Nos. 13-9578 & 13-9588

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 13-9578, 13-9588

THE CHICKASAW NATION, further designation under review by the court

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

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STATEMENT OF RELATED CASES

When the Board's Acting General Counsel issued the complaint in this case, the Nation sued the Board in the United States District Court for the Western District of Oklahoma, Civil Action No. 5:11-cv-506-W, seeking to enjoin the Board's proceedings. The district court granted a preliminary injunction and the Board appealed to this Court. *Chickasaw Nation v. NLRB*, 10th Cir. Case No. 11-6209. Subsequently, the Board and the Nation jointly moved the district court to modify its injunction to permit Board proceedings on a single alleged violation of the NLRA, which the district court did. This Court dismissed the appeal by stipulation of the parties on September 14, 2012.

GLOSSARY OF TERMS

ADA	Americans with Disabilities Act
ADEA	Age Discrimination in Employment Act
AR	Agency Record
ERISA	Employee Retirement Income Security Act
FLSA	Fair Labor Standards Act
IGRA	Indian Gaming Regulatory Act
IRA	Indian Reorganization Act
NLRA	National Labor Relations Act
OIWA	Oklahoma Indian Welfare Act
OSHA	Occupational Safety and Health Act
OSHRC	Occupational Safety and Health Review Commission

STATEMENT OF JURISDICTION

This case is before the Court on the petition of the Chickasaw Nation for review, and the cross-application of the National Labor Relations Board for enforcement, of a Board Order against the Nation. 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 July 12, 2013, and reported at 359 NLRB No. 163 (D&O1-9),[1] is final under Section 10(e) and (f) of the NLRA, 29 U.S.C. § 160(e) and (f). The Court has jurisdiction pursuant to Section 10(e) and (f) because the unfair labor practices occurred in Oklahoma. The NLRA imposes no time limit for such appeals.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board has jurisdiction over a tribal gambling, hospitality, and entertainment complex – advertised as one of the largest such venues in the country – which is located on tribal lands but has a majority non-Indian workforce, mostly non-Indian customers, and competes in interstate commerce against similar non-tribal enterprises.

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[1] This brief cites directly to the Board's Decision and Order as "D&O." The D&O is located at p.35 of the agency record ("AR"). Where applicable, references preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

STATEMENT OF THE CASE

This case came before the Board pursuant to charges filed by Local 886 of the International Brotherhood of Teamsters ("the Union"). (D&O1n.1; AR15p.7.) The Acting General Counsel issued an amended complaint alleging that the Nation, operating Winstar World Casino ("the Casino"), had violated Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(1), by informing its casino employees that they did not enjoy the protections of the NLRA. (D&O1&n.1; AR12.) The parties waived proceedings before an administrative law judge and filed a stipulation of facts with the Board. (D&O1n.1; AR14,AR15.) The Board approved the stipulation and accepted the case. Before the Board, the Nation contested the Board's jurisdiction over the Casino, but did not dispute that, if jurisdiction was proper, its conduct violated the NLRA. (D&O1&nn.1&2,2,5,8; AR20,AR26.) On July 12, the Board (Chairman Pearce, Members Griffin and Block) issued a Decision and Order holding that it had jurisdiction, and finding the violation alleged. (D&O1n.1,8.)

I. THE BOARD'S FINDINGS OF FACT

A. The Nation's Government and Treaties

The Nation is a federally recognized Indian tribe. (D&O1; AR15p.1.) Its constitution establishes an elected government composed of executive, legislative, and judicial branches. (D&O1; AR15pp.1-2.) The Nation has executed a series of

treaties with the United States, including the 1830 Treaty of Dancing Rabbit Creek, 7 Stat. 333 (AR14-A), the 1855 Treaty of Washington, 11 Stat. 611 (AR14-B), and the 1866 Treaty of Washington, 14 Stat. 769 (AR14-C). (D&O2,3; AR15p.1.)

In the 1830 Treaty, the Choctaw Nation ceded its lands to the United States in exchange for territory further west, in what is now Oklahoma. (D&O2; AR14-App.2-3.) It is undisputed that the 1830 Treaty applies to the Nation. (D&O3n.5). Article 4 provides:

> The Government and people of the United States are hereby obliged to secure to the [Nation] … the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the [Nation] …; and that no part of the land granted them shall ever be embraced in any Territory or State; but the U.S. shall forever secure said [Nation] from, and against, all laws except such as from time to time may be enacted in their own National Councils, not inconsistent with the Constitution, Treaties, and Laws of the United States; and except such as may, and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs.

(D&O3-4; AR14-Ap.3.) Article 12 confirms the Nation's power to exclude nonmembers from its lands, while Article 18 sets the conditions for surveyors and non-Indians to enter. (D&O4; AR14-App.4,6.) Article 18 further specifies that in case of "well founded doubt," the treaty "shall be construed most favorably towards [the Nation]." (D&O4; AR14-A p.6.)

The 1855 Treaty clarified the boundary of the 1830 Treaty lands. (D&O4; AR14-Bp.1.) Article 7 states:

> So far as may be compatible with the Constitution of the United States and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the [Nation] shall be secured in the unrestricted right of self-government, and full jurisdiction, over persons and property, within [its] limits; excepting, however, all persons, with their property, who are not by birth, adoption, or otherwise citizens or members of … the [Nation], and all persons, not being citizens or members of [the Nation] … shall be considered intruders, and be removed from, and kept out of the same…,

and enumerates exceptions to such removal. (D&O4; AR14-Bp.3.)

During the Civil War, the Nation allied itself with the Confederacy. After the war, it signed the 1866 Treaty, renouncing slavery and ceding some land. (D&O4; AR14-Cpp.1-2.) In Article 7, the Nation:

> agree[s] to such legislation as Congress and the President of the United States may deem necessary for the better administration of justice and the protection of the rights of person and property within the Indian Territory: Provided, however, Such legislation shall not in anywise interfere with or annul the[] present tribal organization, or … legislature[] or judiciar[y], or the rights, laws, privileges, or customs of the [Nation].

(D&O4; AR14-Cp.4.) Pursuant to Article 8, "[n]o [tribal] law shall be enacted inconsistent with the Constitution of the United States or the laws of Congress, or existing treaty stipulations…." (D&O4; AR14-Cp.5.) And, finally, Article 45 declares all of the Nation's existing "rights, privileges, and immunities," and prior

treaties, to be "in full force, so far as they are consistent with the provisions of [the 1866 Treaty]." (D&O4; AR14-Cp.14.)

B. The Casino

The Nation operates several gaming facilities pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701, et seq., and a compact with the State of Oklahoma. (D&O2; AR14-Kpp.72-77,AR15p.2 (2011 Chickasaw Nation Programs & Services Directory, listing tribal businesses including 16 "gaming centers" or "casinos").) The Nation's division of commerce – a subdivision of its executive branch – oversees all of its gaming enterprises, according to tribal law. (D&O2; AR15p.2.) The Nation uses gaming revenues to fund government operations, including public-safety, health-care, education, and cultural services, and to provide for its members' general welfare. (D&O2; AR15pp.2-6.)

The Nation's largest gaming enterprise is the Casino – which it touts as "the largest casino in the entire world." It comprises "over 500,000 square feet of gaming floor, eight city-themed gaming plazas boast[ing] over 6,700 electronic games, 76 game tables, off-track betting area, Bingo Hall, Poker Room and high stake gaming," with "[e]xceptional restaurants … located throughout." Associated

facilities include a Global Event Center, two hotels, a "D.A. Webring designed golf course," a separate inn and RV park, a spa, and boutiques.[2]

Located on tribal lands in Oklahoma, the Casino employs and serves mostly non-Indian employees and customers. It advertises outside of the Nation's jurisdiction, and on the internet. (D&O2; AR14-K,AR15pp.2,6-7.) In December 2010, the Nation informed casino employees that the NLRA's protections did not extend to them. (D&O2; AR15p.7.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board asserted jurisdiction (D&O1,3-6,8) pursuant to its test announced in *San Manuel Indian Bingo & Casino*, 341 NLRB No. 138 (2004), *enforced*, 475 F.3d 1306 (D.C. Cir. 2007), and found (D&O1,4-5&n.10) that the Nation had violated the NLRA as alleged. The Board's remedial Order (D&O8) requires the Nation to cease and desist from informing employees that they do not have the protection of the NLRA and, in any like or related manner, interfering with employees' NLRA rights. Affirmatively, it requires the Nation to post a remedial notice.

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[2] The Programs & Services Brochure (AR14-K, pp.76-77) lists various websites, which provide the above-described details. *See* www.chickasaw.net/commerce at http://chickasawcountry.com/explore/view/winstar-world-casino-and-resort, and www.winstarworldcasino.com (checked March 6, 2014).

SUMMARY OF ARGUMENT

The Nation does not contest that it violated the NLRA if it is subject to Board jurisdiction. The Board asserted jurisdiction over the Casino – a vast, world-class gaming, entertainment, and hospitality venue – under its established *San Manuel* test. In *San Manuel*, the Board reasonably determined 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 uniform national labor policies. The Board then adopted an established framework to assess when Indian law precludes jurisdiction over a particular tribal employer. Pursuant to that framework, a statute of general applicability like the NLRA presumptively applies to tribal employers unless it would impair core tribal sovereignty, the federal government's treaty obligations, or Congress' plenary authority over Indian affairs. Finally, the *San Manuel* test concludes with a prudential assessment of 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 an appropriate 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, as defined by Congress, the Supreme Court, and circuit courts.

The Nation's critiques of *San Manuel* are unavailing. Contrary to those arguments, the Board's statutory interpretation is well within its broad discretion – true to the NLRA's language, and consistent with its history and structure. The Indian-law analysis adopted by the Board comports with this Court's and Supreme Court precedent, and incorporates appropriate Indian-law canons. The Nation's proposed approach, on the other hand, would categorically prevent the application of even the most universal federal laws to tribes in the absence of explicit congressional direction. The Board's jurisdictional test accommodates the federal government's trust responsibilities towards the tribes. But it also acknowledges the superior sovereignty of the federal government and recognizes other compelling congressional goals, such as those underlying the NLRA, that the Nation 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. The Board's assertion of jurisdiction will not interfere with core tribal governance. In particular, it will not disrupt tribal gaming, or otherwise undermine congressional promotion of Indian economic development and self-government, expressed in

IGRA and elsewhere. Nor will it interfere with the Nation's treaties, which do not establish a specific right to operate commercial enterprises in interstate commerce, free from federal regulation.

STANDARD OF REVIEW

"[T]he Board's construction of the [NLRA] is entitled to considerable deference." *Norris, a Dover Res. Co. v. NLRB*, 417 F.3d 1161, 1167 (10th Cir. 2005); *accord Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984) (Court upholds Board's interpretation if "reasonably defensible"). It 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 Norris, supra*. *See also NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 89-90, 94 (1995) (Court affords Board "leeway when it interprets its governing statute") (listing cases); *Sure-Tan*, 467 U.S. at 891 (Board's role to construe term "employee" in Section 2).[3]

[3] The Nation's suggestion (Br.13) that *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1190 (10th Cir. 2002) (en banc), dictates a *de novo* review of the Board's NLRA construction, contrary to Supreme Court precedent, is mistaken. *San Juan* examined whether a particular NLRA provision preempted a tribal ordinance. *Id.* at 1190 (citing *Mt. Olivet Cemetery Ass'n v. Salt Lake City*, 164 F.3d 480, 486 (10th Cir. 1998) (*de novo* review of district court's state-law preemption determination)). This is not a preemption case.

The Board claims no deference as to its interpretation of Indian law. *See Double Eagle Hotel & Casino v. NLRB*, 414 F.3d 1249, 1253 (10th Cir. 2005) (*de novo* review of non-NLRA legal determinations).

ARGUMENT

The Nation's sole challenge to the Board's Order is jurisdictional. It does not challenge the Board's finding that the Nation violated Section 8(a)(1) of the NLRA by telling its employees that the NLRA does not protect them. 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 IN INTERSTATE COMMERCE, WITH MOSTLY NON-INDIAN EMPLOYEES AND CUSTOMERS

The Board applied its established test 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 test appropriately accommodates *both* important congressional policies (labor and Indian) implicated in this case.

With respect to labor policies, the Board in *San Manuel* reasonably determined that the definition of "employer" in Section 2(2) of the NLRA, 29 U.S.C. § 152(2), encompasses tribes. Once the Board determined that tribal enterprises were statutory employers, it developed a test for assessing whether it

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 exceptions 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 discretionary balancing of the labor and Indian policies.

As demonstrated below, the Board reasonably interpreted the term "employer" to encompass Indian tribes in light of the statutory definition's breadth and limited exemptions, as well as the policies underlying the NLRA. The Nation's various arguments to the contrary are unavailing (Part A). The Board's adoption of the prevailing *Tuscarora/Coeur d'Alene* framework to determine whether federal Indian policy precludes jurisdiction over particular tribal employers comports with relevant precedent and respects tribal sovereignty, federal treaty obligations, and Congress' plenary authority over Indian affairs (Part B). Finally, ample evidence supports the Board's assertion of jurisdiction in this case. The Casino is a large commercial venture that operates comparably to its covered non-tribal competitors, and application of the NLRA will not impair the Nation's treaty rights. (Part C).

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] affecting commerce." 29 U.S.C. § 160(a). Section 8(a), in turn, defines conduct by employers that constitutes unfair labor practices. 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); *YMCA of Pikes Peak Region, Inc. v. NLRB*, 914 F.2d 1442, 1447-48 (10th Cir. 1990).

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 entertainment-department employees); *see, e.g., Double Eagle Hotel & Casino*, 414 F.3d at 1251 (enforcing unfair-labor-practice findings against hotel/casino). The argument that the NLRA does not extend to functionally identical tribal enterprises is unavailing. As detailed below, tribes fit the statutory definition of employer, and the NLRA contains no language exempting them specifically. Nor does it create an exception

for "domestic sovereigns" for which tribes might qualify, contrary to the Nation's repeated assertions. Moreover, the legislative history does not mention tribes, much less demonstrate congressional intent to exclude them. Finally, Board jurisdiction furthers the policies underlying the NLRA and is consistent with the statute's historical context and structure.

1. The NLRA's definition of "employer" encompasses tribal businesses engaged in the national economy

The Board's construction of the term "employer" in NLRA Section 2(2), 29 U.S.C. § 152(2), as encompassing Indian tribes is reasonable. Section 2(2) defines "employer" very broadly, including any person acting as a direct or indirect agent of an employer. *See San Manuel*, 475 F.3d at 1316 (citing "generic" definition of "employer," 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 scores 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 Nation 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 expressly, and specifically, excludes only: "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….") (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 those exemptions. 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 exceptions as effectively creating a broad

government exemption that would encompass 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")).[4] *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 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). It is also consistent with this Court's *San Juan* decision. *San Juan* determined that NLRA Section 14(b)'s authorization of state and territorial right-to-work laws authorizes comparable tribal laws. But it based

[4] 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 its 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"); *accord River-Barrientos v. Holder*, 666 F.3d 641, 645 (10th Cir. 2012).

its holding on the fact that Section 14(b) – unlike the rest of the NLRA – expressly "embraces diversity of legal regimes respecting [such laws] at the level of 'major policy-making units.'" 276 F.3d at 1197-98. *See also* discussion *infra* at pp.29-30.[5] That rationale is inapplicable to the NLRA's definition of employer which Congress framed as broadly as possible to extend uniform labor policies to protect employees and commerce nationwide.

Moreover, the Board in *San Manuel* found no evidence that Congress intended to exclude tribes implicitly from Board jurisdiction when enacting the NLRA. 341 NLRB at 1058. The statute's legislative history is devoid of any reference to tribes, and Congress knows how to exclude tribes explicitly from 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 like states, it does so expressly. The Clean Water Act, for example, affirmatively requires that tribes be

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[5] Similarly, the Seventh Circuit in *Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490, 492-94 (7th Cir. 1993), applied a specific statutory exemption for state and local law-enforcement officers to tribal officers performing comparable functions. Such core governmental functions are also exempt under the Board's jurisdictional standard, *see* D&O7.n.16. *See* discussion *infra* at pp.32-37.

treated as States for purposes of one provision, and permits their treatment as such for several others. 33 U.S.C. § 1251(g), 1377. That provision, and similar language in other statutes, demonstrates that Congress limits such treatment to circumstances when tribes are *acting* as governments, or substantially fulfilling "governmental functions."[6] That practice validates the Board's refusal to read an implicit exemption for all domestic sovereigns into the NLRA that would categorically remove tribes from Board jurisdiction, even when they act as commercial employers. As discussed below, it is also consistent with the *San Manuel* test, which exempts tribal entities performing particularly governmental functions from Board jurisdiction.

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[6] *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 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").

2. The Nation's arguments that the Board misinterpreted the NLRA's definition of "employer" are unavailing

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

Contrary to the Nation and amicus NCAI (Br.27-29; A-Br.10-18), 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 Nation and NCAI point out that when Congress enacted the NLRA in 1935, it had just committed to 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 not have sabotaged 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.[7] 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

[7] The *San Manuel* test exempts tribal enterprises performing intramural governmental functions from Board jurisdiction. *See* discussion *infra* at pp.32-37.

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 between those cases and the issues here (Br.11,36; Scholars A-Br.22-23), Congress in 1935 may well have understood the cases 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 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 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 was necessary to exclude tribes from Board jurisdiction – Congress enacted the NLRA without a tribal exemption.

b. The NLRA's coverage is not limited to employers in private industry

The Nation's claim (Br.18-19,24) that the Board construes the NLRA as covering only private employers – "applying the exclusion to cover all manner of domestic sovereigns" not enumerated in Section 2(2)'s exemption – is simply wrong. The Board, with court approval, has in fact long held that the NLRA covers some employers that might be considered "sovereign." The Section 2(2) exemption does not, for example, encompass 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.

Likewise, despite Congress' initial focus on for-profit industry (Br.24 and NCAI A-Br.6), the Board, with court approval, has long interpreted the NLRA, in light of an evolving economy, to cover less traditional employers when they engage in typical commercial enterprises, evaluating the distinct operations of a given organization separately. In *World Evangelism, Inc.*, for example, it asserted jurisdiction over a hotel/retail complex owned, and used as a major funding source, by a non-profit, 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." 248 NLRB 909, 913-14 (1980), *enforced*, 656 F.2d 1349, 1353-54 (9th Cir. 1981) (noting Congress'

implicit ratification of policy through rejection of amendment exempting non-profits from NLRA).[8]

Finally, as the Board found in *San Manuel*, the type of competitive tribal enterprises subject to jurisdiction under its standard "play[] an increasingly important role in the Nation's economy." 341 NLRB at1056 & n.4 (citing *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 757-58 (1998)). When those tribal businesses employ scores 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 because the tribes that operate them are domestic sovereigns is specious. *See* discussion *infra* at pp.35-37 (detailing this Court's differing treatment of tribes' "sovereign" and "proprietary" activities).

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[8] Nor does the Board's treatment of U.S. territories, another type of domestic sovereign, support an interpretation of Section 2(2) as creating a broad governmental exemption. As the Board explained in *San Manuel*, it has never considered or decided whether U.S. territories are exempt. 341 NLRB at 1058 n.11. Should the Board exempt territories in the future, it would still need to consider whether the policy considerations supporting such an exemption extend to tribes. *Cf. United States v. Wheeler*, 435 U.S. 313, 321-23 (1978) (distinguishing territorial sovereignty, which derives from the federal government, from tribal sovereignty, which predates it). The Nation and amicus NCAI (Br.19-20; A-Br.9,18) highlight a few court decisions that appear to find territories exempted, and cite a Board regulation listing territories as exempt. But the cited decisions assume exempt status without analysis, and the Board has never discussed or applied the regulation.

c. Congress' 1947 NLRA amendments do not demonstrate an intent to exempt tribes

There is no merit to the Nation's and amicus NCAI's argument (Br.30-31; A-Br.16-17) that Congress' failure expressly to abrogate tribal sovereign immunity, when it amended the NLRA to add private causes of action against employers, 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 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 or 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 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 store to collect state sales tax on sales to non-Indians but cannot enforce right in court due to tribal sovereign immunity); *Fla. Paraplegic, 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)). 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.

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

The pro-Indian canon does not, contrary to the contentions of the Nation and amici (Br.32-33; NCAI A-Br.5; Navajo A-Br.9; Scholars A-Br.10,13), require a 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. *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); *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, as the D.C. Circuit determined in *San Manuel*, the Supreme Court has never invoked the pro-Indian canon to resolve ambiguities in a generally applicable federal statute like the NLRA. 475 F.3d at 1312 (declining to apply canon to NLRA); *see also United States v. Dakota*, 796 F.2d 186, 188 (6th Cir. 1986) (pro-Indian canon inapplicable to federal laws that do not address tribal interests).

The Supreme Court cases cited by the Nation and amici are not to the contrary. They all involve the interpretation of Indian treaties or laws explicitly directed at, or addressing, Indian affairs.[9] Indeed, even when interpreting a statute

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[9] *See, e.g.*, *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 505-06 (1986) (statute removing federal protections from tribe; 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, statutes creating "comprehensive and pervasive" federal regulation of Indian-school construction/financing; pro-Indian canon applies to "federal statutes and regulations relating to tribes and tribal activities"); *Merrion v. Jicarilla Apache*

directly concerning Indian affairs, the Supreme Court 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." *Chickasaw Nation v. United States*, 534 U.S. 84, 87-88, 93-95 (2001) (rejecting argument that IGRA entitled tribe to tax exemption for certain state-operated gambling).[10]

As described below, the Board's *San Manuel* jurisdictional test incorporates the pro-Indian canon by applying it to interpret Indian treaties. It also incorporates a related, but distinct, Indian-law canon requiring evident congressional intent to abrogate core tribal sovereignty and treaty rights through application of the *Tuscarora/Coeur d'Alene* framework. *See Karuk Tribe*, 260 F.3d at 1082

Tribe, 455 U.S. 130, 148-52 & nn.14 & 18 (1982) (tribal constitution, federal statutes governing resource development and state taxation on Indian land, federal energy statute listing tribal taxes among recoverable costs); *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").

[10] *Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275 (10th Cir. 2010), *San Juan*, 276 F.3d 1186, and *EEOC v. Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989) apply the pro-Indian canon to general federal statutes, but cite as authority Supreme Court cases applying the canon to treaties and statutes addressing Indians. *See, e.g.*, *San Juan*, 276 F.3d at 1190-91, 1195 (citing *Blackfeet Tribe*, *Catawba Indian Tribe*, and *Bracker*, *supra* n.11; *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 466-67, 484 (1979)(interpreting statute setting conditions for states to assert jurisdiction over Indian reservations)). *See infra* at pp.31-32,36-37,40 (further discussing *Dobbs*, *San Juan*, and *Cherokee Nation*).

(explaining, after invoking Indian-law canons, 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"). Accordingly, and by interpreting treaties according to the pro-Indian canon, the Board properly applies "canons of statutory construction peculiar to Indian law" when assessing whether to assert jurisdiction over tribal enterprises. *San Juan*, 276 F.3d at 1196. It appropriately declined, however, to apply them to interpret the NLRA.

B. The *San Manuel* Test, 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. Instead, it sought 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* framework – developed by the Ninth Circuit, and used by nearly every circuit court that has 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 Board already applied *Coeur d'Alene* to off-reservation tribal enterprises).

As discussed below, *San Manuel* accommodates Congress' commitment to tribal self-government 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 an undifferentiated notion of tribal sovereignty. 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

a. General federal statutes presumptively apply to tribes

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., Fla. Paraplegic*, 166 F.3d 1126 (ADA); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996) (Occupational Safety and Health Act ("OSHA"); *Smart*, 868 F.2d 929 (ERISA); *EEOC v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246, 248 (8th Cir. 1993) (acknowledging *Tuscarora* presumption in ADEA case, but finding exception for intramural dispute). 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). This Court also regularly presumes the applicability of general federal laws to Indians and Indian tribes, particularly when they are operating in a proprietary capacity, as here. *See, e.g., United States v. Fox*, 573 F.3d 1050, 1052 (10th Cir. 2009) (federal criminal law barring felons from possessing firearms); *San Juan*, 276 F.3d at 1199 & n.11 (acknowledging *Tuscarora* may apply to tribes acting in proprietary capacity; collecting cases); *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). Indeed, as discussed in more depth below (pp.30-41), this Court's application of *Tuscarora* is largely consistent with that of its sister circuits and of the Board, which recognize three broad exceptions to applicability.

b. The NLRA is a presumptively applicable general statute

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. 341 NLRB at 1059.[11] Two

[11] Although the Nation and amicus Scholars (Br.11,36; A-Br.11,27-28,30,33) 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 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).

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 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.[12]

This Court's *San Juan* decision does not hold otherwise. *San Juan* interpreted Section 14(b) of the NLRA, 29 U.S.C. § 164(b). That provision carves out what the Court acknowledged to be a limited exception to the general rule that the NLRA preempts inconsistent state laws. 276 F.3d at 1197-98. Its rationale is thus inapplicable to the rest of the statute. Indeed, as the Board noted

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[12] *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 few governmental exclusions); *see id.* at 1115-16 (citing federal statutes applied to tribes without explicit language).

(D&O6n.14), *San Juan* highlighted 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").

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. Specifically, 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.[13] Those exceptions incorporate key Indian-law canons of construction. Together they protect core tribal sovereignty and federal trust responsibilities through application of the canon reserving the power to abrogate such rights to Congress. And the second exception also incorporates the pro-

[13] The Nation has the burden of establishing its 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.

Indian canon to define treaty rights. As detailed below, the *Coeur d'Alene* framework's nuanced application of the congressional-intent requirement reconciles the presumptive nationwide applicability of general federal law and Supreme Court Indian-law precedent.

The Board's test is also consistent with this Court's Indian-law jurisprudence. As just described, the Court presumes, pursuant to *Tuscarora*, that general federal laws apply to tribes. It has also explicitly adopted and applied the *Coeur d'Alene* exceptions in several cases. *See, e.g., Nero v. Cherokee Nation of Okla.*, 892 F.2d 1457, 1462-63 (10th Cir. 1989) (applying *Tuscarora* presumption and *Coeur d'Alene* exceptions; finding challenge to tribe's membership rules within self-governance exception); *Fox*, 573 F.3d at 1052 (applying *Nero*); *Cherokee Nation*, 871 F.2d at 938 n.3 (citing *Phillips, supra*, and *Coeur d'Alene* for proposition that *Tuscarora* presumption does not abrogate treaty rights). In doing so, it seemingly rejected *dicta* in earlier cases speculating that the Supreme Court may have implicitly overruled *Tuscarora* in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). Those earlier cases, *Donovan v. Navajo Forest*, 692 F.2d 709, 711-13 (10th Cir. 1982), and *Cherokee Nation*, 871 F.2d at 938 n.3, had questioned *Tuscarora*. But they did so only after rejecting application of a general federal statute as abrogating treaty rights, consistent with the second *Coeur d'Alene* exception. This Court has since cited *Navajo Forest* as an example of a

case applying *Tuscarora*. *See San Juan*, 276 F.3d at 1199 & n.11. It has also applied *Tuscarora* even after specifically acknowledging the concerns raised in *Cherokee Nation*. *See Nero*, 892 F.2d at 1462-63. Moreover, as the Board explained, *Merrion* itself did not mention, much less disapprove of, *Tuscarora* – it did not even involve the applicability of a general federal statute to a tribe. Instead, *Merrion* addressed a tribe's right to tax non-members on its reservation and rejected arguments that statutes directed at Indians preempted those taxes. *See* D&O7-8&n.8 (citing to Ninth Circuit's rejection of same argument in *Coeur d'Alene*, 751 F.2d at 1117). As described below, any asserted conflict between this Court's Indian-law jurisprudence and the *San Manuel/Coeur d'Alene* framework is illusory. Certainly, as the Board held (D&O6-7), the facts of this case do not present such a conflict.

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). And the consensus of the Second, Seventh, Ninth, Eleventh, and D.C. circuits, adopted by the Board, D&O3; *San Manuel*, 341 NLRB at 1063, is that the untouchable core of tribal sovereignty can be found by focusing on intramural self-government. This Court employs an analogous distinction, and its application appears consistent with *Coeur d'Alene*.

The Ninth Circuit first outlined the limited contours of the self-governance exception to *Tuscarora*. *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 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." *Id.* In doing so, it emphasized that the farm was virtually identical to non-tribal farms and employed Indians and non-Indians. 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 was between tribal members and that the authority's housing had 99-percent Indian occupancy. *Id.* at 1073-74, 1080-81.

Other circuit courts have followed the Ninth Circuit's approach, further clarifying the scope of the first *Coeur d'Alene* exception. In *Mashantucket Sand & Gravel*, 95 F.3d at 175, 177, 180-81, the Second Circuit concluded that OSHA applied to an on-reservation tribal construction firm that employed Indians and non-Indians, and worked on the tribe's principal source of income, a hotel-casino designed to attract out-of-state customers. The court expressly rejected the tribe's argument 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.[14] 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 entertainment and gaming

[14] *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").

facility subject to ADA accessibility requirements); *Smart*, 868 F.2d at 935 (listing general statutes applied to tribes without controversy) (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 relations, and from typically governmental functions. Enforcing Board jurisdiction over a tribal casino, it 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 noted, this Court has applied the *Coeur d'Alene* self-governance exception. *See, e.g.*, *Nero*, 892 F.2d at 1463 (tribe's definition of membership "integral to … self-governance"). Even those cases that explain the Court's approach somewhat differently share a similar focus. They apply general federal statutes to tribes acting in a "proprietary capacity such as that of employer or landowner," rather than in a "sovereign" capacity. *San Juan*, 276 F.3d at 1199;

accord Dobbs, 600 F.3d 1284 n.8. In practice, that proprietary-sovereign distinction resembles the first *San Manuel/Coeur d'Alene* exception. Both focus on the governmental nature of tribal activities. *San Juan* cites several cases involving commercial enterprises as examples of "Indian tribal governments acting in proprietary capacities," presumptively subject to general federal laws. 276 F.3d at 1199 (citing *Fla. Paraplegic*, *supra* (gaming/entertainment complex); *Mashantucket*, *supra* (construction firm); *Smart*, *supra* (health center); *Donovan v. Navajo Forest Prods. Indus.*, 692 F.2d 709, 710-12 (10th Cir. 1982) (logging/wood-product business; exempt under treaty exception)); *see also Dobbs*, 600 F.3d at 1284 (under sovereign-proprietary distinction, "ERISA would not apply to insurance plans purchased by tribes for employees *primarily engaged in governmental functions*," absent congressional direction) (emphasis added). Any marginal differences between the approaches do not affect the outcome of this case, which involves a gaming and entertainment complex, like *Florida Paraplegic*.

As just detailed, the self-governance exception is more nuanced than a simple commercial-governmental dichotomy. It also requires the consideration of 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 governmental functions within the tribal community negate

any argument by the Nation and amici (Br.25-26; Choctaw A-Br.38-40; NCAI A-Br.27-29; Navajo A-Br.6,21-23) that the distinction is unworkable in practice or *per se* inapplicable to tribal activities.[15] This Court's analogous sovereign-proprietary distinction also demonstrates the relevance and practicality of such an inquiry. Moreover, the Supreme Court has suggested that a governmental-commercial distinction might be appropriate for tribal enterprises in the sovereign-immunity context, 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 whether to alter established immunity). And, as noted above (pp.16-17&n.6), Congress has codified governmental-function requirements into many statutes affording tribes special treatment. Those decisions and statutory provisions all speak to 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.

b. The treaty-rights exception

Under the second *Coeur d'Alene* exception, the Board will not assert jurisdiction if application of the NLRA would abrogate a tribe's treaty rights. As

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[15] *Cf. Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 200 (1985) (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 taxing mineral extraction]'") (quoting *Merrion*, 455 U.S. at 145-46).

the Board held (D&O4-5&n.7) (citing *Soaring Eagle Casino & Resort*, 359 NLRB No. 92, 2013 WL 1646049, *12 (April 16, 2013), *petition for review filed*, 6th Cir. Nos. 13-1569, 13-1629), that exception is properly limited to specific treaty rights. 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); *see also* Scholars A-Br.14-15. General treaty rights, therefore, do not logically carry more 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*).

Broadly defined treaty rights do not suffice to preclude application of general federal statutes. *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); *cf. 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 Nation's contrary position (Br.50-51) would, as the Ninth Circuit has explained, "nullif[y]" the *Tuscarora* presumption of applicability, 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 186-87; *see also* D&O5. The Board's treatment of general treaty rights properly conforms to its treatment of general treaty rights, described just above, and is consistent with this Court's and others' application of *Tuscarora*.

This Court does not, as the Nation contends (Br.37), "categorically" refuse to presume application of general federal laws to "treaty-protected Tribes operating in their own territory." Like the Board, the Court evaluates particular treaty rights, and its accommodation of *Tuscarora* to treaties is analogous to the *Coeur d'Alene* approach. *See Cherokee Nation*, 871 F.2d at 938 n.3 (citing *Phillips* and *Coeur d'Alene, supra*); *Navajo Forest*, 692 F.2d at 711 (*Tuscarora* does not apply if statute "would be in derogation of the Indians' treaty rights"). The first *Coeur d'Alene* exception recognizes that some core attributes of tribal sovereignty – whether inherent or treaty-protected – are inviolate absent clear abrogation. The cases the Nation cites (*Navajo Forest, Cherokee Nation*, and *Dion*) (Br.50-51; *see also* Scholars A-Br.25) as demonstrating that even general treaty rights require

express abrogation fall factually within that category – they do not demonstrate that any general treaty right would be treated in the same manner. *See Chickasaw Nation*, *supra*.

Indeed, particular factual circumstances in each of the Nation's cases, rather than broad treaty language standing alone, explain the need for specific congressional intent. In *Navajo Forest*, the tribe had a *specific* treaty right to exclude "officers, soldiers, agents and employees of the government" not expressly "authorized to enter … in discharge of duties imposed by law." 692 F.2d at 711-12 (interpreting "authorization" as limited to those tasked "to deal with Indian affairs"); *see also 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."). Moreover, as the Board noted (D&O7), the dispute in *Navajo Forest* was largely intramural, involving a tribal enterprise whose employees were over 90% Indian. Similarly, *Cherokee Nation* concerned a lawsuit against a subdivision of the tribal government itself, performing typically governmental functions. 871 F.2d at 938 (suit against tribe's Director of Health and Human Services). *United States v. Dion*, 476 U.S. 734 (1986) concerned the undisputed right of Indians to hunt and fish on their land. While not spelled out in the treaty, that particular right – exercised by Indians on Indian land, and ingrained in tribal

life when treaties granted exclusive use of that land – is well-established, as this Court has recognized. *See Fox*, 573 F.3d at 1052 (quoting *Dion*, 476 U.S. at 738; citing *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 406 & n.2 (1968)).

Finally, according protections to broad treaty rights *not* granted to corresponding inherent rights would 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

Even in cases where *Coeur d'Alene* is not an impediment to jurisdiction, the Board balances its "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 triggering 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 tribes, but employing few members had: (1) a "relatively limited" impact on commerce, with few non-member 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 test conforms to Supreme Court precedent

As demonstrated, the prevailing circuit-court understanding is 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. The *Coeur d'Alene* framework, which *San Manuel* adopts, exemplifies that approach. And, as shown below, it comports with Supreme Court precedent and this Court's caselaw.

The Supreme Court has recognized the breadth of retained inherent sovereignty described by the Nation and amici. But it has also made 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, or condition their presence on

reservations. *Id.* at 333 (internal quotation and citation omitted).[16] Moreover, the Court based its holding that New Mexico could not regulate non-member hunting on tribal lands partly on the federal government's express authorization and supervision of the tribe's wildlife-management program. *Mescalero*, 462 U.S. at 328-41.

The Nation's and amici's cases (Br.15,32-34,43-46; NCAI A-Br.3-5; Navajo A-Br.7-8,24; Scholars A-Br.13-14,18,29-30) 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 Nation's and amici's cases do not concern alleged conflicts between tribal sovereignty and *federal* law, much less federal laws of general applicability.[17] *Cf. Cabazon*, 480 U.S. at 207 ("[T]ribal sovereignty is dependent

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[16] *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 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").

[17] *See, e.g., Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008) (tribe's authority to regulate non-Indian's sale of non-Indian fee land within reservation boundaries); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 176, 185 (1999) (state power to regulate tribe's hunting and fishing); *Merrion*, 455 U.S. 130, 151-52 (tribal taxes not preempted by federal

on, and subordinate to, only the Federal Government, not the States.'") (quoting *Colville*, 447 U.S. at 154); *Dakota*, 796 F.2d at 188 (assertion of federal, rather than state, authority over tribe raises distinct issues). And many involve abrogation of treaty rights, consistent with the second *Coeur d'Alene* exemption.[18] Still others apply 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*, 892 F.2d at 1459, 1461 (limitation of tribe's sovereign power does not necessarily limit its immunity). Notably, the Court has never held that a tribe may require non-Indians to forfeit substantive federal statutory rights as a condition to enter 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.

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statutes governing mineral development on Indian land, but preserving tribal prerogatives, and authorizing state taxation of mineral lessees on tribal lands; two sovereigns may tax same transaction); *Montana v. United States*, 450 U.S. 544 (1981) (state's and tribe's authority to regulate non-member hunting and fishing on non-member land within reservation boundaries; federal government sued on behalf of tribe); *Bracker*, *supra* n.16 (state taxes); *Menominee Tribe*, 391 U.S. at 407 (state hunting and fishing regulations).

[18] *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.

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 *Coeur d'Alene* framework, whether or not the courts have applied that analytical approach. 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*, 341 NLRB at 1061, a critical attribute of internal self-governance within the meaning of the first *Coeur d'Alene* exception. 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); D&O7n.16 (characterizing *Great Lakes* as involving "governmental functions," tribe's ability to govern itself).

Several other decisions involve similar core governmental functions. *See, e.g.*, *Dobbs*, 600 F.3d at 1283-85 (managing tribal treasury, which court found related to "essential government functions"; involved applicability of law to tribal benefit plan covering "employees primarily engaged in governmental functions"); *Snyder v. Navajo Nation*, 382 F.3d 892, 894-96 (9th Cir. 2004) (tribal law enforcement); *Cherokee Nation*, 871 F.2d at 938 (tribal Department of Health and

Human Services); *Karuk Tribe*, 260 F.3d at 1080 (tribal housing authority).[19] Finally other cases involved purely intramural concerns within the first exception, such as on-reservation disputes between tribes and member employees or tribal membership requirements, *see, e.g., Karuk, supra*; *Fond du Lac*, 986 F.2d at 249 ("strictly internal matter" between on-reservation tribal employer and applicant); *Nero*, 892 F.2d at 1462-63 (definition of membership), or treaty rights within the second, *see, e.g., Navajo Forest*, 692 F.2d at 711-12.

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, directs its advertising to non-Indians, and employs and caters to mostly non-Indians, constitutes an exercise of core tribal sovereign authority presumptively exempt from the NLRA and other general federal laws.

[19] *Cf. Santa Clara Pueblo*, 436 U.S. at 58-72) (declining to imply civil cause of action, or waiver of sovereign immunity, to enforce restrictions statute imposed on tribal governments).

C. The Board Properly Asserted Jurisdiction over the Casino

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

The Board properly held that the first *Coeur d'Alene* exception does not apply.[20] 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. Indeed, as the Board noted (D&O7), this Court has specifically listed a similar tribal business as an example of "proprietary" tribal activity properly subject to federal regulation pursuant to *Tuscarora*. *See San Juan*, 276 F.3d at 1199 (citing *Fla. Paraplegic*, 166 F.3d 1126); *see also Menominee*, 601 F.3d at 671, 673-74 (tribal "sawmill is just a sawmill, a commercial enterprise," not part of governance structure); *Mashantucket* (contractor) and *Coeur d'Alene* (farm), *supra*.

The Nation and amici (Br.11-12,41-46,53-55,57; NCAI A-Br.24-26; Navajo A-Br.5-6,12-21,25-31) erroneously insist that tribal gaming is *per se* governmental. They cite the undisputed federal policy supporting tribal self-sufficiency and self-government, as well as judicial and congressional recognition of gaming as an important source of tribal revenues. But they overstate the import of those

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[20] D&O3&n.4 (citing *San Manuel*, 341 NLRB at 1063; *Little River Band of Ottawa Indians Tribal Gov't*, 359 NLRB No. 84, 2013 WL 1123814, *4 (March 18, 2013), *petition for review filed*, 6th Cir. Nos. 13-1464, 13-1583; *Soaring Eagle*, 2013 WL 1646049, *10-11).

authorities, none of which characterize gaming as a core attribute of tribal sovereignty. And there is no merit to their assertion that Board jurisdiction over tribal casinos conflicts with IGRA.

The claim that the use of casino revenues to fund governmental services transforms the gaming operation into an intramural or governmental entity is, as the Board held (D&O3n.4), incorrect. However the money is *spent*, the Nation *earns* it by running a multi-faceted business that employs scores of non-Indian workers entitled to federal protections. And many of those employees perform work unrelated to gaming (e.g., housekeeping on the casino floor, front-desk service in its hotel, food preparation in its restaurants, maintenance of its entertainment facilities). The Supreme Court and Congress have recognized and codified the value of tribal commercial ventures – particularly gaming – in sustaining tribal governments. But they have not suggested that such tribal enterprises may pursue (or maximize) 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). *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").

Moreover, the Supreme Court has acknowledged that tribal commercial operations are not governmental. *See Kiowa*, 523 U.S. at 758 (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 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 commercial tribal enterprise's profits to fund tribal government makes the business "governmental." *See OSHRC*, 935 F.2d at 184 (applying OSHA, 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, this Court 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 …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 limited prizes), federal 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; *see also Indian Country, U.S.A. v. State of Okla.*, 829 F.2d 967, 981-82 (1987) (rejecting *state* regulation of tribal bingo encouraged by federal government) (citing *Cabazon*). Here, by contrast, the Nation claims the right not only to earn revenue through gaming, consistent with federal interests, but also to disregard *federal* labor policies that neither regulate gaming operations nor preclude gaming profits.

Nor does IGRA support the argument that gaming is governmental. IGRA 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.[21] But it does not designate gaming as "governmental," or a core attribute of sovereignty.

The regulatory domain IGRA reserves to the tribes (subject to federal oversight) does not 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 ("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

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[21] This case involves only the Casino's pronouncement that its employees are unprotected by federal labor law, not tribal legislation as the Nation implies (Br.57-59). *Cf. Mashantucket*, 95 F.3d at 178-79 ("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.").

[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)).

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).

The NLRA, in turn, regulates only labor relations – it does not regulate *gaming*. *See San Manuel*, 341 NLRB at 1064 (NLRA does not regulate gaming, so does not interfere with IGRA; conversely, IGRA does not address labor relations, the Board's sole concern). Specifically, the NLRA protects statutory employees' right to act concertedly for mutual aid or protection, and requires employers to bargain with their employees' chosen representative. It 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) (employer may "discharge 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."). Accordingly, the NLRA is compatible with IGRA's personnel-related provisions, many of which are intended to promote not tribal autonomy, but a distinct

congressional purpose underlying IGRA: preventing infiltration of the gaming operations by organized crime. *See* 25 U.S.C. § 2702(1) & (2).

The Nation and amici amplify their argument (Br.53-43; Navajo A-Br.25-30; NCAI A-Br.18-19,25-26), asserting that employees and their representatives could unduly influence 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 strikes, or limit their effects. 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 contract pursuant to 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)).[23] 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

[23] At the request of the Board's librarian, Bloomberg BNA searched its database for casino-industry collective-bargaining agreements expiring in 2011 or later. It found 22; each contained a no-strike clause and grievance-arbitration procedure.

employees to further bargaining demands, and hire 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-faceted 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.53-54; NCAI A-Br.7-8,25-26; Navajo A-Br.25-26) 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," 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 specific treaty rights

The Board applied the pro-Indian canon to interpret the treaties in the Nation's favor, and as the signatory Indians would have understood them. *See* D&O4 (acknowledging ambiguities to be construed in Nation's favor), D&O5 (acknowledging breadth of 1830 treaty, read without reference to later treaties; interpreting treaties in light of contemporary context). As explained fully above (pp.37-41), the Board first held (D&O4-5) that the Nation's general treaty rights to self-government and exclusion are, like the inherent sovereign rights they restate, insufficient to preclude application of the NLRA. Then it rejected (D&O5-6) the argument (Br.47-50,52-53; A-Br.10,14-16,19-21) that the Nation has a specific treaty exemption that bars application of the NLRA.

The Board began by acknowledging Article 4 of the 1830 Treaty, which "secure[s the Nation] from and against all laws…," but went on to examine the 1866 Treaty. Signed after the Civil War, the 1866 Treaty reaffirmed the 1830 Treaty – which the government had renounced during the war, when the Nation allied with the Confederacy – only to the extent consistent with the 1866 Treaty. As the Board found (D&O5&n.10), the 1866 Treaty sharply increased the authority of the federal government relative to the Nation, due to the Nation's participation on the losing side of the war, and consistent with a contemporary trend increasing federal control and decreasing tribal autonomy, *see* Cohen's Handbook of Federal

Indian Law (2005) § 1.08[1], [8] & n.468, §4.07[1][a] & nn.709 & 711 (Five Civilized Tribes' 1866 treaties "reflect the repercussions of allying with the Confederacy," grant federal government "a large measure of control over the tribal governments").

Specifically, Article 7 of the 1866 Treaty contains sweeping language that subjects the Nation to "such legislation as Congress and the President may deem necessary for the better administration of justice and the protection of the rights of person and property within the Indian Territory." *Compare* Cohen's §1.03[1] (trend of increasing federal authority in 1850s and 1860s exemplified by provision authorizing President or Congress to prescribe "rules and regulations to protect the rights of persons and property among the Indians…."). As the Board held (D&O6), the NLRA qualifies as such – it protects the rights of persons employed on tribal lands by covered employers, like the Casino.

The Nation and amicus Choctaw cite several cases discussing their treaties, and recognizing their *general* rights to self-government and exclusion. Crucially, however, not one involves application of a general federal law. Accordingly, none address the key issue here: whether the Nation is exempt from such laws despite the limitation Article 7 of the 1866 Treaty imposes on the Nation's sovereignty. *See* D&O6n.11 (distinguishing *Atlantic & Pacific R.R. Co. v. Mingus*, 165 U.S. 413 (1897) and *Ex parte Kan-Gi-Shun-Ca, otherwise known as Crow Dog*, 109

U.S. 556 (1883)). Instead, one case turns on the interpretation of express conditions in a federal statute rather than treaty rights, *see Mingus*, 165 U.S. at 437-49, and another involves the Nation's treaty right to regulate non-members on tribal land with federal approval and in the absence of any conflicting federal law, *see Morris v. Hitchcock*, 194 U.S. 384, 388-89, 392-93 (1904). Two more resolved conflicts between tribal and *state* authority, *see Choctaw Nation v. Okla.*, 397 U.S. 620 (1970) (affirming Indian title to land over state claims, based on treaty language defining title to land); *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 462-67 & n.16 (1995) (dispute over *state* taxation of tribal members; distinguishes state and federal assertions of authority).

Finally, amicus Choctaw (A-Br.26-27) cites *Crow Dog*, *supra*, to argue that treaty language subjecting a tribe to congressional legislation, like Article 7 of the 1866 Treaty, only obliges the tribe to obey laws specifically directed at Indians. But *Crow Dog* did not involve a general federal statute. Rather, as the Board noted (D&O6n.11), it analyzed whether a treaty implicitly repealed a federal criminal statute's express exemption of intramural Indian crimes. *Id.* at 562, 570. The Court's description of the treaty right in *Crow Dog* focused, moreover, on *intramural* tribal relations. *Id.* at 568, 570 (citing Indians' "regulation by themselves of *their own domestic affairs*, the maintenance of order and peace *among their own members*…," and responsibility to their tribes "in all their

personal and domestic *relations with each other*") (emphasis added). Accordingly, like *Navajo Forest*, *Cherokee Nation*, and *Dion*, discussed above (pp.39-41), *Crow Dog* does not demonstrate that a general treaty right to self-government or exclusion – or even language similar to Article 7's – exempts a tribe from general federal laws applicable under *Tuscarora/Coeur d'Alene*.

In conclusion, the Board appropriately determined that the 1866 Treaty curtailed any extraordinary, specific exemption from general federal laws that the 1830 Treaty may have created. None of the cited cases address, much less confirm, the asserted right to operate a large business like the Casino – affecting individuals and commerce well beyond the Nation's membership and jurisdiction – free from nationally applicable employee and consumer protections.

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

As detailed above (pp.12-23), the Board reasonably determined (D&O3 (citing *San Manuel*)) that the third exception has not been satisfied. Nothing in the NLRA's language, legislative history, context, or structure demonstrates a congressional intent to foreclose 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 held (D&O6) that policy considerations favor jurisdiction, for the reasons detailed in *San Manuel*, 341 NLRB at 1062-63. Because the Casino operates as a typical

business, competing with similar non-tribal casinos and employing and serving mostly non-Indians, it has a significant effect on interstate commerce and federal labor policies. Conversely, jurisdiction will not unduly interfere with tribal autonomy because it will not entail application of the NLRA beyond the commercial operations of the Casino to the Nation's purely intramural concerns.

CONCLUSION

The Board respectfully requests that the Court enforce the Board's Order, and deny the Nation's petition for review.

ORAL ARGUMENT STATEMENT

Oral argument would assist the Court in evaluating the novel issues presented.

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Chickasaw brief-jgkv

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

THE CHICKASAW NATION,	*	
further designation under review by the court	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 13-9578, 13-9588
	*	
v.	*	Board Case No.
	*	17-CA-025121
NATIONAL LABOR RELATIONS BOARD	*	
	*	
Respondent/Cross-Petitioner	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,999 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

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Dated at Washington, DC
this 17th day of March 2014

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

THE CHICKASAW NATION,	*	
further designation under review by the court	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 13-9578, 13-9588
	*	
v.	*	Board Case No.
	*	17-CA-025121
NATIONAL LABOR RELATIONS BOARD	*	
	*	
Respondent/Cross-Petitioner	*	

ADDITIONAL CERTIFICATIONS
REQUIRED BY CIRCUIT RULES

1. I certify that there are no required privacy redactions.

2. I certify that the hard copies submitted to the Court are exact copies of the electronic version.

3. I certify that the electronic submission was scanned for viruses with Symantec Endpoint Protection, version 12.1.2015.215, last updated on March 16, 2014.

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	*	
Respondent/Cross-Petitioner	*	

CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2014, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all parties, or their counsel of record, through the CM/ECF system.

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