringe on reservation Indians' power "to prescribe the conduct of tribal members," or right "to make their own laws and be ruled by them" without express congressional authorization. *Id.* at 332 (citations omitted). 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. *Id.* at 333 (alteration in original) (internal quotation and citation omitted).¹⁷ Moreover, the Court based its holding that New Mexico could

¹⁷ *Accord Cabazon*, 480 U.S. at 215-16 & n.17 (state may sometimes assert jurisdiction over non-member – and, exceptionally, over tribal-member – activities on reservations without express authorization) (quoting *Mescalero*). *See generally*

not regulate non-member hunting on tribal lands partly on the federal government's express authorization and supervision of the tribe's comprehensive wildlife-management program. *Mescalero*, 462 U.S. at 328-41.

The Tribe's and amici's cases (Br.22,24n.97,35,37-38,43,54; Chickasaw A-Br.4-6,24; Scholars A-Br.8,11-12,16-17,22-25; Ute A-Br.5,29-31) do not support their contrary, undifferentiated conception of tribal sovereignty. In *Mescalero* – like many other Supreme Court cases defining the contours of tribal sovereignty – the tribe and the federal government jointly opposed application of a particular state law. Likewise, many of the Tribe's and amici's cases do not concern an alleged conflict between tribal sovereignty and *federal* law, much less a federal law of general applicability.¹⁸ *Cf. Cabazon*, 480 U.S. at 207 (“[T]ribal sovereignty is

Bracker, 448 U.S. at 145 (validity of 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”).

¹⁸ See, e.g., *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 176, 185 (1999) (state power to regulate tribe's hunting and fishing); *Solem v. Bartlett*, 465 U.S. 463, 464-66, 470 (1984) (state did not have criminal jurisdiction over Indian on tribal land); *Merrion*, 455 U.S. 130 (federal statute authorizing state taxation of mineral lessees on tribal lands does not preclude tribal taxation of same; two sovereigns may tax same transaction); *Bryan v. Itasca County*, 426 U.S. 373 (1976) (state power to tax on tribal lands); *United States v. Mazurie*, 419 U.S. 544, 556-58 (1975) (Congress delegated regulation of alcohol on tribal lands to tribe; does not decide whether tribe could regulate without delegation); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 407 (1968) (state hunting and fishing regulations); *Memphis Biofuels, LLC v. Chickasaw Nation Indus.*, 585 F.3d 917

dependent on, and subordinate to, only the Federal Government, not the States.”) (quoting *Colville*, 447 U.S. at 154); *Dakota*, 796 F.2d at 188 (distinct issues involved when evaluating assertion of federal, rather than state, authority over tribe). Many also involve abrogation of treaty rights, consistent with the second *Coeur d’Alene* exemption.¹⁹ And still others involve the distinct sovereign-immunity doctrine, which provides further evidence that not all sovereign attributes are equal. See *Fla. Paraplegic*, 166 F.3d at 1130 (tribal immunity entitled to greater protection than some other aspects of tribal sovereignty); *Nero v. Cherokee Nation of Okla.*, 892 F.2d 1457, 1459, 1461 (10th Cir. 1989) (limitation of tribe’s sovereign power does not necessarily limit its immunity). 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. That would amount to a determination that tribal sovereignty is equal, or superior, to that of the federal government. The law is just the opposite.

(6th Cir. 2009) (dismissing private company’s lawsuit against tribal enterprise based on sovereign immunity).

¹⁹ See, e.g., *Mille Lacs*, 526 U.S. at 202-03; *United States v. Dion*, 476 U.S. 734, 737-38 (1986); *Oneida Indian Nation*, 470 U.S. at 246-47; *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 674-76 (1979); *Menominee Tribe*, 391 U.S. at 412-13; *Keweenaw Bay Indian Community v. Naftaly*, 452 F.3d 514, 523-24 (6th Cir. 2006).

Ultimately, most, if not all, cases where courts have resolved conflicts between tribal sovereignty and general federal law in favor of tribes fit neatly into the space *Coeur d'Alene* carves out for exclusive tribal sovereignty over intramural self-governance, or protection of treaty rights, whether or not the courts have applied that test. In *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), 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 within the meaning of *Coeur d'Alene*. *San Manuel*, 341 NLRB at 1061. Similarly, the Seventh Circuit in *Great Lakes*, 4 F.3d 490, declined to apply the FLSA to employees performing law-enforcement duties, traditionally a key governmental function. *See Menominee*, 601 F.3d 669, 670-71 (7th Cir. 2010) (applying *Tuscarora/Coeur d'Alene*, and explaining that *Great Lakes* fits first exception). And several other decisions involve similar core governmental functions. *See, e.g., Dobbs*, 600 F.3d at 1285 (employee helped manage tribal treasury, which court found related to “essential government functions”); *Snyder v. Navajo Nation*, 382 F.3d 892, 894-96 (9th Cir. 2004) (tribal law-enforcement officers); *EEOC v. Cherokee Nation*, 871 F.2d at 938 (employee at tribe’s Department of Health and Human Services); *Karuk Tribe*, 260 F.3d at 1080 (tribal housing authority).²⁰

²⁰ *Cf. Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-72 (1978) (declining to

Other cases involved purely intramural concerns within the first exception, such as on-reservation disputes between tribes and member employees, or tribal membership rules, *see, e.g., Karuk, supra; Fond du Lac*, 986 F.2d at 249 (“strictly internal matter” between on-reservation tribal employer and tribal-member applicant); *Nero*, 892 F.2d at 1462-63 (definition of tribal membership), or treaty rights within the second, *see, e.g., Donovan v. Navajo Forest Prods. Indus.*, 692 F.2d 709, 711-12 (10th Cir. 1982).

The Board is unaware of any court decision holding that tribal operation of a large commercial venture like the Casino, that competes with similar non-tribal businesses in interstate commerce, employs over 2700 non-Indians, directs its advertising to non-Indians, and caters almost exclusively to non-Indians, constitutes an exercise of core tribal sovereign authority presumptively exempt from the NLRA and other general federal laws.

C. The Board Properly Asserted Jurisdiction over the Casino

In applying its *San Manuel* standard in this case, the Board properly found that neither the *Coeur d’Alene* exceptions nor the Board’s discretionary inquiry preclude jurisdiction.

imply civil cause of action, or waiver of sovereign immunity, into Indian Civil Rights Act to enforce restrictions statute imposes on tribal governments).

1. The Casino's operations are not intramural self-governance

The Board properly held (D&O 7) that the Casino does not satisfy the first exception. The Casino is not purely intramural because it employs and serves predominantly non-Indians, and competes with non-tribal casinos. Nor are its functions governmental – it operates as a quintessential for-profit business. *See Menominee*, 601 F.3d at 671, 673-74 (tribal “sawmill is just a sawmill, a commercial enterprise,” not part of tribe’s governance structure); *see also supra*, *Mashantucket* (contractor), *Fla. Paraplegic* (gaming and entertainment complex), and *Coeur d’Alene* (farm). To counter that determination, the Tribe and amici (Br.27-31,38-43,48-49; Chickasaw A-Br.27-30; NCAI A-Br.23-26; Ute A-Br.6-17,23-28) insist that tribal gaming is *per se* governmental, citing the undisputed federal policy supporting tribal self-sufficiency and self-government, as well as executive, judicial, and congressional recognition of gaming as an important source of tribal revenues. As demonstrated below, they overstate the import of the cases and statutory provisions they cite – none of which characterize gaming as a core attribute of tribal sovereignty. They also fail to show that Board jurisdiction over tribal casinos would place the NLRA in conflict with IGRA.²¹

²¹ The Tribe and amici state (Br.25-26; NCAI A-Br.21n.8) that the Department of the Interior disagrees with the Board. This case, however, is one of three recent Board proceedings where the Board asserted jurisdiction over Indian tribes. *See Little River Band of Ottawa Indians Tribal Government*, 359 NLRB No. 84, 2013 WL 1123814 (March 18, 2013), *petition for review filed*, 6th Cir. Nos. 13-1464,

The claim that the use of casino revenues to fund the Tribe’s governmental services (and to make cash payments to tribal members) transforms the gaming operation into an intramural or governmental entity is incorrect. However the money is *spent*, the Tribe *earns* it by running a multi-faceted business that employs thousands of non-Indian workers entitled to federal protections. And many of those Casino-complex employees perform work unrelated to gaming (e.g., housekeeping on the Casino floor, front-desk service in its hotel, food preparation in its restaurants and bars, maintenance of its entertainment facilities). The Supreme Court and Congress have recognized and codified the value of tribal commercial ventures – and particularly tribal gaming – in sustaining tribal governments. But they have not suggested that such tribal ventures may pursue (or maximize) those revenues at the expense of their workers’ and customers’ federal rights and protections (e.g., occupational- and consumer-safety standards, minimum-pay and accessibility requirements, NLRA rights to mutual support and collective activity). *Cf. Chickasaw Nation*, 208 F.3d at 881 (rejecting argument that Indian gaming is exempt from federal taxes because IGRA was meant to “maximize tribal gaming revenues”).

13-1583, and *Chickasaw Nation operating Winstar World Casino*, 359 NLRB No. 163, 2013 WL 3809177 (July 12, 2013), *petition for review filed*, 10th Cir. No. 13-9578. The DOI did not participate in any of the three cases before the Board; nor is it participating in any of the court proceedings.

Moreover, the Supreme Court has acknowledged that tribal commercial operations are not governmental. *See Kiowa*, 523 U.S. at 758 (stating sovereign immunity “extends beyond what is needed to safeguard tribal self-governance” when it protects tribes’ participation “in the Nation’s commerce”). It has also rejected the notion that a reduction in tribal revenues necessarily impairs core sovereignty. *See Colville*, 447 U.S. at 154, 156 (State did not impair “the right of reservation Indians to ‘make their own laws and be ruled by them’... merely because the result of imposing its taxes will be to deprive the Tribes of revenues which they currently are receiving,” and which they use for “essential governmental services, including programs to combat severe poverty and underdevelopment”) (citation omitted). Similarly, circuit courts have rejected the argument that use of a tribal commercial enterprise’s profits to fund tribal government makes the business a governmental entity. *See OSHRC*, 935 F.2d at 184 (applying OSHA to sawmill, 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”). Indeed, the Tenth Circuit held in *Chickasaw Nation* that application of federal taxes to tribal gaming, which would “undoubtedly reduce[] the profit earned by the Nation on its gaming activities,

...[but] not otherwise...interfere with the...wagering operations,” would not impair the Nation’s treaty right to self-government. 208 F.3d at 884.

Unlike the state laws the Supreme Court found inapplicable to tribal gaming in *Cabazon*, 480 U.S. at 205, 216 (e.g., permitting bingo only if staffed by volunteers and with strictly limited prizes), federal statutory requirements routinely followed by viable businesses – including the NLRA – will not effectively eliminate the Casino as a revenue source. Equally important, the Court in *Cabazon* dismissed the *state’s* interest in effectively barring for-profit gaming operations as insufficient to outweigh “the compelling federal and tribal interests” supporting tribal gaming as a revenue source. 480 U.S. at 221-22. Here, by contrast, the Tribe claims the right not only to earn revenue through gaming, consistent with federal interests, but also to disregard *federal* labor policies embodied in the NLRA, which do not regulate gaming operations or preclude gaming profits.

Following *Cabazon*, Congress enacted IGRA. The statute was designed not to endow tribes with exclusive authority over gaming and all associated businesses 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.” *In Re Indian Gaming Related Cases*, 331 F.3d 1094, 1096 (9th Cir. 2003) (citation omitted). The statutory text and legislative history reiterate Congress’ commitment to tribal self-government and self-sufficiency, and

to gaming as a source of tribal revenues. 25 U.S.C. § 2702(1). IGRA also allows tribes to regulate gaming on their lands through federally approved ordinances, and according to tribal-state compacts. But it does not – despite the Tribe’s and amici’s insistence – designate gaming “governmental,” or a core attribute of sovereignty.

Nor does the regulatory domain IGRA reserves to the tribes (subject to federal oversight) encompass labor relations at gaming sites, much less at their associated dining, entertainment, and hospitality venues. As the D.C. Circuit explained in *San Manuel*, “IGRA certainly permits tribes and states to regulate gaming activities, but it is a considerable leap from that 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....” 475 F.3d at 1318 (finding “no indication that Congress intended to limit the scope of the NLRA when it enacted IGRA”).²² Indeed, one of three reasons the Secretary of the Interior may rely upon to disapprove a tribal-state compact under IGRA is if the compact violates “any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands.” 25 U.S.C. § 2710(d)(8)(B).

²² See also *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 473 (2d Cir. 2013) (“Congress chose to limit the scope of IGRA’s preemptive effect to the ‘governance of gaming.’”) (quoting *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536 (8th Cir. 1996)).

The NLRA, which regulates only labor relations, does not conflict with IGRA. *See San Manuel*, 341 NLRB at 1064 (NLRA does not regulate gaming, so Board jurisdiction will not interfere with application of IGRA; conversely, IGRA does not address labor relations, the Board's sole concern). The NLRA protects statutory employees' right to act concertedly for mutual aid and protection and imposes on employers a duty to bargain with their employees' chosen representative. It does not affect tribal regulation of *gaming*. Nor are NLRA requirements comparable to the rejected version of IGRA under which the federal government would have controlled many aspects of gaming operations and personnel. The NLRA does not dictate any particular terms of employment (e.g., respecting alcohol testing or Indian hiring preferences). *See H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103-09 (1970); *accord San Manuel*, 341 NLRB at 1064 n.23. Nor does it prevent employers from making basic personnel or business decisions. *See Palace Sports & Entm't, Inc. v. NLRB*, 411 F.3d 212, 224 (D.C. Cir. 2005) (NLRA does not prevent employer from "discharg[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); *Ryder Distrib. Res.*, 311 NLRB 814, 816 (1993) ("[T]he Board does not substitute its own business judgment for that of the employer in evaluating whether conduct was unlawfully motivated."). Moreover, while one purpose of IGRA is to promote tribal development, its specific provisions

regulating gaming go to another congressional purpose: preventing infiltration of the gaming operations by organized crime. *See* 25 U.S.C. § 2702(1) & (2); *see also* Ute A-Br.12n.3. In other words, the personnel-related IGRA provisions are not incompatible with the NLRA, nor do they address covered labor relations.

Like other commercial businesses, the Casino will retain ultimate control over its employment policies under the NLRA. But it cannot legislate around its federal duty to bargain concerning its statutory employees' terms of employment by enacting its employee Handbook through the Tribal Council as an ordinance. "Nobody questions that a 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."

Mashantucket, 95 F.3d at 178-79; *see also* *Lumber Indus. Pension Fund v. Warm Springs Forest 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).²³

²³ *See also* *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"). *Cf. Dakota*, 796 F.2d at 186-87 (finding casino, owned and operated on tribal lands by tribal

The Tribe and amici amplify their argument by asserting that employees and their representatives could exercise undue influence in tribal affairs by using the threat of an NLRA-protected strike that could restrict casino revenues. But the Casino has both legal and practical recourse in such circumstances. Under the NLRA, the Casino can prevent, or limit the effects of, strikes. It can, for example, negotiate no-strike clauses, which often accompany grievance/arbitration provisions, in its collective-bargaining agreements. *See Delaware Coca-Cola Bottling Co. v. Teamsters Local 326*, 624 F.2d 1182, 1185-86 (3d Cir. 1980) (interpreting breadth of no-strike clause based on theory “that the no-strike clause is a quid pro quo for the arbitration clause”) (citing *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397, 407 (1976)).²⁴ It can also permanently replace economic strikers. *See United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int’l Union v. NLRB*, 544 F.3d 841, 850 (7th Cir. 2008) (“[D]uring an economic strike, an employer has a ‘right to protect and continue his business’...” (quoting *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938))). And it can lock out employees to further bargaining

members and licensed pursuant to tribal code approved by Secretary of the Interior, violated state and federal law).

²⁴ At the request of the Board’s librarian, Bloomberg BNA conducted a search of collective-bargaining agreements in its database. Each of the 22 casino-industry contracts expiring in 2011 or later in its database contained a no-strike clause and grievance-arbitration procedure.

demands, and hire temporary replacements for the duration of a lawful lockout. *See Boilermakers v. NLRB*, 858 F.2d 756, 759-60, 767-69 (D.C. Cir. 1988). On a practical level, the Casino is a sophisticated, multi-million-dollar operation. Like its non-tribal competitors, it can plan for strikes just as it plans for other contingencies, such as natural disasters, power outages, suppliers' inability to provide promised goods, or unexpected repairs.

Fundamentally, the argument (Br.42-43; Chickasaw A-Br.27; NCAI A-Br.19,25; Ute A-Br.23-24) that the Casino must be spared any risk of strike is an assertion of the right to deny employees an effective voice respecting their terms and conditions of employment. Congress struck a different balance between the conflicting legitimate interests at stake in passing the NLRA which has, for decades, covered enterprises that perform vital roles in their communities. *See, e.g., Salt River Valley Water Users' Ass'n v. NLRB*, 206 F.2d 325, 326-27 & n.2 (9th Cir. 1953) (irrigation association crucial to industry and daily living requirements in state); 29 U.S.C. § 158(g) (1974 amendments to NLRA, extending coverage to hospitals and other critical healthcare providers, with strike-notice requirement); *NLRB v. New York*, 436 F. Supp. 335, 338-39 (E.D.N.Y. 1977) (finding Congress intended to grant nursing-home employees "right to strike, with only minimal restrictions," deliberately preempting state regulation of the same), *aff'd mem.*, 591 F.2d 1331 (2d Cir. 1978).

2. Application of the NLRA to the Casino will not impair the Tribe's specific treaty rights

In analyzing the second exception, the Board used the pro-Indian canon to interpret the treaties in the Tribe's favor, and as the signatory Indians would have understood them, accepting the Tribe's experts' testimony regarding that understanding. It found, accordingly, that the Tribe has general treaty rights of self-governance, possession, and exclusion. (D&O 3 & nn.4-8,7-8.) As described above, the Board further held (D&O 7), in accord with the Eighth and Ninth Circuits, that such broad treaty rights have the same effect as the inherent sovereign rights they restate. The Tribe's inherent (and treaty) right to self-governance is thus insufficiently specific to bar application of the NLRA.

Contrary to the Tribe's assertions (Br.32-36), the same is true of its broad treaty right to exclude, inferred from treaty language ensuring its "exclusive use, ownership, and occupancy" of tribal lands. (A 35,40; *see* D&O 7). That language is non-specific, unlike in *Navajo Forest*, where the treaty excluded "officers, soldiers, agents and employees of the government" unless expressly "authorized to enter ... in discharge of duties imposed by law." 692 F.2d at 711-12 (adopting tribal interpretation limiting "authorization" to those tasked with Indian affairs). *See Smart*, 868 F.2d at 934 (distinguishing *Navajo Forest* right from general right to exclude because it "specifically provided the Tribe with the right to exclude any agent of the federal government [including OSHA inspectors] from the

reservation.”); *Chickasaw Nation operating Winstar World Casino*, 359 NLRB No. 163, 2013 WL 3809177, *9 (July 12, 2013) (same). As the Board found (D&O 4 n.8; *see also San Manuel*, 341 NLRB at 1061-62), the Tribe’s general right to exclude non-Indians from tribal lands does not preclude application of general federal regulatory laws to a modern tribal business employing and serving thousands of non-Indians. As the Ninth Circuit held, such a sweeping interpretation of broad rights to exclude would prove too much, essentially precluding application of all universally applied federal laws on tribal lands, even where tribes act as employers otherwise subject to such regulation. *See OSHRC*, 935 F.2d at 186; *see also D&O 8*. Moreover, even under the pro-Indian canon, courts will not expand treaties “beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties.” *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1942); *see, e.g., Matheson*, 563 F.3d at 434-35 (treaty agreement to free slaves does not “address[] employment rights and payment of overtime,” so does not bar application of FLSA; nor does general treaty right to exclude); *Great Lakes*, 4 F.3d at 493 (specific treaty rights to hunt, fish, and gather did not bar application of FLSA requirements to multi-tribe commission enforcing those rights, because treaties made “no mention of the system for enforcing these rights, let alone any reference to the terms of employment of those hired to enforce it”).

3. There is no evidence Congress intended to exempt tribes from the NLRA

As detailed above, *see* pp.16-26, the Board reasonably determined (D&O 8 (citing *San Manuel*, 341 NLRB at 1063)) that the third exception has not been satisfied with respect to the NLRA. Nothing in the statutory language, legislative history, context, or structure demonstrates a congressional intent to foreclose Board jurisdiction over tribal employers like the Casino.

4. The balance of labor and Indian policies favors Board jurisdiction

Having determined that no *Coeur d'Alene* exception applies, the Board turned to its final inquiry. It found (D&O 8 (citing *San Manuel*)) that, because the Casino operates as a business in competition with similar non-tribal casinos and serves mostly non-tribal customers – and because it does not fulfill a governmental function – policy considerations favor jurisdiction. As the Board further explained in *San Manuel*, 341 NLRB at 1062-63, those aspects of large tribal gaming enterprises, as well as their employment (as here) of mostly non-Indian employees combine to “affect interstate commerce in a significant way,” implicating the policies underlying the NLRA. Because the Board’s mission is to effectuate those policies, declining jurisdiction would, contrary to the Tribe’s theory (Br.51), prevent the Board from “fulfill[ing] its statutory purpose.” Conversely, jurisdiction will not unduly interfere with tribal autonomy because the NLRA is inapplicable to purely intramural concerns. *See id.*; pp.34-38,52.

D. The Board's Assertion of Jurisdiction Is Not Unconstitutional

Finally, the Tribe reframes (Br.45-47,52; *see also* Chickasaw A-Br.17) its challenges under separation-of-powers principles. Essentially, it argues that because the NLRA does not expressly cover tribes, the Board's rationale is so incorrect as to be an unconstitutional power grab. Some perspective is in order. Unlike the Tribe's cases, this case does not involve an agency's assertion of authority in disregard of an express "congressional *denial* of power," *see Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 370, 374-75 (1986), much less one so contrary to "[e]xplicit and unambiguous provisions of the Constitution" that Congress could not have delegated it, *see INS v. Chadha*, 462 U.S. 919, 945-56 (1983) (statutory provision for one-house veto of decision statutorily delegated to Attorney General violated constitutional requirements that legislation be bicameral and subject to presidential review). As noted, the NLRA confers the broadest jurisdiction constitutionally possible, and it is undisputed that Congress may authorize Board jurisdiction over tribes.

As detailed in this brief, the Board is entitled to deference when interpreting the NLRA, its statutory construction is reasonable, and its jurisdictional standard accommodates federal Indian law by applying the pro-Indian canon to interpret treaties, and the related canon requiring clear congressional design to protect core sovereignty and treaty rights. There is no serious argument that the Board's

construction of the statute Congress tasked it with defining, and its adoption of an Indian-law analysis used by several courts of appeals in similar circumstances, violates the separation-of-powers principles enshrined in the Constitution.

CONCLUSION

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

/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

RICHARD F. GRIFFIN, JR.
General Counsel
JENNIFER ABRUZZO
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel
National Labor Relations Board

February 2014
Saginaw brief-jgkv

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

SAGINAW CHIPPEWA INDIAN TRIBE OF
MICHIGAN

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

*
*
*
* Nos. 13-1569
* 13-1629
*
* Board Case No.
* 07-CA-53586
*
*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 13,967 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 20th day of February, 2014

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

SAGINAW CHIPPEWA INDIAN TRIBE OF
MICHIGAN

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

*
*
*
* Nos. 13-1569
* 13-1629
*
* Board Case No.
* 07-CA-53586
*
*

CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2014, 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 a registered user or, if they are not by serving a true and correct copy at the address listed below:

William A. Szotkowski
Andrew Adams, III
Jessica S. Intermill
Hogen Adams
1935 W. Country Road B-2, suite 460
St. Paul, MN 55113

/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 20th day of February, 2014