

**Nos. 16-70397 & 16-70756**

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

**CASINO PAUMA**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

**and**

**UNITE HERE INTERNATIONAL UNION**

**Intervenor**

---

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**Intervenor**

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**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 JURISDICTION**

This case is before the Court on the petition of Casino Pauma (“the Casino”) to review and cross-application of the Board to enforce the final Board Order in

*Casino Pauma*, 363 NLRB No. 60 (December 3, 2015). (ER1-13.)<sup>1</sup> Unite Here International Union (“the Union”), the Charging Party before the Board, intervened on behalf of the Board. The petition for review and cross-application for enforcement are timely because there is no time limitation for such filings.

The Board had jurisdiction over this unfair-labor-practice proceeding pursuant to Section 10(a) of the National Labor Relations Act, as amended (“the NLRA”) 29 U.S.C. §§ 151, 160(a). The Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) and venue is proper because the unfair labor practices took place in California.

### **STATEMENT OF ISSUES**

(1) Whether the Board has jurisdiction over the Casino, a large tribal gaming complex which is located on tribal lands but employs almost all non-Indians, has mostly non-Indians patrons, and competes in interstate commerce against similar non-Indian enterprises.

(2) Whether the Board is entitled to summary enforcement of its finding that the Casino violated Section 8(a)(1) of the NLRA (by photographing employees distributing union literature.

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<sup>1</sup> “ER” refers to Excerpts of Record. “SER” refers to the Board’s Supplemental Excerpts of Record. References preceding a semicolon are to Board findings; those following are to supporting evidence.

(3) Whether the Board rationally found that the Casino violated Section 8(a)(1) of the NLRA by maintaining and enforcing an overbroad work rule prohibiting employees from distributing literature in guest areas; interfering with and threatening discipline for such distribution in nonworking public or guest areas; and disciplining an employee for distributing union literature.

### **STATUTORY ADDENDUM**

The relevant provisions are attached.

### **STATEMENT OF THE CASE**

Upon charges filed by the Union, the Acting General Counsel issued complaint alleging that the Casino, owned by the Pauma Band of Mission Indians (“the Tribe”), committed numerous violations of the Act related to union organizing activity.

At an unfair-labor-practice hearing, the parties stipulated to the same facts underlying jurisdictional findings in an earlier case against the Casino. (ER3.) After the hearing, an administrative law judge ruled that the Board had jurisdiction over the Casino and the Casino committed most of the alleged violations. (ER4,10.) On review, the Board adopted that decision in significant part.

## **I. THE BOARD'S FACT FINDINGS**

### **A. The Tribally-Owned Casino**

The Tribe is a federally-recognized Indian Tribe, consisting of 236 members with a 5800-acre reservation in Pauma Valley, California. The Tribe owns the Casino, a gaming and entertaining establishment located on the Tribe's reservation. The Casino operates 998 slot machines, 21 table games, and four restaurants. In 2013, its revenues exceeded \$50 million. (ER3; SER7.)

The Casino complex, comprised of 7 buildings and a parking lot, dedicates 35,000 square feet for gaming and restaurant purposes. Other space is used for administrative offices, storage warehouses, and a maintenance shop. (ER3; SER8.)

The Casino is open to the public around-the-clock, 7 days a week, and the vast majority of its customers are not members of the Tribe or any other Native American Tribe. The Casino advertises in multiple California counties using its website, television, radio, mail, and mobile bus billboards. The Casino provides daily, free shuttle bus services for customers throughout Southern California. (ER3; SER7-8.)

There is no evidence that the Tribe is involved with day-to-day operations at the Casino. The vast majority of the Casino's 450-500 employees, security guards, supervisors, and managers are not members of the Tribe or any other Native American Tribe. The Casino employs only 5 tribal members. (ER3;SER8.)

**B. The Casino's Handbook Rule**

The Casino's employee handbook contains a rule stating:

Circulation of Petitions

No one shall be allowed to distribute literature in working or guest areas at any time. Team Members may not solicit other Team Members for any purpose during scheduled work time. Work time does not include break time. In addition, a Team Member who is on his/her break may not solicit or distribute literature of any kind to a Team Member who is working.

(ER4; SER41.)

**C. Casino Employees Distribute Union Literature; Casino Officials Instruct Employees To Stop, Threaten Discipline, and, in One Instance, Photograph Employees**

The Casino's valet entrance contains a crescent-shaped driveway in front of the main public entrance doors. The driveway and doors are on the front, or "public" side of the two main buildings housing gaming and dining. The valet entrance is facing and immediately adjacent to the parking lot. (ER4;SER11-16.)

Since 2013, the Union has conducted an organizing campaign among the Casino's employees. (ER4.) On four occasions on December 14, 2013, small groups of Casino employees distributed union flyers at the exit and entry points of the driveway at the valet entrance. The flyers contained a photograph of employees on the union organizing committee, and exhorted customers to support the Union. The employees were 75-100 feet from the main doors. They were not blocking foot or vehicular traffic or harassing customers. Neither the employees

nor any customers were littering. (ER4-7;SER57-64,65-78,79-82,83,84-91,92-97,98-102,103-107,108-111,112-151,152,153-159,160-165,167-169,170,193-194;195-200.)

Casino security guards stopped employees from distributing flyers on four occasions, telling them they could be disciplined for persisting. On one occasion, a security guard photographed two employees distributing flyers. (*Id.*)

**D. Audelia Reyes Distributes Union Flyers on Her Break in Front of the Timeclock Moments Before Clocking Out, and Is Disciplined**

On January 24, 2014, buffet attendant Reyes took her break just before the end of her shift. While on break, she distributed union flyers to three coworkers gathered in a hallway outside the time clock. Neither she nor her co-workers had clocked out. (ER7;SER210-212.) On March 6, the Casino disciplined Reyes for distributing flyers. (ER7-8;SER171-175,176,206-212,183-185,186-192.)

**II. THE ADMINISTRATIVE LAW JUDGE’S DECISION**

Before the administrative law judge, the parties stipulated to the same facts (above at pp.4-5; SER7-10) that established jurisdiction over the Casino in an earlier case. *Casino Pauma*, 362 NLRB No. 52, 2015 WL 1457679 (“*Casino Pauma I*”)(ER3; SER1-6)).<sup>2</sup> Thus, the judge found the issue of jurisdiction in the

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<sup>2</sup> The parties resolved *Casino Pauma I* without further litigation following the Board’s Order in that case.

instant case was *res judicata* because the facts had not changed since *Casino Pauma I*. (ER4.) The judge rejected the Casino’s two additional jurisdictional arguments: reliance on *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024 (2014), and its contention that a Tribal Labor Relations Ordinance (“TLRO”) entered into between the Tribe and the State of California, pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, et seq (“IGRA”), should control, not the NLRA. (ER4.)

On the merits, as relevant here, the judge found the Casino violated Section 8(a)(1) of the Act by maintaining and enforcing an unlawful no-distribution rule, interfering with employees’ distribution of union literature, threatening employees with discipline for such distribution, photographing employees distributing union literature, and disciplining Reyes. He also found that the Casino’s discipline of Reyes violated Section 8(a)(3) of the NLRA.

### **III. THE BOARD’S CONCLUSIONS AND ORDER**

After the Casino filed exceptions, the Board (Members Miscimarra, Hirozawa, and McFerran) agreed with the judge that it had jurisdiction over the Casino by similarly relying on its jurisdictional finding in *Casino Pauma I* that was rendered under the test announced in *San Manuel Indian Bingo & Casino*, 341 NLRB 1055 (2004), *enforced*, 475 F.3d 1306 (D.C. Cir. 2007), and followed in *Little River Band of Ottawa Indians Tribal Government*, 361 NLRB No. 45 (2014),

*adopting and incorporating* 359 NLRB No. 84 (2013), *enforced, NLRB v. Little River*, 788 F.3d 537 (2015), *cert. denied* 136 S.Ct. 2508 (2016), and *Soaring Eagle Casino & Resort*, 361 NLRB No. 73 (2014), *adopting and incorporating* 359 NLRB No. 92 (2013), *enforced, NLRB v. Soaring Eagle*, 791 F.3d 648 (2015), *cert. denied* 136 S.Ct. 2509 (2016). (ER1n.1,4, *Casino Pauma I* at 1n.3.) In doing so, the Board found that issue preclusion, rather than *res judicata*, foreclosed the Casino from relitigating jurisdiction before the Board. (ER1n.1.) The Board adopted the judge's unfair-labor-practice findings in significant part.<sup>3</sup>

The Board ordered the Casino to cease and desist from the violations found and from, in any like or related manner, interfering with employees' rights. Affirmatively, the Order requires the Casino to revise or rescind its handbook rule regarding distributing literature in guest areas, remove from its files any reference to Reyes' disciplinary warning, and to post a notice. (ER1.)

### **SUMMARY OF ARGUMENT**

The Board asserted jurisdiction over the Casino under its established *San Manuel* test, incorporating this Court's decision in *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985). The Board's framework comports with Supreme Court precedent by accommodating the federal government's trust

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<sup>3</sup> The Board found it unnecessary to pass on the 8(a)(3) finding regarding Reyes' discipline. (ER1n.1.)

responsibilities towards the tribes, but also acknowledges the superior sovereignty of the federal government.

The Casino and Amici's critiques of *San Manuel*, *Coeur d'Alene*, and the Board's application of that precedent, are unavailing. To the contrary, the Board's jurisdictional framework and application are consistent with Supreme Court precedent as well as decisions from other courts of appeal.

On the merits, the Board is entitled to summary enforcement of its uncontested finding that the Casino violated Section 8(a)(1) of the Act by photographing employees distributing union literature. The Board also rationally determined that the Casino committed additional Section 8(a)(1) violations by restricting employee rights to solicit and distribute union literature. The Casino's belated claim that the Supreme Court's *Republic Aviation* decision should not have applied here is jurisdictionally barred and without merit.

## ARGUMENT

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

#### **A. Standard of Review**

The Board's interpretation of the NLRA must be upheld if "reasonably defensible." *Retlaw Broad. Co. v. NLRB*, 53 F.3d 1002, 1005 (9th Cir. 1995); *accord Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984). The Board's

construction of the NLRA need not be “the *best* way to read the statute; rather, courts must respect the Board’s judgment so long as its reading is a reasonable one.” *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 409 (1996).

This Court and the Supreme Court have recognized the Board’s role in defining the contours of the statute. *See, e.g., NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 89-90, 94 (1995) (Supreme Court affords the Board “leeway when it interprets its governing statute”) (collecting cases); *Sure-Tan*, 467 U.S. at 891 (Board’s role to construe term “employee” in Section 2); *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984) (Board defines scope of NLRA-protected activity; entitled to “considerable deference”); *UFCW Local 1036 v. NLRB*, 307 F.3d 760, 766 (9th Cir. 2002) (court defers to Board’s interpretation of NLRA statutory term if interpretation rational and consistent with the NLRA).

The Supreme Court recently reaffirmed that courts must accord such deference to an agency’s interpretation of a statute within its expertise, even on questions of agency jurisdiction. *City of Arlington v. FCC*, 133 S.Ct. 1863 (2013) (reaffirming *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)). The Casino cannot show, as it must to defeat the deference owed to the Board’s interpretation, that “the statutory text forecloses” Board jurisdiction over tribes, *City of Arlington*, 133 S.Ct. at 1871, or that Congress has otherwise “established a clear line[] the agency cannot go beyond,” *id.* at 1874.

The Board's interpretation of the NLRA's jurisdictional and definitional provisions to cover tribes acting as statutory employers is therefore entitled to deference. *See e.g., San Manuel*, 475 F.3d at 1315-1316; *Soaring Eagle*, 791 F.3d at 655. The Board claims no deference regarding the Casino's assertion that Indian law bars Board jurisdiction over tribes, because the Court does not defer to the Board's interpretation of statutes other than the NLRA. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002); *NLRB v. Int'l Bhd. of Elec. Workers, Local 48*, 345 F.3d 1049, 1054 (9th Cir. 2003). In upholding the Board's asserted jurisdiction over a tribal casino in *Little River*, the Sixth Circuit declined to separate questions concerning the Board's construction of the term "employer" from questions of tribal sovereignty, and applied de novo review to the jurisdictional question as a whole. 788 F.3d at 543-544. Under either formulation, the Board properly determined that relevant precedent supports jurisdiction over the Casino.

### **B. The Board Properly Asserted Jurisdiction**

In asserting jurisdiction over the tribal casino, the Board applied its established test for determining jurisdiction over tribal enterprises, developed in *San Manuel* and reaffirmed in *Little River*, *Soaring Eagle*, and *Chickasaw Nation*, 362 NLRB No. 109, 2015 WL 3526096. That test appropriately accommodates *both* important congressional policies (labor and Indian) implicated here.

The Board in *San Manuel* reasonably determined that the definition of “employer” in Section 2(2) of the NLRA generally encompasses tribes. In doing so, it rejected its former interpretation of “employer” as categorically barring jurisdiction over any on-reservation tribal enterprises, regardless of their impact on employee rights or the national economy, or connection to core tribal governance. Having determined that such enterprises fit the statutory definition, the Board articulated the appropriate inquiry for assessing whether it should nonetheless decline jurisdiction over a particular tribal enterprise. Relying on *FPC v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), it adopted a presumption that generally applicable federal statutes like the NLRA apply to Indian tribes. It then adopted three exemptions to that presumption developed by this Court in *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985), to protect core tribal sovereignty and federal trust obligations. And, finally, it augmented the *Tuscarora/Coeur d’Alene* framework with a Board-specific discretionary balancing of the labor and Indian policies implicated in each case.

The Board’s interpretation of “employer” as encompassing Indian tribes is reasonable, consistent with the statutory language, and calculated to effectuate federal labor policy, and is thus within its broad discretion (Part 1). Its approach to determining whether federal Indian policy nonetheless precludes jurisdiction over a particular tribal employer comports with relevant precedent and respects and

balances the policies underlying both labor and Indian law (Part 2). And finally, ample evidence supports the Board's application of *San Manuel* to find jurisdiction over the Casino, a large gaming complex which indisputably operates comparably to similar non-tribal enterprises and competes in interstate commerce (Part 3).

**1. The Board's broad statutory jurisdiction extends to tribal employers operating in interstate commerce**

Section 10(a) of the NLRA empowers the Board "to prevent any person from engaging in any unfair labor practice [defined in Section 8 of the statute] affecting commerce." 29 U.S.C. § 160(a). Section 8(a), in turn, defines what conduct by an "employer" constitutes an unfair labor practice. 29 U.S.C. § 158(a). The Supreme Court "has consistently declared that in passing the ... [NLRA], Congress intended to and did vest in the Board the fullest jurisdictional breath constitutionally permissible under the Commerce Clause." *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963) (collecting cases); accord *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1316 (D.C. Cir. 2007). This Court, likewise, has recognized the Board's jurisdiction extends to "any enterprise whose effect on Commerce is more than de minimis." *NLRB v. Southeast Ass'n for Retarded Citizens*, 666 F.2d 428, 430 (9th Cir. 1982). That jurisdiction clearly encompasses the labor relations of gaming enterprises, and their associated dining, lodging, and entertainment operations. *NLRB v. Harrah's Club*, 362 F.2d 425,

427-29 (9th Cir. 1966) (upholding jurisdiction over gambling industry in case involving employees in entertainment department).

The Casino's and Amici's arguments that the NLRA does not extend to functionally identical tribal enterprises are unavailing. As detailed below, tribes fit the statutory definition of employer, and the NLRA contains no language exempting them. Nor does the legislative history, in which tribes are not mentioned, provide a basis for exclusion. Board jurisdiction, moreover, furthers the policies underlying the NLRA and comports with the statute's historical context and structure.

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

The Board's construction of the term "employer" as encompassing Indian tribes is a reasonable exercise of the Board's interpretive prerogative. Section 2(2) defines "employer" in very general terms, including any person acting as a direct or indirect agent of an employer. *See San Manuel*, 475 F.3d at 1316 (measuring Board's definition of employer against "generic" definition, i.e., "[a] person who controls and directs a worker under an express or implied contract of hire and who pays the worker's salary or wages") (citation omitted)). That broad definition plainly covers tribal enterprises like the Casino, which employs hundreds of

workers, all performing essentially the same functions as employees working similar jobs for non-tribal employers.

The definition of a statutory employer is subject only to exemptions for: “the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act..., or any labor organization (other than when acting as an employer)...” 29 U.S.C. § 152(2). *See San Manuel*, 475 F.3d at 1316 (“[B]y listing certain entities that are not employers, the NLRA arguably intends to include everything else that might qualify as an employer.”) (citation omitted)); *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 categories: they do not qualify as states, political subdivisions of states, or any other listed entity. 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). *See San Manuel*, 341 NLRB at 1058 (collecting cases).

The Board in *San Manuel* reasonably rejected an expansive construction of Section 2(2)'s enumerated exceptions, advanced here by Amicus (FtPeckA-Br.5-7), as creating a government exemption encompassing tribes. 341 NLRB at 1058; *see San Manuel*, 475 F.3d at 1316-17 (finding permissible Board's reading of exception as confined to "its ordinary and plain meaning").<sup>4</sup> *See also 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"). The Board's interpretation is consistent with the Supreme Court's specific admonishment that the Board must "take care that exemptions from [Board] coverage are not so expansively interpreted as to deny protection to workers the [NLRA] was designed to reach." *Holly Farms*, 517 U.S. at 399 (discussing Section 2's similarly broad definition of "employee," also subject to specific exceptions); *accord NLRB v. Dick Seidler Enterprises*, 666 F.2d

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<sup>4</sup> Amicus' reliance (FtPeckA-Br.2,7) on the Board's prior interpretation of Section 2(2) is misplaced. In *San Manuel*, the Board rejected its prior interpretation of Section 2(2) as excluding tribes from the NLRA, consistent with agencies' prerogative to adopt reasoned policy changes. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-16 (2009) (agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one," it need only provide "a reasoned analysis for the change"); *Bahr v. EPA*, 836 F.3d 1218, 1229 (9th Cir. 2016) (agencies free to change existing policies if they provide a reasoned explanation).

383, 385 (9th Cir. 1982).<sup>5</sup> Indeed, the NLRA does not exempt all employers that might be considered “governmental.” It does not, for example, exempt a bank’s commercial activities in the United States merely because a foreign government owns the bank. *See State Bank of India*, 808 F.2d at 530-34.

The Casino asserts (Br.48-50) that a 1959 Board regulation (first adopted in 1936) defines “State” as including “possessions” of the United States, and therefore tribes should be exempt from coverage as such “possessions.” 29 C.F.R. § 102.7; see 1 Fed. Reg. 208 (1936). But the regulation does not construe the NLRA. Instead it addresses “[t]he term State” only “as used herein,” which means as used within part of the Board’s own rules and regulations. 29 C.F.R. § 102.7. Those regulations do not address when governmental entities should be treated as

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<sup>5</sup> Contrary to Amicus (FtPeckA-Br.15), protection of tribal sovereignty does not warrant excluding tribes from the definition of “employer” in Section 2(2). As shown below, the Board adequately considers tribal sovereignty by adopting the *Coeur d’Alene* framework. The cases cited by Amicus are inapposite because they involve exceptional circumstances, not the expansion of exclusions to the “employer” definition. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500-07 (1979) (construing NLRA to exclude jurisdiction over teachers in religious schools, to avoid First Amendment issues stemming from their critical role in schools’ mission); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 13, 17-22 (1963) (finding Board lacked jurisdiction over maritime operations of foreign ship employing non-Americans due to potentially serious adverse effects on international relations). *But see ILA Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195, 199-200 (1970) (holding, subsequent to *McCulloch*, Board had jurisdiction over labor disputes involving foreign ships and American employees).

employers. Nor do they contain any mentions of “State” that would shed light on that question. Instead, they define “employer” entirely by reference to Section 2(2). 29 C.F.R. § 102.1. The Board’s regulations therefore do not support the Casino’s claim.

Finally, the *San Manuel* Board found no evidence that Congress intended to exclude tribes from the Board’s jurisdiction when enacting the NLRA. 341 NLRB at 1058. As it noted, the statute’s legislative history is devoid of any reference to Indian tribes, and Congress knows how to exclude tribes from the coverage of general workplace statutes when that is its intent. *San Manuel*, 341 NLRB at 1058 (quoting Title VII, 42 U.S.C. § 2000e(b) (“The term ‘employer’ ... does not include...an Indian tribe....”), and citing Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12111(5)(B)(i) (same)).

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

Contrary to Amicus (FtPeckA-Br.12-13), events contemporaneous to the passage of the NLRA do not demonstrate that congressional silence meant tribe exclusion from the statute’s coverage. Amici states that when Congress enacted the NLRA in 1935, it had just committed to promoting tribal self-government by passing the Indian Reorganization Act of 1934 (“IRA”), and was actively debating the similar Oklahoma Indian Welfare Act of 1936 (“OIWA”). Congress, it asserts,

would not have undermined its commitment by simultaneously subjecting tribes to the NLRA. That argument assumes that federal regulation of commercial tribal employers' labor relations fundamentally undermines tribes' distinct governmental functions.<sup>6</sup> Moreover, the import of those self-determination statutes on Congress' mind-set is debatable.

Supreme Court cases predating the NLRA – including *Superintendent of Five Civilized Tribes v. CIR*, 295 U.S. 418 (1935), decided a few weeks before enactment – expressly rejected the proposition that statutes apply to Indians only when they so specify. *See Tuscarora*, 362 U.S. at 116-17 (discussing cases supporting “well settled” proposition that general federal laws presumptively apply to Indians). Combined with the contemporaneous passage of the IRA and OIWA, those cases undermine any conclusion that Congress' failure to exclude tribes from NLRA coverage was inadvertent. At a time when both labor policy and tribal self-government considerations were paramount – and recent Supreme Court cases suggested explicit language might well be necessary to exclude tribes from Board jurisdiction – Congress enacted the NLRA without a tribal exemption.

Contrary to claims (Br.50,FtPeckA-Br.10-12) that Board jurisdiction is properly limited to “private industry,” the Board, with court approval, has long

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<sup>6</sup> The *San Manuel* framework exempts tribal enterprises performing governmental functions from Board jurisdiction, *see* pp.29-33.

interpreted the NLRA to cover less traditional employers engaged in commercial enterprises. *See, e.g., World Evangelism, Inc.*, 248 NLRB 909, 913-14 (1980) (asserting jurisdiction over hotel and retail complex owned by, and used as major funding source for, religious organization; noting, “[a]lthough it is the Board’s general *practice* to decline jurisdiction over nonprofit religious organizations, the Board does assert jurisdiction over those operations of such organizations which are, in the generally accepted sense, commercial in nature”), *enforced*, 656 F.2d 1349, 1353-54 (9th Cir. 1981) (noting Congress’ implicit ratification of Board’s policy through rejection of amendment exempting all non-profit organizations from NLRA). As the Board found, the type of competitive tribal enterprises subject to jurisdiction under the *San Manuel* test “play[] an increasingly important role in the Nation’s economy.” 341 NLRB at 1056, n.4 (citing *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 757-58 (1998)). Further, where those enterprises employ numerous workers performing non-governmental tasks – housekeeping and food service (Tr.116-117,193-194) – to maintain operations functionally identical to covered non-tribal enterprises throughout the economy, the objection that jurisdiction does not comport with the regulation of private industry is specious.

**c. Indian law does not mandate a different interpretation**

The pro-Indian canon does not, contrary to the assertions of the Casino and Amicus (Br.38-40;FtPeckA-Br.13-17), require construction of the NLRA in favor of tribal interests. That canon, construing ambiguities in favor of Indians, developed to ensure Indian treaties were interpreted consistent with the circumstances of their signings (rather than as true arms-length contracts). *See McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 174-76 (1973) (interpreting treaty and statute specifically addressing treatment of Indians); *Choctaw Nation v. Okla.*, 397 U.S. 620, 630-31 (1970) (interpreting treaty). It also effectuates Congress' plenary authority over Indian tribes accurately when construing statutes explicitly intended to address Indian affairs. But as the D.C. Circuit concluded in *San Manuel*, 475 F.3d at 1312, and the Sixth Circuit concluded in *Little River*, 788 F.3d at 551, Supreme Court precedent does not apply this principle of pro-Indian construction when resolving an ambiguity in a statute of general application like the NLRA.<sup>7</sup> Moreover, interpreting IGRA, a statute directly concerning Indian affairs, the Supreme Court in *Chickasaw Nation v. United States* held that the pro-Indian canon was not "inevitably stronger" than

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<sup>7</sup> The assertion that the NLRA is not a statute of general application is addressed below at pp. 25-28.

another canon of interpretation relating to tax exemptions, “particularly where the interpretation of a congressional statute rather than an Indian treaty is at issue.” 534 U.S. 84, 87-88, 93-95 (2001) (rejecting argument that IGRA entitled tribe to tax exemption for certain state-operated gambling). Accordingly, the Board applies the pro-Indian canon to construe Indian treaties under its framework for assessing jurisdiction over tribal employers, but did not use it to interpret the NLRA. *See Chickasaw*, 2015 WL 3526096, at \*2-4.

Indeed, the cases cited by the Casino and Amicus respecting the pro-Indian canon involve the interpretation of Indian treaties or laws explicitly directed at, or addressing, Indian affairs.<sup>8</sup> While several Tenth Circuit cases apply the canon to general federal statutes, they in turn rely exclusively on cases interpreting Indian treaties or statutes specifically directed at Indians.<sup>9</sup> Tenth Circuit precedent on this

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<sup>8</sup> *See, e.g., South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 505-06 (1986) (statute removing federal protections from particular tribe; noting pro-Indian canon “does not permit reliance on ambiguities that do not exist”); *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985) (statutes governing tribal-land leases); *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 246-47 (1985) (treaties).

<sup>9</sup> For example, *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1190-91, 1195 (10th Cir. 2002) (en banc), discussing the NLRA, cited *Blackfeet Tribe* and *Catawba Indian Tribe*, *supra* note 10, as well as two other cases interpreting statutes addressing Indian affairs, *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 466-67, 484 (1979) (statute setting conditions under which states could assert jurisdiction over Indian reservations) and *Southland Royalty Co. v. Navajo Tribe of Indians*, 715 F.2d 486, 489-90 (10th Cir. 1983) (interpreting IRA and statute regulating Indian taxation of natural gas).

issue is not controlling and, given in-circuit and Supreme Court precedent, is unpersuasive.

The one exception is *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), cited by Amicus (FtPeckA-Br.14,30), and it is inapposite because it does not apply the pro-Indian canon to interpret a statutory ambiguity.<sup>10</sup> In *Iowa Mutual*, the Court held that the federal diversity-jurisdiction statute, silent as to Indians, does not override the specific federal policy of promoting Indian self-governance through deference to tribal courts, which play a “vital role” in such governance and retain presumptive jurisdiction over reservation affairs. *Id.* at 14-15, 17-18. The Court did not hold that federal courts have no jurisdiction over such cases. Rather, it found that well-established principles of comity required federal courts to allow a tribal court that is already adjudicating a dispute the “full opportunity to determine its own jurisdiction.” *Id.* at 16-17. Accordingly, a federal court cannot consider the federal question of the tribal court’s jurisdiction until the parties to the ongoing tribal-court lawsuit have first exhausted their tribal-

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<sup>10</sup> Likewise, and contrary to the Casino (Br. 38-39) and Amicus (FtPeckA-Br.10,14), *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), which involved a statute directed at Indian affairs, does not explicitly apply the pro-Indian canon. The Court declined to infer a private civil right of action into the Indian Civil Rights Act, based on evidence that Congress intentionally declined to create one.

court remedies. But, at that time, the federal court may review the tribal court's jurisdictional ruling. *See id.* at 11, 16-17 & n.8, 19.

Because there was no asserted ambiguity in the diversity-jurisdiction statute, the pro-Indian canon played no role in the Court's analysis. *Iowa Mutual* thus does not support a broad rule that any ambiguity, much less silence, in even the most general federal statute must be interpreted to favor Indians. This Court's *Coeur d'Alene* doctrine, which the Board applied in this case, is just the sort of specific doctrine, developed in light of federal Indian policy, that prevails over standard canons of statutory construction in cases involving Indian affairs. *EEOC v. Karuk Tribe Housing Auth.*, 260 F.3d 1071, 1082 (9th Cir. 2001). As explained below (p.39), the facts of *Iowa Mutual* also fit *Coeur d'Alene*.

Contrary to the Casino, the related principle (Br.38-39) that evident congressional intent is required to abrogate core tribal sovereignty and treaty rights also does not undermine the Board's NLRA construction. As explained below, the Board's *San Manuel* test incorporates that Indian-law canon of interpretation by adopting the *Coeur d'Alene* framework. *See generally Karuk Tribe*, 260 F.3d at 1082 (explaining, after invoking Indian-law canons of construction, that court was "guided by doctrine specific to Indian law—the *Coeur d'Alene* exception").

**2. The *San Manuel* test accommodates federal labor and Indian policies**

The Board did not end its analysis in *San Manuel* with a determination that “employer” encompasses tribes. It sought, instead, to accommodate federal labor and Indian policies. *San Manuel*, 341 NLRB at 1056. The Board, therefore, adopted the *Tuscarora/Coeur d’Alene* test – developed by this Circuit, and used by nearly every circuit to have considered the applicability of workplace and other general federal laws to tribes – and supplemented it with a policy-balancing assessment. *See San Manuel*, 341 NLRB at 1059-60 (noting that Board already applied *Coeur d’Alene* in cases involving off-reservation tribal enterprises).

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

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

The Supreme Court observed in *Tuscarora*: “it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests.” 362 U.S. at 116. Drawing on that

statement, several circuits have concluded that generally applicable federal workplace statutes presumptively apply to tribes. *See, e.g., Florida Paraplegic, Ass'n v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126 (11th Cir. 1999) (ADA); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996) (Occupational Safety and Health Act (“OSHA”)); *Smart*, 868 F.2d 929 (Employee Retirement Income Security Act (“ERISA”)). Still others have applied the presumption to federal laws outside the workplace. *See, e.g., Cook v. United States*, 86 F.3d 1095, 1097 (Fed. Cir. 1996) (excise tax); *Lazore v. CIR*, 11 F.3d 1180, 1183, 1188 (3d Cir. 1993) (income tax); *Phillips Petroleum Co. v. EPA*, 803 F.2d 545, 556 & n.14 (10th Cir. 1986) (Safe Drinking Water Act; collecting cases applying presumption to other laws); *see also NLRB v. Pueblo of San Juan*, 276 F.3d at 1199 & n.11 (en banc) (acknowledging *Tuscarora* may apply when tribe acts in proprietary capacity, but not when tribe acts as sovereign). As the Board explained in *San Manuel*, Congress’ clear intent for the NLRA “to have the broadest possible breadth permitted under the Constitution” qualifies it for the *Tuscarora* presumption of applicability to tribes. 341 NLRB at 1059.<sup>11</sup> Three

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<sup>11</sup> Although the Casino and Amicus (Br.40; FtPeckA-Br.2,24-26) label the *Tuscarora* statement *dictum*, the Court decided *Tuscarora* on the ground that the general federal law in that case covered tribal lands, rejecting a contrary assertion. *Id.* at 115-18. That holding may not be dismissed as *dictum* 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,

circuit courts, including this one, 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); *Little River*, 788 F.3d at 551. As this Court has 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”).

Contrary to these cases, the Casino incorrectly asserts (Br.42-44) that “proving that the NLRA is not generally applicable requires little more than simply subtracting the individuals” who are excluded from the Act from the number included by the Act. (*See also FtPeckA-Br.21*). As shown, however, courts including this one have determined “the statute’s reach was intended to be broad.” *Chapa De*, 316 F.3d at 998. Moreover, several courts have cited characteristics

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622-23 (1948); *Richmond Screw Anchor v. United States*, 275 U.S. 331, 340 (1928).

shared by the NLRA when classifying other statutes (including the ADA, ERISA, and OSHA) as generally applicable.<sup>12</sup>

The Tenth Circuit did not hold otherwise (Br.40,42; FtPeckA-Br. 20) in *Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002). There, the court interpreted Section 14(b) of the NLRA, 29 U.S.C. § 164(b), which carves out what the court acknowledged to be a limited exception to the general rule that the NLRA preempts inconsistent laws. 276 F.3d at 1197-98. The rationale is thus inapplicable to the rest of the NLRA. Indeed, the court began by highlighting that “the general applicability of federal labor law [wa]s not at issue.” *Id.* at 1991.

**b. *San Manuel* applies Indian-law canons to protect core tribal sovereignty and congressional authority**

When evaluating the applicability of a general statute like the NLRA to tribes, *Tuscarora* is only the analytical beginning. Led by this Court, the circuits have established – and the Board in *San Manuel* and its progeny adopted – three exceptions to the *Tuscarora* presumption. Those exceptions protect core tribal

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<sup>12</sup> See, e.g., *Fla. Paraplegic*, 166 F.3d at 1128-29 & n.3 (ADA intended to have broad applicability; key definitions are “broad”); *Smart*, 868 F.2d at 933 & nn.1-3 (ERISA “is clearly a statute of general application, one that envisions inclusion within its ambit as the norm. The exemptions from coverage [for church and governmental plans] are explicitly and specifically defined, as well as few in number.”); *Coeur d’Alene*, 751 F.2d at 1115 & n.1 (OSHA designed to protect all workers; “employer” definition broad with only a few governmental exclusions); see *id.* at 1115-16 (citing federal statutes applied to tribes without explicit language).

sovereignty and federal trust responsibilities through application of the Indian-law canon of construction that reserves the power to abrogate such rights to Congress. The second exception also incorporates the pro-Indian canon of construction to define treaty rights. Accordingly, as this Court 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.<sup>13</sup> As detailed below, that nuanced application of the congressional-intent requirement effectively reconciles the presumptive nationwide applicability of general federal law and Supreme Court Indian-law precedent. *See Little River*, 788 F.3d at 551 (“we find that the *Coeur d'Alene* framework accommodates principles of federal and tribal sovereignty.”)

### **(1) 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) (internal quotations omitted). But the consensus of this Court, and that of

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<sup>13</sup> The Tribe has the burden of proving the applicability of any exemption. *See NLRB v. Kentucky River*, 532 U.S. 706, 711 (2001); *Smart*, 868 F.2d at 936.

five other circuits and the Board, is that intramural self-government defines that untouchable core of tribal sovereignty.

*Coeur d'Alene* itself held that OSHA applied to an on-reservation farm wholly owned and operated by a tribe. 751 F.2d at 116-18. This Court rejected the contention that all tribal commercial activity satisfies the self-governance exception, which it viewed as applying to “purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations . . . 751 F.2d at 1116. Rather, it concluded that operating “a farm that sells produce on the open market and in interstate commerce is not an aspect of tribal self-government,” emphasizing that the farm was virtually identical to non-tribal commercial farms and employed both Indians and non-Indians. *Id.* Crucially, this Court held that the right to operate such a business in interstate commerce *free from federal health and safety regulations* is not “essential to self-government.” *Id.* (internal quotations omitted). *See Little River*, 788 F.3d at 552 (applying *Coeur d'Alene* to reject argument that applying the NLRA to a tribal casino would fatally undermine self-governance).

By contrast, in *Karuk Tribe*, 260 F.3d at 1073, this Court held that the ADEA claims of a tribal member working for the tribal housing authority fell within the exception because the authority was providing governmental services (safe and affordable housing), not running a business. The court also highlighted

that the dispute involved only tribal members (employer and employee), and that the authority's housing had 99-percent Indian occupancy. *Id.*

In *Reich v. 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 expansion of 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 – similar to that here – that courts should presume no federal statute affecting any aspect of tribal sovereignty applies without express congressional authorization. *Id.* at 177. Such a test, the court held, “would almost invariably compel the conclusion that every federal statute that failed expressly to mention Indians would not apply to them.” *Id.* at 178. It declared such a result “inconsistent with the limited sovereignty retained by Indian tribes,” citing Supreme Court cases describing the dependent and subordinate nature of that sovereignty. *Id.* at 178-79.

The Seventh and Eleventh Circuits have both reached the same conclusion. *See Fla. Paraplegic*, 166 F.3d at 1127, 1129 (tribal restaurant, entertainment, and gaming facility subject to ADA accessibility requirements); *Smart*, 868 F.2d at 935 (listing general statutes applied to tribes without controversy, despite effects on sovereignty) (citation omitted). 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 typical governmental functions. Enforcing Board jurisdiction over a tribal casino, it concluded, like this Court, 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.

The Supreme Court’s decision in *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024 (2014) is not to the contrary. Although the Court declined to distinguish between governmental and commercial functions in *Bay Mills*, that case recognized that sovereign immunity from suit presents a different question than whether the sovereign is subject to the substantive provisions of applicable law. *Id.* at 2034-35 & n.6. This case involves the latter question. Indian tribes (like States) do not enjoy sovereign immunity from suits by the United States (here, through the NLRB enforcing the NLRA) to enforce substantive law. *See Alden v. Maine*, 527 U.S. 706, 755-56 (1999) (noting sovereign immunity does not bar a suit “brought by the United States itself” against a State to enforce, *inter alia*, “obligations imposed by the Constitution and by federal statutes”—there, the Fair

Labor Standards Act of 1938); *Karuk Tribe*, 260 F.3d 1071, 1075 (9th Cir. 2001); see also ER4, citing *Casino Pauma I* at 4, & n.12.<sup>14</sup> Moreover, as discussed at pp. 45-46, *Bay Mills*' recognition of the special status of gaming under IGRA does not render the activities associated with operating a casino noncommercial in a sense that would render the NLRA inapplicable.

### (2) The treaty-rights exception

Although there are no treaty-rights at issue here, the second *Coeur d'Alene* exception protects tribes' treaty rights from implicit abrogation. See *Chickasaw Nation*, 2015 WL 3526096 (Board declines jurisdiction based on treaty).

### (3) 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.

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<sup>14</sup> The other cases cited by Amici are also inapposite. Indeed, in *Kiowa*, the Supreme Court suggested that a distinction similar to the *Coeur d'Alene* self-governance exception might be appropriate, citing "modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities." *Kiowa*, 523 U.S. at 757-58 (ultimately deferring to Congress the policy decision of whether to alter established immunity).

**(4) The Board’s policy-balancing inquiry**

*San Manuel* held that, even in cases where *Coeur d’Alene* is not an impediment to jurisdiction, the Board will “balance the Board’s interest in effectuating the policies of the NLRA with its desire to accommodate the unique status of Indians in our society and legal culture.” *San Manuel*, 341 NLRB at 1062. That discretionary inquiry examines whether the employer: (1) deliberately engages in and affects interstate commerce as a typical commercial enterprise, employing and catering to non-Indians, thus invoking the Board’s duty to effectuate the NLRA, or (2) primarily fulfills traditionally tribal or customarily governmental functions, implicating core sovereignty whose protection will likely take precedence.

In *San Manuel*, *Little River*, and *Soaring Eagle*, 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; *Little River*, 359 NLRB No. 84, at \*6; *Soaring Eagle*, 359 NLRB No. 92 at \*13. 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 that the employer, an off-reservation hospital run by Native Alaskan tribes, but employing few Native Alaskans had: (1) a “relatively limited” impact on commerce, with 95-percent Native Alaskan patients and no non-tribal competitors; and (2) a unique governmental function “fulfilling the Federal Government’s trust responsibility to provide free health care to Indians.” *Id.* at 1075-77. The juxtaposition of *San Manuel* and *Yukon Kuskokwim* demonstrates that the Board takes care to accommodate tribal sovereignty, even when *Coeur d’Alene* does not bar jurisdiction.

**c. *San Manuel* conforms to Supreme Court precedent**

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

In *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), for example, the Supreme Court explained, using language reminiscent of *Coeur*

*d'Alene*, that a State may not infringe on reservation Indians' power "to prescribe the conduct of tribal members," or right "to make their own laws and be ruled by them" without express congressional authorization. *Id.* at 332 (citations omitted). It characterized as "[m]ore difficult," however, the issues surrounding a State's assertion of authority over non-members' on-reservation activities despite tribes' "equally well established" power to exclude non-members from, or condition their presence on, a reservation. *Id.* at 333 (alteration in original) (internal quotation and citation omitted).<sup>15</sup> 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 comprehensive wildlife-management program. *Mescalero*, 462 U.S. at 328-41.

The Casino's and Amicus' cases (Br.45;FtPeckA-Br.16-18,26) 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

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<sup>15</sup> *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 White Mtn. Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980) (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").

particular state law. Likewise, neither the Casino nor Amicus cite cases concerning a conflict between tribal sovereignty and *federal* law, much less a federal law of general applicability.<sup>16</sup> Cf. *Cabazon*, 480 U.S. at 207 (“[T]ribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.”) (citation omitted); *Dakota*, 796 F.2d at 188 (distinct issues involved when evaluating assertion of federal, rather than state, authority over tribe). Others involve the distinct sovereign-immunity doctrine, which provides further evidence that not all sovereign attributes are equal. See *Fla. Paralegic*, 166 F.3d at 1130 (tribal immunity entitled to greater protection than some other aspects of tribal sovereignty); *Bay Mills*, 134 S.Ct at 2034-2035 & n.6 (discussed above). Notably, the Court has never held that a tribe may require forfeiture of substantive federal statutory rights as a condition of non-Indians’ presence on tribal lands. That would amount to a determination that tribal sovereignty is equal, or superior, to that of the federal government. The law is the opposite.

Contrary to Amicus (FtPeckA-Br.16,17,28), the Supreme Court’s decision in *Montana v. United States*, 450 U.S. 544 (1981) does not hold otherwise. In *Montana*, the Court found a tribe had the inherent right to regulate activities of

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<sup>16</sup> Amici’s reliance on *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (FtPeckA-Br.17-18,26) is unsupported. In *Merrion*, state taxation of mineral lessees on tribal lands did not preclude tribal taxation, but allowed two sovereigns to tax the same transaction.

nonmembers who enter into consensual relations with the tribe or its members. Nonmembers may enter into enforceable agreements to comply with tribal law. But employees cannot even voluntarily prospectively waive their federal labor rights under the NLRA. *See National Licorice Co. v. NLRB*, 309 U.S. 350, 364 (1940).

More fundamentally, the NLRA does not deprive a tribe of its underlying inherent authority to enter into employment or other consensual relationships with nonmembers, or to regulate those relationships. Indeed, tribal regulation of employment and other commercial relationships can be an important area of cooperation by tribes with federal enforcement agencies in the exercise of the tribes' sovereign power. But, if an aspect of them is inconsistent with the NLRA, federal law must prevail.

The Casino and Amicus also rely (Br.45,48;FtPeckA-Br.28) on the discussion of the unworkability of the “governmental-proprietary” distinction in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 537-47 (1985). However, *Garcia* discussed this issue to *reject* the argument that application of federal employment laws to States was an unconstitutional infringement on their sovereignty. The Court concluded that no such infringement would occur when the covered state agency “faces nothing more than the same . . .

obligations that hundreds of thousands of other employers, public as well as private, have to meet.” 469 U.S. at 554.

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

Human Services).<sup>17</sup> Other cases involved concerns within the first exception, such as on-reservation disputes between tribes and member employees, or tribal membership rules, *see, e.g., Karuk, supra; Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246, 249 (8th Cir. 1993) (“strictly internal matter” between on-reservation tribal employer and tribal-member applicant); *Nero*, 892 F.2d at 1462-63 (definition of tribal membership), or treaty rights within the second, *see, e.g., Donovan v. Navajo Forest Prods. Indus.*, 692 F.2d 709, 711-12 (10th Cir. 1982).<sup>18</sup>

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<sup>17</sup> *Cf. Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-72 (1978) (declining to imply civil cause of action, or waiver of sovereign immunity, into Indian Civil Rights Act to enforce restrictions statute imposes on tribal governments).

<sup>18</sup> Thus there is no merit to the Casino’s claim that the panel “can and should” reconsider *Coeur d’Alene* because that decision’s “self-governance” inquiry is “irreconcilable” with *Garcia*. Br. 48 (citing *Rodriguez v. AT&T Mobility Servs., LLC*, 728 F.3d 975, 979 (9th Cir. 2013)). The courts have found the *Coeur d’Alene* distinction to be workable. *Compare, e.g., Reich v. Great Lakes Indian Fish & Wildlife Comm’n*, 4 F.3d 490 (7th Cir. 1993), with *Menominee Tribal Enters. v. Solis*, 601 F.3d 669 (7th Cir. 2010) and *Coeur d’Alene* with this Court’s decision in *Karuk Tribe Housing*, 260 F.3d 1071. And, notably, Congress has distinguished between Indian tribes’ governmental and commercial activities. *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)”).

Nor should the Court follow the request made by an amicus ((FtPeckA-Br.23-26) that the panel “*sua sponte* refer this case for *en banc* consideration.” This Court generally “do[es] not consider on appeal an issue raised only by an amicus.” *U.S. v. Gementera*, 379 F.3d 596, 607 (9th Cir. 2004). In any event, Amicus has failed to show the *Coeur d’Alene* directly conflicts with a decision of the Supreme Court or decisions of other courts of appeals. *See Local Rule 35(b)(1)*. As shown above, pp. 28, 30, 32, contrary to Amicus’s claim, there is no

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

### **3. The Board Properly Asserted Jurisdiction**

In applying *San Manuel*, the Board properly found (ER1n.1,4 (applying *Casino Pauma I* at 1n.3)) that neither of the applicable *Coeur d'Alene* exceptions nor the Board's discretionary inquiry preclude jurisdiction.

#### **a. The Casino's operations are not self-governance**

The Board properly held (ER1n.1,3-4, relying on *Casino Pauma I* at 1n.3,3-4) that the Casino does not satisfy the first exception. The Casino employs and serves predominantly non-Indians, competes with non-tribal casinos, and operates as a quintessential for-profit business. *See Menominee*, 601 F.3d at 671, 673-74 (tribal "sawmill is just a sawmill, a commercial enterprise," not part of tribe's governance structure); *see also supra*, *Mashantucket* (contractor), *Fla. Paraplegic* (gaming and entertainment complex), and *Coeur d'Alene* (farm). As discussed

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conflict between *Coeur d'Alene* and any decision by the D.C., Sixth or Tenth Circuits.

above, “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. To counter that determination, the Casino and Amicus (Br.45-48; FtPeckA-Br.17-20) insist that tribal gaming is *per se* governmental, citing the undisputed federal policy supporting tribal self-sufficiency and self-government, as well as IGRA’s recognition of gaming as an important source of tribal revenues. Relatedly, Amici assert (FtPeckA-Br.20; CalNtnsA-Br.14-17) that the Board’s assertion of jurisdiction countermands IGRA and federal Indian policy because under IGRA, the Tribe entered a compact with the State of California containing a TLRO. As demonstrated below, these assertions do not withstand scrutiny.

The claim (Br.46) that the Tribe uses Casino revenues rather than collecting taxes does not transform gaming into a government function at the core of tribal sovereignty. The Supreme Court and Congress have recognized and codified the value of tribal commercial ventures – and particularly tribal gaming – in sustaining tribal governments. But they have not suggested that such tribal ventures may pursue (or maximize) those revenues at the expense of their workers’ and customers’ federal rights and protections (e.g., occupational and consumer-safety standards, minimum-pay and accessibility requirements, NLRA rights to mutual support and collective activity). *Cf. Chickasaw Nation v. U.S.*, 208 F.3d 871, 881

(10<sup>th</sup> Cir. 2000) (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 (stating sovereign immunity “extends beyond what is needed to safeguard tribal self-governance” when it protects tribes’ participation “in the Nation’s commerce”). Similarly, circuit courts have rejected the argument that use of a tribal commercial enterprise’s profits to fund tribal government makes the business a governmental entity. *See OSHRC*, 935 F.2d at 184 (applying OSHA to sawmill, despite fact that “revenue from the mill [wa]s critical to the tribal government”); *San Manuel*, 475 F.3d at 1313 (rejecting argument that any tribal activity “aimed at raising revenue that will fund governmental functions” is “governmental”). The Tenth Circuit held in *Chickasaw Nation* that application of federal taxes to tribal gaming, which would “undoubtedly reduce[] the profit earned by the Nation on its gaming activities, ... [but] not otherwise... interfere with the ...wagering operations,” would not impair the Nation’s treaty right to self-government. 208 F.3d at 884.

Unlike the state laws found inapplicable to tribal gaming in *Cabazon*, 480 U.S. at 205, 216, federal statutory requirements routinely followed by viable businesses—including the NLRA—will not effectively eliminate the Casino as a revenue source. Significantly, 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. In contrast, the Casino claims the right not only to earn revenue for the Tribe through gaming, consistent with federal interests, but also to disregard *federal* labor policies embodied in the NLRA, which do not regulate gaming operations or preclude gaming profits.

Following *Cabazon*, Congress enacted IGRA. The statute was designed not to endow tribes with exclusive authority over gaming and all associated businesses on tribal lands but “to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme.” *In Re Indian Gaming Related Cases*, 331 F.3d 1094, 1096 (9th Cir. 2003) (citation omitted). The statutory text and legislative history reiterate Congress’ commitment to tribal self-government and self-sufficiency, and to gaming as a source of tribal revenues. 25 U.S.C. § 2702(1). IGRA also allows tribes to regulate gaming on their lands through federally approved ordinances, and according to tribal-state compacts. But it does not designate gaming “governmental,” or a core attribute of sovereignty.

Nor does the regulatory domain IGRA reserves to the tribes (subject to federal oversight) encompass labor relations at gaming sites, much less at their associated dining venues. As the D.C. Circuit explained in *San Manuel*, “IGRA

certainly permits tribes and states to regulate gaming activities, but it is a considerable leap from that bare fact to the conclusion that Congress intended federal agencies to have no role in regulating employment issues that arise in the context of tribal gaming . . . .” 475 F.3d at 1318 (finding “no indication that Congress intended to limit the scope of the NLRA when it enacted IGRA”).<sup>19</sup> *See also Little River*, 788 F.3d at 553 (“we do not find that the IGRA renders commercial gaming an untouchable aspect of tribal self-governance, leaving the [Tribe] to operate gaming enterprises free from all other federal regulations”). Indeed, one of three reasons the Secretary of the Interior may rely upon to disapprove a tribal-state compact under IGRA is if the compact violates “any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands.” 25 U.S.C. § 2710(d)(8)(B).

The Casino’s and Amici’s reliance (Br.46, 50; FtPeck-A.Br.18) on *Bay Mills* is again misplaced. In *Bay Mills*, the Supreme Court held that “tribal gaming under IGRA is not just ordinary commercial activity.” *Bay Mills*, 134 S.Ct. 2043. Such gaming is sanctioned and regulated, and as Justice Sotomayor stated in her concurring opinion, “tribal gaming operations cannot be understood as mere profit-

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<sup>19</sup> *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.’”) (citation omitted).

making ventures that are wholly separate from the Tribe’s core government functions.” *Id.* But the special status of tribal gaming in this respect does not render the activities associated with operating a casino *noncommercial* in a sense that would render the NLRA inapplicable or the Board’s exercise of jurisdiction improper. IGRA itself does not indicate that Congress regarded tribal gaming as exempt from non-tribal regulation. To the contrary, with regard to Class III gaming, “everything . . . in IGRA affords tools (for either state or federal officials) to regulate gaming on Indian lands.” *Id.* at 2034 (majority opinion). And as noted above, IGRA contemplates that non-gaming-related federal law will apply.

Thus, the Casino is wrong that applying the NLRA to a tribal enterprise “raises the specter that a court is simply making a policy judgment that it, unlike Congress, disfavors the activity in question.” (Br. 47.) As demonstrated, Congress, in enacting IGRA, recognized the importance of gaming to tribes, but also explicitly allowed for appropriate federal regulation.<sup>20</sup>

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<sup>20</sup> Contrary to Amicus (Ft.PeckA-Br.19), NLRA requirements are not comparable to the rejected version of IGRA, under which the federal government would have controlled many aspects of gaming operations and personnel. The NLRA does not dictate any particular terms of employment (e.g., alcohol testing or Indian hiring preferences). *See H.K. Porter 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 v. NLRB*, 411 F.3d 212, 224 (D.C. Cir. 2005) (NLRA does not prevent employer from “discharg[ing] an employee for a good reason, a bad reason, or no reason, so long as it is not for an unlawful reason.”) (citation omitted). Moreover, while one

The Tribe's entry into a compact containing the TLRO, pursuant to IGRA, does not change the analysis. (CalNtnsA-Br.15). "Nobody questions that a tribe may, in the absence of a federal statute, act on its inherent sovereign power to adopt regulations for its tribe. It is quite different to hold, however, that this broad sovereign power essentially preempts the application of a federal regulatory scheme which is silent on its application to Indians." *Mashantucket*, 95 F.3d at 178-79; *see also Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus.*, 939 F.2d 683, 685 (9th Cir. 1991) (rejecting argument that tribal enterprise need not comply with ERISA because it was complying with tribal ordinance, holding "[f]ederal law does not give way to a tribal ordinance" unless it falls within *Coeur d'Alene* exceptions).<sup>21</sup>

In *San Manuel*, the court held that neither IGRA nor a TLRO enacted pursuant to the same requirements as the compact between the Tribe and the State

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purpose of IGRA is to promote tribal development, its specific provisions regulating gaming address another congressional purpose: preventing infiltration of the gaming operations by organized crime. *See* 25 U.S.C. § 2702(1) & (2).

<sup>21</sup> *See also Menominee*, 601 F.3d at 674 (rejecting implicit tribal authority to preempt federal law); *United States v. Santee Sioux Tribe of Neb.*, 254 F.3d 728, 736-37 (8th Cir. 2001) (holding tribe lacked authority to pass referendum contrary to federal court order, and thus "in contravention of federal law"). *Cf. Dakota*, 796 F.2d at 186-87 (finding casino, owned and operated on tribal lands by tribal members and licensed pursuant to tribal code approved by Secretary of the Interior, violated state and federal law).

of California here, deprive the Board of jurisdiction over the casino's labor relations. 475 F.3d at 1314-15 ("impairment of tribal sovereignty is negligible in [the context of the compact and TLRO], as the Tribe's activity was primarily commercial and its enactment of labor legislation and execution of a gaming compact were ancillary to that commercial activity.") *See also Little River*, 788 F.3d at 555 ("no indication that Congress intended the NLRA not to apply to a tribal government's operation of tribal gaming, including the tribe's regulation of the labor-organizing of non-member employees.") Nothing in IGRA provides that such a Tribe-State compact, or any tribal ordinance adopted pursuant thereto, will supersede inconsistent provisions of federal employment laws in general or the NLRA in particular.<sup>22</sup>

**b. No evidence Congress intended to exempt tribes from the NLRA**

As discussed pp.14-24, the Board reasonably determined (ER1n1;4 (referencing *Casino Pauma I* at 1n.3,3-4)) that the third exception has not been

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<sup>22</sup> Amicus' reliance (Cal Ntns A.Br.17) on *In re Indian Gaming Related Cases*, 331 F.3d at 1116, for its claim that labor relations "falls within the exclusive purview of tribal sovereignty under IGRA," is misplaced. In that case, decided before the Board asserted jurisdiction, the Court simply held that it was not bad faith for California to require a Tribe to adopt a labor provision, because a labor provision is "not too far afield" from tribal gaming to be an inappropriate topic for negotiations. 331 F.3d at 1115-1116. Nothing in that case, nor in IGRA, indicates that provisions of such a compact supersede inconsistent provisions of existing federal laws.

satisfied with respect to the NLRA. Nothing in the statutory language, legislative history, context, or structure demonstrates a congressional intent to foreclose Board jurisdiction here.

**c. The balance of labor and Indian policies favors Board jurisdiction**

Having determined that no *Coeur d'Alene* exception applies, the Board found (*Casino Pauma I* 3-4) that, because the Casino operates as a business in competition with similar non-tribal casinos and serves mostly non-tribal customers, policy considerations favor jurisdiction. As the Board further explained in *San Manuel*, 341 NLRB at 1062-63, those aspects of large tribal gaming enterprises, as well as their employment (as here) of mostly non-Indian employees, combine to “affect interstate commerce in a significant way,” implicating the policies underlying the NLRA. Accordingly, the Board concluded (ER1n.1,3-4), relying on *Casino Pauma I*, that “there is no basis in the record” to distinguish this case from *San Manuel* and its progeny.

**d. The TLRO does not govern these proceedings**

The Casino and Amici (Br.50-53;FtPeckA-Br.20; CalNtnA-Br.*passim*) urge that the TLRO should control the disposition of this case rather than the NLRA. As discussed, the federal NLRA, not the State-Tribe TLRO, governs this case.

Indeed, the Board found (ER4) that the claim that the TLRO should control “would have been valid prior to the Board’s 2004 decision in *San Manuel*,

pursuant to which the Board for the first time opted to exercise jurisdiction over Indian casinos.” However, since 2004, the Board, with Court approval in *San Manuel, Little River, and Soaring Eagle*, has asserted jurisdiction consistent with its federal mandate over Indian casinos, which cannot be usurped by a tribal or state agreement. (ER4.) In doing so, as discussed above, the Board and courts have found that tribal adoption of the TLRO and similar ordinances does not defeat federal law.

Accordingly, the Casino’s arguments (Br.51-53) about the adoption of the TLRO provisions, and, more specifically, the Union’s alleged waiver of its right to Board proceedings, are irrelevant. The TLRO does not trump the NLRA, nor does it provide grounds to question the Board’s jurisdiction. In any event, as the Board found (ER4), the parties entered into the TLRO *before* the Board determined that it had jurisdiction over Indian casinos. Thus, the Union could not have waived a right to having the Board take jurisdiction over its claim because that right did not exist at that time. *See Local Joint Exec. Bd. Of Las Vegas v. NLRB*, 540 F.3d 1072, 1079 & n.10 (9th Cir. 2008) (union must consciously yield or clearly and mistakably waive its interest in matter).<sup>23</sup>

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<sup>23</sup> The Casino’s related claims (Br.51-52) that the Union should be “estopped” from using the NLRA processes because at times the Union has utilized the TLRO, and has opined that it could survive alongside the NLRA, are unavailing. The Casino has taken contradictory positions over the years; in fact, the Casino, which

Amicus (CalNtnsA.Br.18-25) argues that the Board's assertion of jurisdiction would disrupt the funding scheme and operations of the California Tribes that have entered into similar compacts. But the TLRO provisions in those compacts were included to satisfy the state that workers would have labor rights at tribal casinos at a time when the Board had not asserted jurisdiction. There is no evidence that California would invalidate the other provisions of its compacts. The Casino and Amici have failed to demonstrate grounds for overturning this Court's precedent or any aspect of the Board's jurisdictional determination.<sup>24</sup>

**II. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDING THAT THE CASINO VIOLATED SECTION 8(a)(1) OF THE ACT BY PHOTOGRAPHING EMPLOYEES DISTRIBUTING UNION LITERATURE**

It is uncontested that a security guard photographed employees distributing union literature on December 14, 2013. (ER1n.1;SER112-124, 126, 133.) Judge Sotolongo found (ER9,12) that such conduct "has a chilling and coercive effect, and thus violates Section 8(a)(1) of the Act." (ER9 (citing cases); *see NLRB v.*

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now insists that the TLRO governs, assured employees in 2013 that the NLRA protected them. *See Casino Pauma I* at 3,3n.7.

<sup>24</sup> The Casino's claim (Br.23-25) that the judge precluded it from fully presenting jurisdictional claims is without merit. First, it stipulated to the same jurisdictional facts in *Casino Pauma I*, where the Board found jurisdiction. (ER3; SER 7.) The judge allowed the Casino to offer additional facts, and to enter the TLRO into evidence. He further invited the Casino to make an offer of proof, which the Casino failed to do. (ER 64). In any event, the Casino was able to raise all jurisdictional arguments in its brief here.

*Randall Kane*, 581 F.2d 215, 218 (9th Cir. 1978) (surveillance of union sympathizers one of “clearest” forms of Section 8(a)(1) violation).)

The Casino failed to challenge this finding in exceptions to the Board. (ER1n.1.) Thus, the Board adopted Judge Sotolongo’s finding and the Court is without jurisdiction to consider it now. *See NLRB v. Friendly Cab*, 512 F.3d 1090, 1103 n.10 (9th Cir. 2008) (“Section 10(e) of the [NLRA] constitutes a jurisdictional bar to this court considering claims not raised before the [Board].”); *see* 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.”).<sup>25</sup> The Board is thus entitled to enforcement of this finding.

### **III. THE BOARD RATIONALLY FOUND THAT THE CASINO VIOLATED SECTION 8(a)(1) BY RESTRICTING EMPLOYEES FROM DISTRIBUTING UNION LITERATURE**

The Casino does not contest any of the facts. The Board’s determination that the Casino violated Section 8(a)(1) of the Act by limiting its employees’ rights to distribute union literature is rational and based on these undisputed facts. The

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<sup>25</sup> The Casino excepted to the *remedy* for the photography violation before the Board (ER1n.1), but has not before the Court. Therefore, it waived any such challenge. *See* Fed. R. App. Proc. 28(a)(9)(A) (party waives claim failed to raise in opening brief); *Sparks Nugget, Inc. v. NLRB*, 968 F.2d 991, 998 (9th Cir. 1992).

Casino’s arguments to the contrary are jurisdictionally barred and otherwise without merit.

**A. Applicable Principles and Standard of Review**

Section 7 of the Act (29 U.S.C. § 157) guarantees employees’ right to self-organization and engage in concerted activities for the purpose of mutual aid or protection. Employers violate Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) if they “interfere with, restrain, or coerce employees in the exercise of [those] rights.”

Section 7 “rights are not viable in a vacuum; their effectiveness depends . . . on the ability of employees to learn the advantages and disadvantages of organization from others.” *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972). Therefore, Section 7 encompasses the rights of employees to engage in union solicitation (*Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945)), and to solicit other employees regarding terms and conditions of employment. *See Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978).

Employees may also “seek to . . . improve their lot as employees through channels outside the immediate employee-employer relationship.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). They have the right to communicate with, and solicit the support of, the general public regarding their terms and conditions of employment. *See Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 343 (D.C. Cir.

2003) (employees have right to communicate with employer's customers and clients).

With respect to solicitation, an employer has a legitimate interest in maintaining discipline and production in operating its business. *See Republic Aviation*, 324 U.S. at 797-98, 802 n.8. Therefore, an employer “may legitimately prohibit [employee] solicitation in working areas during working time.” *Albertson's, Inc. v. NLRB*, 161 F.3d 1231, 1236 (10th Cir. 1998). Any restriction on employee solicitation, however, “must be justified by the employer's legitimate concerns.” *Rest. Corp. of Am. v. NLRB*, 827 F.2d 799, 806 (D.C. Cir. 1987).

To strike an appropriate balance between employee and employer interests, the Board has articulated standards for assessing the legality of employee no-solicitation and distribution rules in certain industries. For casinos, the Board applies the standards it developed for retail stores, having found that “the gambling area” of a casino “equates to [the] ‘selling floor’ areas in retail stores.” *Dunes Hotel*, 284 NLRB 871, 875 (1987). *Accord Santa Fe Hotel & Casino*, 331 NLRB 723, 729 (2000); *Double Eagle Hotel*, 341 NLRB 112, 113, *enforced*, 414 F.3d 1249 (10th Cir. 2005).

Under those standards, an employer may lawfully ban all employee solicitation and distribution on the selling floor, and its adjacent aisles and corridors, because active solicitation in a sales area may disrupt a retail store's

business. *See Marshall Field & Co.*, 98 NLRB 88, 92 (1952), *modified on other grounds*, 200 F.2d 375 (7th Cir. 1952). *Hughes Properties v. NLRB*, 758 F.2d 1320, 1322-23 (9th Cir. 1985). That ban, however, may not “be extended beyond that portion of the store which is used for selling purposes,” to areas such as public restrooms and restaurants. *McBride’s of Naylor Road*, 229 NLRB 795, 795 (1977). Restrictions beyond the selling floor or gaming area require a showing of a legitimate employer interest. *See Hughes*, 758 F.2d at 1321-23; *Double Eagle Hotel*, 414 F.3d at 1254. Absent this showing, an employee has the Section 7 right to solicit or distribute literature in public areas beyond the selling floor. *See Ark Las Vegas Rest. Corp. v. NLRB*, 334 F.3d 99, 108-09 (D.C. Cir. 2003); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 (1999). This Court's inquiry is limited to whether the Board’s factual findings are supported by substantial evidence on the record as a whole, and whether the Board’s application of those findings is rational and consistent with the Act. *Beth Israel*, 437 U.S. at 501(1978); *Precision Striping v. NLRB*, 642 F.2d 1144, 1146 (9th Cir. 1981).

**B. The Casino Violated the Act By Maintaining And Enforcing Its Handbook Rule; Interfering With and Threatening To Discipline Employees for Distributing Union Literature; and Disciplining Reyes**

1. The Casino’s handbook rule broadly prohibits distribution of literature in “working or guest areas at any time.” (ER4;SER40.) In *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the Board adopted a test for determining

whether an employer rule violates the Act. If a rule does not explicitly restrict Section 7 activities, the Board finds that it nonetheless violates Section 8(a)(1) if “(1) employees would reasonably construe [it] to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.” 343 NLRB at 647.

The Board found that under the “well-settled” solicitation law discussed above, employees have the right, “absent unusual or exceptional circumstances” not demonstrated here, “to distribute union literature on their employer premises on non-work time and in non-work areas.” (ER8-9.) The Board determined that the term “guest areas” and was “vague and ambiguous” because it could encompass non-work areas. Thus, the Board found that under prong one of *Lutheran*, employees could “reasonably construe” the rule to apply to areas in which solicitation was protected by Section 7. (ER8-9.)

The Board found that the rule also runs afoul of the third prong of *Lutheran* 343 NLRB at 647 because it was applied to restrict the rights of the off-duty employees distributing literature at the Casino’s main entrance on December 14, 2013. (ER8-9.) Following precedent, the Board rationally concluded that the Casino unlawfully applied the rule to restrict the Section 7 rights of those employees. (ER8-9.) *See Santa Fe*, 331 NLRB at 723 (distribution allowed in main entrance to facility); *Dunes Hotel*, 284 NLRB at 878 (distribution allowed in

“areas open to the guests or the public”); *Flamingo Hilton*, 330 NLRB at 288 (distribution allowed in “public areas”). In *Hughes*, this Court distinguished an earlier panel decision by noting that there, “soliciting off-duty employees in public areas could have been disruptive to the service of customers.” 758 F.2d at 1323 (distinguishing *Silver Spur Casino*, 623 F.2d 571 (9th Cir. 1980)). Here, it is undisputed that none of the off-duty employees in nonwork areas disrupted the service of customers. Thus, the Board’s conclusion that the rule violates Section 8(a)(1) of the Act should be upheld. (ER8-9.)

2. The Board found that the Casino committed additional Section 8(a)(1) violations by stopping employees from distributing union literature and threatening them with discipline on December 14, 2013. (ER9; Facts at 5-6.) These findings are rational and consistent with the Act. See *Double Eagle*, 414 F.3d at 1252 n.2 (interference with union solicitation violates Section 8(a)(1)); *Randall Kane*, 581 F.2d at 218 (threats of discipline for engaging in union activity violate Section 8(a)(1)).

3. The Board rationally found that the Casino violated Section 8(a)(1) by disciplining Reyes for distributing flyers to coworkers near the time-clock while on break. (ER11; Facts at 6.) The Board found that although Reyes’ coworkers had not yet performed the “perfunctory act” of clocking out, they were not functionally on work time because they were within seconds of clocking out when she

distributed the flyers. (ER11.) Thus, the Board determined that all employees involved, including Reyes, were not on work time. The Board also found that the timeclock area—immediately outside the breakroom and removed from the gaming area—was not a working area. The Board reasonably concluded that Reyes “engaged in activity protected by Section 7 when she handed out union flyers to fellow employees.” (ER11.) The Casino therefore violated Section 8(a)(1) by disciplining her for that conduct. *See NLRB v. Lenkurt Elec.*, 459 F.2d 635, 636-639 (9th Cir. 1972) (discipline for union activity violates Section 8(a)(1)).

**C. The Casino’s *Republic Aviation* Challenge Is Jurisdictionally-Barred and Without Merit, and Its Tribal Defense Fails**

Forgoing any challenge to the Board’s fact findings or application of well-established law, the Casino instead raises a new claim (Br.22-23,25-38) attacking the applicability of the Supreme Court’s *Republic Aviation* decision. The Casino’s belated claim is jurisdictionally barred and, in any event, is without merit. Its remaining claim, that the Act does not apply because it is a tribally-owned casino (Br.32-22), is contrary to the Board’s jurisdictional finding.

The Casino devotes 16 pages to belatedly decrying *Republic Aviation* and its progeny, which underpin the Board’s solicitation jurisprudence. The Casino complains that courts and the Board routinely apply the teachings of *Republic Aviation* to protect employee-to-customer solicitation (Br. 27) and allow solicitation in non-work guest areas (Br.26-27,29). The Casino also freshly asserts

that *Republic Aviation* is outdated because of workplace technology developments (Br.34-35), and that applying it will “crush” employers’ ability to run their businesses (Br.38).

Under Section 10(e) of the Act, the Casino had to first raise these issues to the Board. 29 U.S.C. §10(e). The critical question in satisfying Section 10(e) is whether the Board received adequate notice of the basis for the objection. *Alwin Mfg. v. NLRB*, 192 F.3d 133, 143 (D.C. Cir. 1999). Before the Board, however, the Casino never challenged any of the Board’s findings on these grounds—either in its exceptions or its exceptions brief.<sup>26</sup> Although the Casino made general exceptions to the Board’s solicitation findings, it did not object with the necessary specificity to put the Board on notice of its extensive challenge to *Republic Aviation* jurisprudence. *See NLRB v. Legacy Health System*, 662 F.3d 1124, 1126-27 (9th Cir. 2012) (party must object with specificity to preserve issue for judicial review). Thus the Court is jurisdictionally barred from considering these claims. *Friendly Cab*, 512 F.3d at 1103 n.10 (Court precluded from considering objections raised for first time unless extraordinary circumstances shown). The Casino’s assertion (Br.25) that the judge precluded it from presenting all of its solicitation arguments does not constitute the requisite “extraordinary circumstance” because

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<sup>26</sup> The Board has moved to lodge the Casino’s exceptions brief.

the Casino has not demonstrated that it was prevented from challenging the judge's findings before the Board.

In any event, the Casino's claims are without merit. *Republic Aviation* held that in evaluating restrictions on employee's Section 7 rights, the Board's findings reflect "an adjustment between the undisputed right of self-organization assured to employees under [Section 7] and the equally undisputed right of employers to maintain discipline in their establishments." 324 U.S. at 797-98. The Court emphasized that it is for the Board to determine how to "apply the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms." *Id.* at 798. Thus, *Republic Aviation* allows for employers to demonstrate that unique contingencies of their workplace counsel restriction of employees' solicitation rights. The Casino provided no such evidence. The Casino's assertions regarding potential harm from "lurking" in bathrooms, or "line-drawing" at sports stadiums and airports, are untethered from the facts of this case (Br.26-27,29,30,32), and its arguments regarding non-employee union organizers are irrelevant because such individuals are not at issue here. (Br.36.)

Finally, the Casino claims a stronger right to bar employees from engaging in otherwise protected conduct because it is owned by the Tribe. (Br.32-33.) As the Board found, "there is simply no support for this proposition under Board law."

(ER9n.23.) Indeed, in *Soaring Eagle*, the Board found that a tribally-owned casino violated Section 8(a)(1) by maintaining and enforcing a no-solicitation and distribution rule. 359 NLRB No. 92. Additionally, the Casino did not provide any evidence that because it is tribally-owned it has a stronger interest in preventing union solicitation and distribution. As the Board found, the Casino's arguments simply re-assert its rejected claim, discussed above, that the NLRA does not apply to its Casino. (ER9n.23.) Accordingly, they are without merit.

## CONCLUSION

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

## STATEMENT OF RELATED CASES

There are no related cases pending before this Court.

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March 2017

# **ADDENDUM**

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## NLRB STATUTES

Relevant provisions of the National Labor Relations Act (29 U.S.C. § 151, et seq.) are as follows:

### **Section 2 (29 U.S.C. § 152(2)):**

The term “employer” includes any person acting as an agent of an employer, directly or indirectly, but shall not include 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 [45 U.S.C. 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

### **Section 7 (29 U.S.C. § 157):**

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

### **Section 8(a)(1) (29 U.S.C. § 158(a)(1)):**

It shall be an unfair labor practice for an employer--

- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

### **Section 8(a)(3) (29 U.S.C. § 158(a)(3)):**

It shall be an unfair labor practice for an employer –

- (2) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization....

**Section 10(a) (29 USC § 160(a)):**

Sec. 10. [§ 160.] (a) [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

**Section 10(e) (29 U.S.C. § 160(e)):**

The Board shall have power to petition any court of appeals of the United States...wherein the unfair labor practice occurred or wherein such person resides or transacts business, for the enforcement of such order.... No objection that has not been urged before the Board...shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive....

**Section 10(f) (29 U.S.C. § 160(f)):**

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia....

**Section 14(b) (29 U.S.C. § 164(b)):**

- (b) AGREEMENTS REQUIRING UNION MEMBERSHIP IN VIOLATION OF STATE LAW. Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

**ADDITIONAL STATUTES**

**25 U.S.C. § 2701 Indian Gaming Regulatory Act:**

The Congress finds that—

- (1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;
- (2) Federal courts have held that section 81 of this title requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;
- (3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;
- (4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and
- (5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

**25 U.S.C. § 2702(1) & (2) Indian Gaming Regulatory Act:**

The purpose of this chapter is—

- (1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;
- (2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming

operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

**25 U.S.C. § 2710(d)(8)(B) National Indian Gaming Commission, Tribal Gaming Ordinances:**

- (B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates—
- (i) any provision of this chapter,
  - (ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or
  - (iii) the trust obligations of the United States to Indians.

**THE BOARD'S RULES AND REGULATIONS**

**29 C.F.R. § 102.1 Terms defined in section 2 of the Act:**

The terms *person*, *employer*, *employee*, *representative*, *labor organization*, *commerce*, *affecting commerce*, and *unfair labor practice*, as used herein, shall have the meanings set forth in section 2 of the National Labor Relations Act, as amended by title I of the Labor Management Relations Act, 1947.

**29 C.F.R. § 102.7 State:**

The term *State* as used herein shall include the District of Columbia and all States, Territories, and possessions of the United States.

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

CASINO PAUMA )  
 )  
 )  
 ) Petitioner/Cross-Respondent )  
 ) Nos. 16-70397 & 16-70756  
 )  
 ) v. )  
 ) Board Case No.  
 ) NATIONAL LABOR RELATIONS BOARD ) 21-CA-125450  
 )  
 ) Respondent/Cross-Petitioner )  
 )  
 ) and )  
 )  
 ) UNITE HERE INTERNATIONAL UNION )  
 )  
 )  
 ) Intervenor )

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 13,924 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC  
this 1st day of March, 2017

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

CASINO PAUMA	)	
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	)	
Respondent/Cross-Petitioner	)	
	)	
and	)	
	)	
UNITE HERE INTERNATIONAL UNION	)	
	)	
Intervenor	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on March 1, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC  
this 1st day of March, 2017