UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

Saginaw Chippewa Indian Tribe of Michigan,

Plaintiff,

Case No. 11-cv-14652
Hon. Thomas L. Ludington

v.

The National Labor Relations Board, et al.

Defendants.

Saginaw Chippewa Indian Tribe of Michigan's Combined Response to Defendants' Motion to Dismiss and Reply to Defendant's Brief in Opposition to Plaintiff's Motion for a Temporary Restraining Order and/or Preliminary Injunction

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CONCISE STATEMENT OF ISSUES PRESENTED

Under well-established Supreme Court precedent, the National Labor Relations Act does not apply to Indian tribes. The National Labor Relations Board's attempt to assert jurisdiction over the Saginaw Chippewa Indian Tribe of Michigan violates treaty rights guaranteed to the Tribe by the Treaties of 1855 and 1864, inherent sovereign rights of the Tribe protected by federal law, and enacted Tribal laws, and would force the Tribe to violate the Indian Gaming Regulatory Act. Does this Court have jurisdiction to hear the Tribe's claims for injunctive relief to prevent these imminent and irreparable injuries?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Jurisdiction

28 U.S.C. § 1331 (federal-question jurisdiction)

Treaty with the Chippewa of Saginaw, Etc., Aug. 2, 1855, 11 Stat. 633 (1855 Treaty)

Treaty with the Chippewa of Saginaw, Swan Creek, and Black River, Oct. 18, 1864, 14 Stat. 657 (1864 Treaty)

25 U.S.C. § 2701 *et seq.* (the National Indian Gaming Regulatory Act)

Nat. Farm. Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985) (federal common-law questions)

NLRA's Inapplicability to the Tribe

United States v. Dion, 476 U.S. 734 (1986)

Dobbs v. Anthem Blue Cross and Blue Shield, 600 F.3d 1275 (10th Cir. 2010)

Chickasaw Nation v. National Labor Relations Board, Case No. CIV-11-506-W (W.D. Okla. July 11, 2011)

TABLE OF CONTENTS

"'No, no!' said the Queen. 'Sentence first — verdict afterwards.'"

– Lewis Carroll, ALICE IN WONDERLAND

INTRODUCTION

Contrary to the protests of the Defendants (collectively, the "NLRB" or "Board"), this case is precisely "about whether the Agency can assert jurisdiction over a [c]asino operated by the Saginaw Tribe."[1] The Board may only exercise the authority delegated to it by Congress in the National Labor Relations Act,[2] and the import of the Saginaw Chippewa Indian Tribe's Complaint is that the NLRA does not afford the Board authority over the Tribe. So the argument that the NLRA's exhaustion provision requires the Board to determine its own exercise of jurisdiction places the cart before the horse. Without a textually demonstrable legislative commitment of authority to the Board, the Board has no authority to conduct such an inquiry in the first place. And the point of the Tribe's request for a preliminary injunction is to make the Board stay its hand while this Court determines whether that legislative commitment exists. This interim step will allow the parties to develop a full and complete record before an impartial decision maker—a step absolutely necessary to protect the Tribe's inherent and Treaty-granted rights as a sovereign government.

ARGUMENT

I. This Court has federal-question jurisdiction to hear this action.

Certainly, the Tribe agrees that this Court is one of limited jurisdiction. But Congress has made clear that it "district courts *shall* have original jurisdiction of all civil actions arising under

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[1] NLRB Et Al.'s Brief in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction and Opposition to Plaintiff's Motion for a Temporary Restraining Order and/or Preliminary Injunction ("NLRB Br."), Dkt. 11 at Pg ID 574.

[2] *See Leedom v. Kyne*, 358 U.S. 184, 188 (1958) ("strik[ing] down an order of the Board made in excess of its delegated powers).

the Constitution, laws, or treaties of the United States."[3] Unfortunately, the Board's reading of the Complaint ignores that this civil action arises under four separate bases of federal-question jurisdiction. The Board may not pick and choose which United States laws and treaties this Court will uphold.

A. Infringement of the treaty right of self-governance is a federal question.

The Treaties of 1855 and 1864 set apart the Isabella Reservation as a permanent home for the Tribe, and guarantee the Tribe certain rights within its territory.[4] One of the most fundamental of these is the Tribe's treaty-guaranteed right to govern itself[5]—a right the Board has not questioned in this proceeding.[6] As to this right, the Supreme Court has "repeatedly recognized the federal government's longstanding policy of encouraging tribal self-government[,]"[7] and has respected "Congress's jealous regard for Indian self-governance."[8] This right of self-governance extends throughout a tribe's territory,[9] and across its people.[10] The Tribe has exercised this treaty right by enacting a Constitution, passing tribal ordinances under that Constitution, and developing a judicial system to enforce those laws. Particularly relevant to

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[3] 28 U.S.C. § 1331 (emphasis added).

[4] Bowes Aff., Ex. 13 to Pl. Motion and Memo. of Law in Support of Motion for a Temporary Restraining Order and Preliminary Injunction ("Tribe's Mot."), Dkt. 6 at ¶ 26, Pg ID 244. On this motion to dismiss, the Court must take the Tribe's allegations of the existence of treaty rights as true, but the Board has not offered any evidence to contradict this averment.

[5] *Id.*

[6] *See generally* NLRB Br., Doc. 11.

[7] *Iowa Mutual Ins. v. LaPlante*, 480 U.S. 9, 14 (1987) (citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 138, n.5 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 and n.10 (1980); *Williams v. Lee*, 358 U.S. 217, 220-21 (1959)).

[8] *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 890 (citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-35 (1983) and *Fisher v. District Court*, 424 U.S. 382, 388-89 (1976)).

[9] *E.g.*, *Iowa Mutual Ins.*, 480 U.S. at 18 ("Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty.").

[10] *E.g., Three Affiliated Tribes*, 476 U.S. at 890 ("'A tribe's power to prescribe the conduct of tribal members has never been doubted[.]'") (quoting *Mescalero Apache Tribe*, 462 U.S. at 332 (1983)).

this case, the Tribe's federally approved Constitution expressly recognizes the right to exclude,[11] and the Tribe has enacted a conduct and exclusion ordinance that grants the Tribal Council the authority to condition permission of presence on the Tribe's restricted lands, and allows the Council to revoke this permission when necessary.[12] Whether the Board's attempt to apply the NLRA to the Tribe's Casino infringes on the Tribe's treaty right of self-governance[13] is a federal question that "aris[es] under the . . . treaties of the United States[,]" and so "*shall*" be heard by this Court.[14]

B. Infringement of the treaty right to exclude is a federal question.

Similarly, the Tribe's Treaties of 1855 and 1864 guarantee it the right to exclude unwanted intruders from its reservation[15]—a right the Board again has not questioned.[16] As the Supreme Court has stated, this right to exclude "necessarily includes the power to place conditions on entry, on continued presence, or on reservation conduct[,]" so "[w]hen a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its *ultimate* power to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry."[17] But "[a] nonmember who enters the jurisdiction of the tribe remains subject to the risk

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[11] Saginaw Chippewa Constitution, Art. VI, Sec. 1(l), ECF No. 5-5, Pg ID 201-02.
[12] Ex. 5 to Tribe's Mot., Dkt. 5-6, Pg ID 205-06.
[13] S*ee* Tribe's Mot., Dkt. 5, Pg ID 71-75.
[14] 28 U.S.C. § 1331 (emphasis added).
[15] *See* Bowes Aff., Ex. 13 to Tribe's Mot., Dkt. 6 at ¶ 26, Pg ID 244. Again, in deciding the motion to dismiss, the Court must take the Tribe's averred treaty right to exclude as true.
[16] *See generally* NLRB Br., Dkt. 11.
[17] *Merrion*, 455 U.S. at 144. *See also generally* Kaighn Smith, Jr., *Tribal Self-Determination and Judicial Restraint: The Problem of Labor and Employment Relations within the Reservation*, 2008 Mich. St. L. Rev. 505, 527 (2008) ("The Court's modern precedents in *Williams*, *Merrion*, and *New Mexico* should leave no doubt that tribes have inherent authority to regulate the conduct of nonmembers who voluntarily enter the reservation to exploit reservation resources or otherwise attain economic gain.").

that the tribe will later exercise its sovereign power."[18] This "sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms."[19]

The Tribe has exercised this treaty right to condition the entry of nonmembers by developing and enforcing policies for the operation and management of its governmental operations, including its gaming operations. For example, the Tribe requires many of its casino employees to obtain tribal gaming licenses,[20] and requires all of its employees to follow a non-solicitation places restrictions on employees' posting of literature—whether political, charitable, religious, social, or otherwise—at its casinos.[21] The Tribe has further exercised this treaty right, repeated in its Constitution,[22] by enacting Ordinance No. 3,[23] which codifies its right to remove employees and others from its restricted lands (and the gaming facilities on those lands) should those persons violate the law-and-policy conditions the Tribe has placed on entry. Whether the Board's attempt to apply the NLRA to the casino infringes on the Tribe's treaty right to exclude[24] is a federal question that "aris[es] under the . . . treaties of the United States[,]" and so "*shall*" be heard by this Court.[25]

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[18] *Merrion*, 455 U.S. at 145.
[19] *Id.* at 147.
[20] Sec. 6 of Saginaw Chippewa Tribe Gaming Ordinance, Ex. 2 to Tribe's Mot., Dkt. 5-3, Pg ID 135-43.
[21] Sec. 5 of Soaring Eagle Casino Resort Associate Handbook, Ex. 15 to Tribe's Mot., Dkt. 8-1, Pg ID 534-36. The underlying complaint against the Tribe is that it engaged in an unfair labor practice by terminating an employee who violated this policy by posting organizing materials, and so violated the Act by following its own law.
[22] Saginaw Chippewa Constitution, Art. VI, Sec. 1(o); Art. VI, Sec. 2; and Art. VI, Sec. 3 of the, ECF No. 5-5, Pg ID 201-02.
[23] Ex. 5 to Tribe's Mot., Dkt. 5-6, Pg ID 205-06.
[24] *See* Tribe's Mot., Dkt. 5, Pg ID 63, 71.
[25] 28 U.S.C. § 1331 (emphasis added).

C. Infringement of the sovereign right to regulate economic activity is a federal question.

The Supreme Court has long recognized that "Indian tribes are 'unique aggregations possessing attributes of sovereignty over both their members and their territory.'"[26] Separate from specific treaty rights, longstanding federal law recognizes tribes' inherent retained right "to undertake and regulate economic activity within the reservation."[27] Again, the Board has not questioned the existence of this right.[28] But whereas the Board ignores the right, "[b]oth the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes[,]"[29] and often effectuated through regulation of economic activity. As a separate sovereign, the Tribe retains the inherent rights to govern itself and to regulate its internal affairs, including by managing the economic resources within its reservation. The Tribe has exercised this inherent right by entering into a gaming compact with the State of Michigan[30] and enacting tribal laws and regulations governing the operation of its gaming facilities.[31] The Tribe's development and regulation of its casinos affords it a reliable source of funds, which the Tribe has used and continues to use to provide

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[26] *Montana v. United States*, 450 U.S. 544, 563 (1981) (quoting *United States v. Wheeler*, 435 U.S. 313 (1978)). *Accord Mazurie*, 419 U.S. at 557 (1975).
[27] *Mescalero Apache Tribe*, 462 U.S. at 335.
[28] *See generally* NLRB Br.
[29] *Mescalero Apache Tribe*, 462 U.S. at 334-35. *See also Iowa Mutual Ins.*, 480 U.S. at 14, n.5 ("Numerous federal statutes designed to promote tribal government embody this policy.") (citing statutes); President Barak Obama, Memorandum for the Heads of Executive Departments and Agencies re. Tribal Consultation (Nov. 5, 2009), available at http://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president ("Obama Memo.") ("My Administration is committed to regular and meaningful consultation and collaboration with tribal officials in policy decisions that have tribal implications[.]"); President George W. Bush, Exec. Order No. 13,336, American Indian and Alaska Native Education, 40 Weekly Comp. Pres. Doc. 713 (Apr. 30, 2004) ("Bush Exec. Order") ("This Administration is committed to continuing to work with these Federally recognized tribal governments on a government-to-government basis, and supports tribal sovereignty and self-determination.").
[30] 58 Fed. Reg. 63262 (Nov. 30, 1993); Ex. 1 to Tribe's Mot., ECF No. 5-2, Pg ID 85, 87.
[31] Ex. 3 to Tribe's Mot., Dkt. 5-3, Pg ID 102.

essential governmental services and to support the economic welfare of the Tribe and its members. Whether the Board's attempt to apply the NLRA to the casino[32] infringes on the Tribe's inherent right to regulate economic activity[33] is a federal question[34] that "aris[es] under the . . . laws . . . of the United States[,]" and so "*shall*" be heard by this Court.[35]

D. Compelled violation of the Indian Gaming Regulatory Act is a federal Question.

Congress enacted the Indian Gaming Regulatory Act "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[.]"[36] It based the law on the finding that "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."[37] And the statute *requires* tribes to enact gaming ordinances—which must be approved by the Chairman of the National Indian Gaming Commission—before they may engage in class II[38] or class III[39] gaming. So in passing the IGRA, Congress recognized the exclusive right of tribes to regulate Indian gaming and codified that right. The Soaring Eagle is a class III gaming facility that has operated under IGRA since its opening. In October 1993, the tribal council passed Title 9 of the

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[32] *McClanahan v. State Tax Comm'n of Ariz.,* 411 U.S. 164, 168-69 (1973)
[33] *See* Tribe's Mot., Dkt. 5, Pg ID 61-2, 70-5.
[34] *Nat. Farm. Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985) ("It is well settled that [25 U.S.C. § 1331] will support claims founded upon federal common law as well as those of a statutory origin. Federal common law as articulated in rules that are fashioned by court decisions are "laws" as that term is used in § 1331.") (internal quotation omitted).
[35] 28 U.S.C. § 1331 (emphasis added).
[36] 25 U.S.C. § 2702(1).
[37] 25 U.S.C. § 2701(5) (emphasis added).
[38] 25 U.S.C. § 2710(b).
[39] 25 U.S.C. § 2710(d)(1).

Tribal Gaming Code[40] to regulate its gaming operations. So, since its inception, the Tribe has exclusively regulated Soaring Eagle Casino Resort, just as Congress intended.

The Board argues that IGRA nevertheless allows it to impose federal labor regulations at the Soaring Eagle because there is "no indication that Congress intended to limit the scope of the NLRA when it enacted IGRA."[41] But this argument ignores both the text of IGRA and the longstanding law against which IGRA was passed. The conclusion that "Congress did not 'enact a comprehensive scheme governing labor relations at Indian casinos'"[42] is nonsensical since Congress enacted a comprehensive scheme governing *all* regulation at Indian casinos. It did not pick and choose between regulatory topics, but instead recognized that "Indian tribes have the *exclusive right to regulate gaming activity*[.]"[43] Moreover, when Congress enacted IGRA, the Board, consistent with longstanding federal law prohibiting the application of silent statutes to Indian tribes,[44] did not regulate Indian gaming.[45] So there would have been "no indication" that Congress would *need* to limit the scope of the NLRA when it enacted IGRA.

When Congress enacted IGRA, the Board respected tribal sovereignty, and the statutes easily coexisted. It is the Board who has since changed positions, with "no indication" from Congress that its reversal is proper. And it is this reversal that creates a federal question. If the Tribe allows the Board to assert jurisdiction over Soaring Eagle and apply its labor regulations—that have not been enacted by the Tribe nor approved by the Chairman of the NIGC—to the class

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[40] Ex. 2 to Tribe's Mot., Dkt. 5-3
[41] NLRB Br., Dkt.11, Pg ID 581 (quoting *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1317 (D.C. Cir. 2007)).
[42] *Id.* (quoting *San Manuel*, 475 F.3d at 1317) (internal alteration omitted).
[43] 25 U.S.C. § 2701(5) (emphasis added).
[44] *E.g., Lone Wolf v. Hitchcock,* 187 U.S. 553, 566 (1903).
[45] *San Manuel Indian Bingo and Casino v. NLRB*, 475 F.3d 1306, 1309-10 (D.C. Cir. 2007)

III operation, it *will* violate IGRA.[46] The Tribe has brought this action to determine, under IGRA, whether this compelled violation is proper. And this question unquestionably "aris[es] under the . . . laws . . . of the United States[,]" and so "*shall*" be heard by this Court.[47]

E. The *Little River* decision does not divest this Court of jurisdiction.

To avoid these federal questions, the Board spills much ink urging this Court to follow the Western District of Michigan's *Little River* decision,[48] an opinion the Board calls "controlling or most appropriate." But *Little River* is *not* controlling on this Court.[49] And neither is it appropriate. Though the Western District—wrongly[50]—rejected the Little River Band's argument that its inherent retained right of self-governance vested the Court with jurisdiction, that case *did not consider* forcible violations of IGRA and those parties *did not raise* the role of treaties in vesting federal-question jurisdiction.[51] The *Little River* Court stated that, "to exercise federal question jurisdiction under 28 U.S.C. § 1331, there must be a constitutional

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[46] 25 U.S.C. § 2710(d)(1).

[47] 28 U.S.C. § 1331 (emphasis added). *See also Pueblo of Santa Anna v. Kelly*, 104 F.3d 1546, 1557 (10th Cir. 1997) ("IGRA is a federal statute, the interpretation of which presents a federal question suitable for determination by a federal court."); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians Florida* 63 F.3d 1030, 1046-47 (11th Cir. 1995) (claim under IGRA raised federal question); *Gaming Corp. of Am. V. Dorsey & Whitney*, 88 F.3d 536, 542-47 (8th Cir. 1986) (same).

[48] *Little River Band of Ottawa Indians v. NLRB*, 747 F. Supp. 2d 872 (W.D. Mich. 2010).

[49] *Fishman & Tobin, Inc. v. Tropical Shipping & Constr. Co., Ltd.*, 240 F.3d 956, 965 (2001) ("Unlike circuit court panels where one panel will not overrule another, district courts are not held to the same standard. While the decisions of their fellow judges are persuasive, they are not binding authority. As a result, the district court cannot be said to be bound by a decision of one of its brother or sister judges.") (citations omitted).

[50] *See Nat. Farm.* Union, 471 U.S. at 852 (a claim regarding tribal rights "must be answered by reference to federal law and is a 'federal question' under § 1331."); *Chickasaw Nation v. NLRB*, Case No. CIV-11-506-W (W.D. Okla. July 11, 2011), *available at* Ex. 16 to Tribe's Mot., Dkt. 8-2, Pg ID 560-61.

[51] *See generally, Little River Band*, 747 F. Supp. 2d 872.

or federal statutory provision under which plaintiff is aggrieved[,]"[52] but that is an incomplete recitation of the law. While the Tribe disagrees with the nonbinding *Little River* decision regarding whether infringement of inherent rights of self-governance raise a federal question, that case did not consider or address IGRA or Indian treaties as a basis of jurisdiction, and so *cannot* control this case.

F. Administrative exhaustion is not appropriate or necessary in this case.

Despite the existence of important federal questions, the Board urges this Court to defer to the administrative process that is itself in question. This is neither necessary nor appropriate.

1. The NLRA's exhaustion clause does not apply to the Tribe because the NLRA does not apply to the Tribe.

The Board argues the NLRA requires exhaustion.[53] But this Court cannot apply the provision of the NLRA that directs administrative exhaustion *unless* the NLRA *actually* applies to the Tribe. Thus, the Board's argument boils down to the bold question-begging assertion that the Court may not decide whether the Act applies because the Act applies.

The Board defends this Ouroboros by promising that *once the Court applies the Act to the Tribe to require exhaustion*, the Board will consider whether the Act *actually* applies, and a circuit court will review that decision. But that's cold comfort. The very act of applying the NLRA in the first place is the injury the Tribe describes at length in its complaint. Moreover, once the Tribe is hailed before the Board, the inquiry will no longer focus on how to accommodate the competing federal goals of enforcing labor policy and fostering tribal sovereignty and economic independence. Before the Board, the question will be whether the Board believes that the Tribe's engine of economic development is *Indian enough*. The Board

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[52] *Id.* at 882.
[53] *See* 29 U.S.C. § 160(a).

has already stated its belief—without citation and contradicted by longstanding federal law—that "[w]hen Indian tribes participate in the national economy in commercial enterprises . . . . the special attributes of their sovereignty *are not implicated*."[54] It has explained in its "path-marking case" that its case-by-case analysis will focus on whether tribes "continue to act in a manner consistent with that mantle of uniqueness. They do so primarily when they are fulfilling traditionally tribal or governmental functions that are unique to their status as Indian tribes."[55]

Before the Board, the question will not be the application of centuries-old canons of construction to resolve conflicting federal interests. The Board's proceeding has no room for proof that treaties reserved economic-development rights and self-governance rights broad enough to evolve alongside a society that has progressed from conquest, telegraphs, and wagon trains to tolerance, social media, and space shuttles. And even if the Tribe somehow creates a treaty-interpretation record before a tribunal that lacks procedures to do so, the Board will *presume* the supremacy of labor policy over tribal sovereignty *unless* the Tribe can *also* convince agency officials trained in labor law, not Indian-law, that regulating and governing a commercial enterprise that almost singlehandedly funds the entire tribal government, including Ojibwe-immersion education programs and culturally competent treatment and aging facilities is indeed "consistent with that mantle of uniqueness."[56] And what if the Tribe fails in this effort to convince the Board that garnering resources necessary to take care of its membership is

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[54] *NLRB v. San Manuel Indian Bingo*, 341 NLRB 1055, 1062 (NLRB 2004).

[55] *Id.* at 1603. Of course, the law does not support such a distinction. For example, municipalities operate "commercial" golf courses, and private corporations operate historically "governmental" universities. In those cases, the "character" of the enterprise is evaluated by its ownership, not by whether the enterprise is "traditional" or "unique to the[] status" of the operator. *Accord* Robert A. Williams, LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA (Univ. of Minn. Press 2005) (describing racist language and precedent used to justify denying Indians and tribes important rights of property, self-governance, and cultural survival).

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

"fulfilling traditionally tribal or governmental functions"?[57] Then it can make its argument to the circuit court. But it will do so handicapped by what is sure to be the Board's call for a deferential standard of review.[58] The Board's protests that "[a]ll defenses based on sovereignty, treaties, or other federal laws will be considered by the Board and reviewed by either the Sixth Circuit or the D.C. Circuit"[59] are hollow because that review will be on an undeveloped record focused on inapposite law and with an unfavorable standard of review.

The Board argues that this result, wrongheaded as it may be, is mandated by *Myers*.[60] It is not. *Myers* is only applicable if an Indian tribe's governmental rights have the same force and effect as a private litigant's commercial rights. In *Myers*, the private shipbuilder argued that the Act did not apply because it acted only in international, not interstate, commerce. The Court did not consider competing policies. It did not consider governmental interests. It did not consider the even-then-well-established canons of Indian law. And because it was decided in a time when the Board recognized that the Act does not apply to tribes, the *Myers* Court had no reason to expect the Board would ever seek to extend its decision to Indian tribes.

The Supreme Court has stated that "[w]here Congress specifically mandates, exhaustion is required. But where Congress has not clearly required exhaustion, sound judicial discretion governs."[61] And "[o]f paramount importance to any exhaustion inquiry is congressional intent."[62] The Act's exhaustion requirement is exclusive as to those employers within the Act's

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[57] *Id.*
[58] *See San Manuel*, 475 F.3d at 1316 (applying *Chevron* standard of review to Board's construction of the Act). Presumably, the Board could also argue that its factual determinations about whether the Tribe's casino is "commercial" or "governmental" will be entitled to deference, even though the Board does not have any particular expertise in Indian governance.
[59] NLRB Br., Dkt. 11, Pg ID 578.
[60] *Myers v. Bethlehem Shipbuilding Co.*, 303 U.S. 41 (1938).
[61] *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) (citations omitted).
[62] *Id.*

reach. But no language or legislative history of the Act indicates that the Act could apply to Tribes. And Congress, charged with "*thorough*" knowledge of the Supreme Court's precedent,[63] enacted the silent statute against the backdrop of controlling law that long "required that Congress' intention to abrogate Indian treaty rights be clear and plain" [64] because "Indian treaty rights are too fundamental to be easily cast aside."[65] *Myers* concerned whether a private shipbuilder's activities were intrastate or not. No canons of construction compelled a particular result. And no rule of law cautioned that the Act may not apply to shipbuilders at all.

Put simply, the *Myers* shipbuilder raised "no claim" that the Board's actions were illegal.[66] But the Tribe has. The Board's actions defy the Tribe's treaties, inherent rights, and longstanding principles of Indian law, and would violate IGRA. And because controlling canons of Indian-law *mandate* the conclusion that the silent statute does not apply to tribes, the Board's attempt to apply the NLRA to the Tribe is not a case of requiring an administrative hearing to learn the facts of where a shipbuilder does business. It is a case of actions taken "in excess of delegated powers" and contrary to controlling federal law.[67] The Supreme Court, in a case decided decades after *Myers*, asked whether "the law, apart from the provisions of the [NLRA], afford[s] a remedy?"[68] It answered: "We think the answer surely must be yes."[69] *Myers* simply does not address the question of whether the NLRA's exhaustion provision requires an Indian tribe to submit to the jurisdiction of the Board, despite controlling law to the contrary. So *Myers*

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[63] *North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995) ("[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with our precedents and that it expects its enactments to be interpreted in conformity with them[.]") (internal alteration omitted).
[64] *United States v. Dion*, 476 U.S. 734, 738-39 (1986) (citing cases dating to 1876).
[65] *Id.* at 739.
[66] *Myers*, 303 U.S. at 47.
[67] *Leedom v. Kyne*, 358 U.S. 184, 188 (1958).
[68] *Id.*
[69] *Id.*

is not applicable to this case.

2. Unlike cases concerning Board jurisdiction over private litigants, this case is most analogous to the Board's unsuccessful attempt to assert jurisdiction over the citizens of foreign nations, contrary to foreign law.

The Board trumpets that "since *Myers* was decided, the Supreme Court, this circuit, and others, have repeatedly rejected attempts by district courts to enjoin the NLRB from investigating, litigating, or adjudicating unfair labor practice cases."[70] But it fails to inform the Court that even *Detroit Newspaper*, the Sixth Circuit case upon which the Board relies, acknowledges that "as with most procedural measures, the exhaustion doctrine as expressed in § 160(f) is *not without exceptions*."[71] Each of the cases the Board relies on concerned private litigants with concerns wholly different than those advanced by the Tribe.[72] None concerned the competing rights of a separate sovereign, or sought to apply the NLRA in direct contravention of a separate sovereign's laws. But *McCulloch*[73] did.

In *McCulloch*, the Board attempted to enforce the Act against a foreign company sailing with a foreign crew under a Honduran flag.[74] The crew were "required to sign Honduran shipping articles, and their wages, terms and condition of employment, discipline, etc., [we]re controlled by a bargaining agreement between [the foreign corporation] and a Honduran union, Sociedad Nacional de Marineros de Honduras."[75] Moreover, though the National Maritime

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[70] NLRB Br., Dkt. 11, Pg ID 578 (citing *Newport News Shipbuilding & Dry Dock Co. v. Schauffler*, 303 U.S. 54 (1938), *Detroit Newspaper Agency v. NLRB*, 286 F.3d 391, 401 (6th Cir. 2002), *Goethe House New York German Cultural Center v. National Labor Relations Board*, 869 F.2d 75 (2d Cir. 1989), and *Grutka v. Barbour*, 549 F.2d 5 (7th Cir. 1977)).

[71] *Detroit Newspaper*, 286 F.3d at 397 (emphasis added).

[72] *Newport News*, 303 U.S. 54 (ship-repair corporation), *Detroit Newspaper.* 286 F.3d 391 (private newspaper) *Goethe House*, 869 F.2d 75 (German-language institute), and *Grutka v. Barbour*, 549 F.2d 5 (Catholic church).

[73] *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963).

[74] *Id.* at 13-14.

[75] *Id*.

Union of America sought certification under the Act, "[u]nder the Honduran Labor Code only a union whose 'juridic personality' is recognized by Honduras and which is composed of at least 90% of Honduran citizens can represent the seamen on Honduran-registered ships."[76] So if the Board were allowed to assert jurisdiction and certify the union, "the concurrent application of the Act and the Honduran Labor Code" would result in a "*head-on collision*" of laws because the National Maritime Union could not be recognized under the law of Honduras.[77] Under these circumstances, the Honduran union petitioned for, and the New York federal district court granted, injunctive relief.[78] On consolidated review with a parallel case in the Second Circuit, the United States Supreme Court affirmed the district court's judgment because it "concluded that the jurisdictional provisions of the Act do not extend to maritime operations of foreign-flag ships employing alien seamen."[79]

Though the *McCulloch* Court began from the *Myers* premise, it recognized that, in an earlier case also allowing direct petition to the district court, "judicial intervention was permitted since the Board's order was 'in excess of its delegated powers and contrary to a specific prohibition in the Act.'"[80] Although, unlike in *Kyne*,

> the Board has violated no specific prohibition in the Act, the overriding consideration is that the Board's assertion of power to determine the representation of foreign seamen aboard vessels under foreign flags has aroused vigorous protests from foreign governments and created international problems for our Government. Important interests of the immediate parties are of course at stake. But the presence of public questions particularly high in the scale of our national interest because of their international complexion is a uniquely compelling justification for *prompt judicial resolution of the controversy over the*

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[76] *Id.*
[77] *Id.* at 21 (emphasis added).
[78] *Id.* at 12.
[79] *Id.* at 13.
[80] *Id.* at 16 (quoting *Kyne*, 358 U.S. at 188).

Board's power.[81]

Accordingly, the Supreme Court did not require administrative exhaustion. Instead, the Court accepted the district court's exercise of jurisdiction, and, because the parties agreed that Congress had the power to extend the NLRA to reach foreign crews of foreign ships in American waters, it moved "directly to the question whether Congress exercised that power."[82] In evaluating that question, the Court rejected the Board's proposed balancing test because

> to follow such a suggested procedure to the ultimate might require that the Board inquire into the internal discipline and order of all foreign vessels calling at American ports. Such activity would raise considerable disturbance not only in the field of maritime law but in our international relations as well. In addition, enforcement of Board orders would project the courts into application of the sanctions of the Act to foreign-flag ships on a purely ad hoc weighing of contacts basis. This would inevitably lead to embarrassment in foreign affairs and be entirely infeasible in actual practice. [83]

Instead, it addressed the question of "whether the Act *as written* was intended to have any application to foreign registered vessels employing alien seamen[,]"[84] keeping in mind "the admonition of Mr. Chief Justice Marshall in *The Charming Betsy*, 2 Cranch 64, 118, 2 L.Ed. 208 (1804), that 'an act of congress ought never to be construed to violate the law of nations if any other possible construction remains. . . .'"[85] Applying this rule, the Court affirmed the judgment of the district court because "[s]ince neither we nor the parties are able to find any such clear expression, we hold that the Board was without jurisdiction to order the election."[86]

The parallels between this case and *McCulloch* are striking. Though the Tribe is not a foreign nation, as a domestic-dependent nation, it retains sovereign attributes analogous to those

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[81] *Id.* at 16-17 (emphasis added).
[82] *Id.* at 17.
[83] *Id.* at 19.
[84] *Id.* (emphasis added).
[85] *Id.* at 21.
[86] *Id.* at 22.

possessed by foreign governments.[87] In particular, here, as in *McCulloch*, the Tribe has exercised its right of self-governance and its law is on course for a "head-on collision"[88] with the Board's exercise of jurisdiction. Here, as in *McCulloch*, "the Board's assertion of power . . . has aroused vigorous protests" from the Tribe and its repeated attempts to assert jurisdiction over tribes has created continuing "problems for our Government."[89] And here, as in *McCulloch*, the Board's proposed case-by-case balancing has created "considerable disturbance" and "embarrassment" and is "entirely infeasible in actual practice."[90] So this case, like *McCulloch*, presents "uniquely compelling justification for *prompt judicial resolution of the controversy over the Board's power*[,]"[91] and that question is properly resolved by looking to the text of the Act, and applying longstanding canons of Indian law that (like maritime law) require "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty."[92] This case is not about a newspaper or a shipbuilder. It is about a government exercising sovereign rights, and the Board's willingness to run roughshod over those rights despite the United States government's responsibility to promote and protect them.

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[87] *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832); *Merrion*, 455 U.S. at 149.
[88] *McCulloch*, 372 U.S. at 21.
[89] *E.g.,* Ltr. from Edith R. Blackwell, DOI Associate Solicitor to Ronald Meisberg, NLRB General Counsel (Jan. 15, 2009), attached as Ex. 1 (raising the Department of Interior's concerns about the Board's improper exercise of jurisdiction over tribes and the resulting injury to tribal sovereignty); Ltr. from John H. Ferguson, NLRB Associate General Counsel to Edith R. Blackwell, DOI Associate Solicitor (Jan. 30, 2009), attached as Ex. 2. (refusing to depart from the *San Manuel* analysis and failing to respond to the Associate Solicitor's concerns regarding the Board's infringement of tribal sovereignty, but recognizing that "[a]s the General Counsels' office has been considering whether to assert jurisdiction over various tribal enterprises, several difficult and complex questions have arisen, particularly in the tribal casino context, where DOI plays a significant role.")
[90] *McCulloch*, 372 U.S. at 19.
[91] *Id.* at 16-17 (emphasis added).
[92] *Dion*, 476 U.S. at 738-40 (1986). *Accord The Charming Betsy*, 2 Cranch 64, 118 (1804).

3. Administrative exhaustion before the Board would be futile because it has already decided the issue against the Tribe.

Where, as here "Congress has not clearly required exhaustion, sound judicial discretion governs."[93] In such cases, exhaustion typically promotes judicial efficiency and administrative authority by affording agencies the opportunity to develop an often-technical record, correct their own mistakes, and potentially moot otherwise live controversies.[94] "Exhaustion concerns apply with particular force when the action under review involves exercise of the agency's discretionary power or when the agency proceedings in question allow the agency to apply its special expertise."[95] But it is similarly well-established that administrative exhaustion is inappropriate "where the administrative body is shown to be biased or has otherwise predetermined the issue before it."[96]

In this case, the case for administrative exhaustion is at its weakest: the question presented is not the discretionary authority of the agency, but whether the agency has authority over the Tribe *at all*. And the agency does not have any "special expertise" determining whether federal Indian law allows the application of particular statutes to tribes, or indeed with Indian tribes or Indian treaty rights. The Board is no better positioned to hear the Tribe's arguments in this regard than the Nuclear Regulatory Agency or the Food and Drug Administration. And it certainly is not better positioned to hear the Tribe's arguments in this regard than is this Court.

But perhaps more importantly, the Board's odious arguments and history regarding this issue confirm that administrative exhaustion is inappropriate because the agency is irretrievably biased in favor of exercising its jurisdiction over the Tribe's casino. For example:

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[93] *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) (superseded by statute on other grounds, as stated in *Woodford v. Ngo*, 548 U.S. 81, 85 (2006)).
[94] *Id.* at 145.
[95] *Id.*
[96] *Id.* 148.

- The Supreme Court has conclusively and repeatedly stated before[97] and since[98] the enactment of the NLRA that determining Congress must use express language to abrogate treaties, including Indian treaties. But the Board's proffered *San Manuel* analysis does not apply this law—it expressly disregards it.[99]

- The Board emphasizes the Congressional interest in labor practices,[100] but never once acknowledges the countervailing federal interest in tribal sovereignty—expressed by the legislative,[101] judicial,[102] and executive[103] branches. Its singular but conclusory assertion that its failure to even consult with the Tribe "does not mean that there was no consideration of the Tribe's position"[104] is a double-negative in search of substance, and it tellingly demonstrates that the Board erroneously believes that the importance of tribal sovereignty is "the Tribe's position," not the position of the United States.

- Like its proposed ad hoc test for jurisdiction over foreign nationals on foreign ships, the Board's case-by-case *San Manuel* analysis demonstrates that the Board does not respect sovereign rights, and so raises similar concerns about "considerable disturbance" and "embarrassment" in intergovernmental relations that are important to the United States.[105]

- In applying its case-by-case test, the Tribe is not aware of a single instance that the Board has decided *not* to apply the NLRA to a tribal casino.[106]

- The assertion that "although the NLRB acknowledges and respects the Tribe's interest in protecting its tribal sovereignty, the *abstract 'harm'* asserted here is *minimal at best*[,]"[107] is but one startling example of the Board's utter failure to appreciate the importance of tribal sovereignty to both tribes and the United States.

- And perhaps most shockingly, though it promises this Court a case-by-case analysis, the

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[97] *E.g. Leavenworth, L., & G. R. Co. v. United States*, 92 U.S. 733, 741-742 (1876); *Lone Wolf v. Hitchcock,* 187 U.S. 553, 566 (1903); *Pigeon River Co. v. Cox Co.,* 291 U. S. 138, 160 (1934).
[98] *United States v. Santa Fe Pacific R. Co.,* 314 U. S. 339, 353 (1941); *Menominee Tribe v. United States,* 391 U.S. 404, 412 (1968); *Washington v. Washington Commercial Passenger Fishing Vessel Assn.,* 443 U. S. 658, 690 (1979); *Dion*, 476 U.S. at 738-40.
[99] *San Manuel*, 341 NLRB at 1059.
[100] NLRB Br., Pg ID 585.
[101] *E.g.,* 25 U.S.C. § 2701 et seq.
[102] *E.g.,* Worcester, 31 U.S. at 559 (1832); *Merrion*, 455 U.S. at 149
[103] *E.g.,* President William Jefferson Clinton, Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, 65 FR 67249 (Nov. 9, 2000).
[104] NLRB Br., Dkt. 11, Pg ID 585.
[105] *See McCulloch*, 372 U.S. at 19.
[106] *See San Manuel Indian Bingo*, 341 NLRB at 1055-57, 1059.
[107] NLRB Br., Dkt. 11, Pg ID 584 (emphasis added).

Board *has already decided that it will exercise jurisdiction over this very casino*.[108] Under these circumstances, requiring the Tribe to once again participate in a proceeding before the Board is unnecessary and inappropriate. The sole question is one of statutory construction to determine whether the Board has authority over the Tribe, and it is a question that this Court, not the Board, is best-positioned to address.[109] Requiring the Tribe to proceed before a biased tribunal can only avoid meaningful judicial review.

G. The Board's sovereign-immunity does not divest the Court of jurisdiction.

Finally, the Board's last-ditch argument that this suit must be dismissed because the Board is immune from suit falls short. Regardless of whether the Board as an agency is immune, officials acting outside of their authority are not.[110] By seeking to apply the NLRA to the Tribe, the Board's officials have exceeded their delegated authority, and this suit against them is proper. This case against the officials may proceed regardless of the agency's immunity.

II. Injunctive relief to restrain Board action while the Court determines whether the NLRA applies to the Tribe is necessary to prevent irreparable harm.

As the parties' briefing demonstrates, courts around the country have split on the ultimate question of whether the Board may exert jurisdiction over Indian tribes—a question the Sixth Circuit has not yet confronted. But unlike the Board, the Tribe does not ask the Court to decide that question today. Rather, by its motion, it only seeks injunctive relief to maintain the status quo while the Court decides the ultimate question of the scope of the Board's jurisdiction.

Exercising such restraint would allow this Court to carefully consider the conflicting

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[108] *Soaring Eagle Casino and Resort v. Local 486, Intl. Brotherhood of Teamsters*, NLRB 7th Rgn., Case GR-7-RC-23147 (Nov. 20, 2007), at 2, attached as Ex. 3 ("Based on the foregoing…I find assertion of jurisdiction over the [Soaring Eagle Casino Resort] to be proper.").

[109] *See McCulloch*, 372 U.S. at 19.

[110] *Ex parte Young*, 209 U.S. 123 (1908).

federal policies presented by this case—a question uniquely suited to Article III review.[111] In due time, the Board can argue why it believes this Court should follow what it acknowledges is the Supreme Courts' *Tuscarora* dicta[112] instead of the myriad cases—before and since—that require Congressional abrogations of tribal sovereign rights to be "express" and "unmistakable."[113] But a preliminary injunction affords the Court the breathing room to most carefully consider both the Board's and the Tribe's arguments.

A. The Tribe's argument against the Board's jurisdiction is likely to succeed.

Though the circuits are split on the question of the Board's assertion of jurisdiction over tribes, it remains an open question in the Sixth Circuit. The most recent court to address the issue—a court "uniquely experienced"[114] in the application of Indian law—unflinchingly held that injunctive relief to prevent the Board from exercising jurisdiction over a tribe is "appropriate and necessary."[115] The Board's *only* attempt to address this case—a case that *unlike Myers* is on all fours with this case—was to state that "it was a decision applying—inaccurately we submit—Tenth Circuit law."[116] But each of the Tenth Circuit decisions relied on by *Chickasaw* in turn relied on the law of the Supreme Court[117]—law that continues to bind the parties and this

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[111] *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984); THE FEDERALIST NO. 51, at 337 (James Madison) (Edward Mead Earle ed., 1937) ("In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."); *Id.* No. 78, at 505 (Alexander Hamilton) ("The complete independence of the courts of justice is peculiarly essential in a limited constitution.").

[112] *San Manuel*, 475 F.3d at 1310, citing *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960).

[113] *E.g. Kiowa Tribe v. Manufacturing Tech., Inc.*, 523 U.S. 751, 759 (1998); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978).

[114] *Chickasaw Nation*, Dkt. 8-2, Pg ID 554-65.

[115] *Id.*

[116] NLRB Br., Dkt. 11, Pg ID 587.

[117] *E.g., Dobbs v. Anthem Blue Cross and Blue Shield*, 600 F.3d 1275 (10th Cir. 2010) (citing *Montana v. Blackfeet Tribe,* 471 U.S. 759, 766, (1985) and *Merrion,* 455 U.S. 130, 152); *NLRB*

Court.[118] So the Board's assertion that a Tenth Circuit decision about the application of the NLRA to Tribes is "far from clear" is disingenuous. Following the precedent that the Supreme Court *itself* follows,[119] the NLRA does not apply to tribes. As the Tribe has outlined,[120] and will further detail in future briefing should this case proceed, centuries of Indian law support this result.

B. Without a preliminary injunction, the Tribe will suffer irreparable injury.

Because of the important governmental interests at issue here, the *Myers* Court's holding that allowing the Board to exercise jurisdiction over a private commercial litigant does not cause irreparable harm simply does not control this case. Rather, should the Court decline to enter a preliminary injunction, the "relatively modest procedure"[121] the Board advocates will break multiple laws of the United States and the Tribe. As the Tribe detailed in its complaint and opening briefing, allowing the Board to exercise jurisdiction over the Tribe would violate the tribe's treaties of 1855 and 1864 by unduly infringing on those treaties' guarantees of the rights

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v. Pueblo of San Juan, 280 F.3d 1278, 1281 (10th Cir. 2002) (affirming the district court where "[t]he district court relied on Supreme Court precedent which demonstrates that tribal sovereign authority may be abriged only by a clear indication to that effect in the language or legislative history of a statute, or by federal preemption of the entire subject area[,]" and "[t]he district court also relied on Supreme Court authority that federl law does not preempt regulation of contracts which require union membership as a condition of employment.").

[118] The Board's attempt to muddy this conclusion by noting that the Tenth Circuit has at times, relied on its preferred *Tuscarara/Coeur d'Alene* test, NLRB Br., Pg ID 589, is weak tea. First, the Tenth Circuit has not done so since 1989. Second, when it did, it explained that it did so only where "tribal governments . . . exercise property rights, rather than their authority as sovereign." *Nero v. Cherokee Nation of Okla.*, 892 F.2d 1457, 1462-63 (10th Cir. 1989). Obviously, in this case, as in *Chickasaw*, the Tribe is exercising governmental rights, not property rights. The Board has not argued otherwise.

[119] Though the Supreme Court often restates the rule that Congress may not abrogate tribal sovereign rights without an express and unmistakable language, *Kiowa Tribe* 523 U.S. at 759; *Santa Clara Pueblo,* 436 U.S. at 58, the Court has *never* repeated or relied on its *Tuscarora* dicta.

[120] *See generally* Tribe's Memo. of Law, Dkt. 5.

[121] NLRB Br., Dkt. 11, Pg ID 584.

to govern and, if necessary, exclude unwanted nonmembers from the Tribe's permanent home.[122] It would further violate longstanding case law recognizing the Tribe's inherent sovereign right to undertake and regulate economic activity.[123] It would violate the Indian Gaming Regulatory Act by allowing the Board to regulate the Tribe's casino despite the Congressional directive that tribes retain the "exclusive right to regulate gaming activity on Indian lands[.]"[124] And it would violate the Tribe's federally approved compact with the State of Michigan[125] and enacted Tribal Gaming Ordinance,[126] both of which also require the Tribe to have exclusive authority over gaming activities. A root canal is a "modest procedure." The Board's proposed exercise of jurisdiction over the Tribe despite unchallenged proof that that exercise would violate the laws and treaties of the United States and the law of the Tribe is a "head-on collision"[127] where irreparable injury is inescapable.[128]

C. A preliminary injunction will not cause harm to others.

The only "harm" the Board claims is that a preliminary injunction would "frustrate

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[122] Tribe's Compl., ECF No. 1, Pg ID 14; Tribe's Mot., ECF No. 5, Pg ID 55, 70.
[123] Tribe's Compl., ECF No. 1, Pg ID 17; Tribe's Mot., ECF No. 5, Pg ID 56, 61, 70-2; *see also Mescalero Apache Tribe*, 462 U.S. at 335.
[124] Tribe's Compl., Dkt. 1, Pg ID 17; Tribe's Mot., Dkt. 5, Pg ID 72; 25 U.S.C. § 2701(5).
[125] Tribe's Compl., Dkt. 1, Pg ID 7-11, 17-24; Tribe's Mot., Dkt. 5, Pg ID 72-4; Compact, Ex. 1 to Tribe's Mot., Dkt. 5-2, Pg ID 92
[126] Ex. 2 to Tribe's Mot., Dkt 5-3, Pg ID 108-09, 135-43.
[127] *McCulloch*, 372 U.S. at 21.
[128] Tribe's Compl., Dkt. 1, Pg ID 4; Tribe's Mot., Dkt. 5, Pg ID 63-6, 78-9; *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 578 (6th Cir. 2002) ("A plaintiff's harm from the denial of a preliminary injunction is irreparable if it is not fully compensable by monetary damages."); *Prairie Band of Potawatomi Indians v. Peirce* 253 F.3d. 1234, 1250-51 (10th Cir. 2001) (prospect of significant interference with tribal self-government constitute irreparable harm); *Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163, 1172 (10th Cir. 1998) (An injury cannot be vindicated following a determination on the merits where a tribe has to litigate a case before a tribunal that does not have jurisdiction.); *Chickasaw Nation*, Dkt. 8-2, Pg ID 557.

Congress's purposes" in enforcing labor law.[129] But that Congressional interest only exists where the Board actually has jurisdiction to enforce the Act—the precise question at issue in the Board's motion. In contrast, entering a preliminary injunction would promote Congress's expressed interest in" promoting tribal economic development, self-sufficiency, and strong tribal governments[,]"[130] and protecting Tribe's "exclusive right to regulate gaming activity on Indian lands[,]"[131]—purposes and policies echoed by the judicial[132] and executive[133] branches. While the Court decides the question of the Board's jurisdiction over the Tribe, the Board may still enforce federal labor laws against those employers who are within the scope of the act. And "[t]he NLRB has full recourse to appellate review of any preliminary injunctive relief entered by this Court. If on appeal the NLRB is found to have power to enforce the NLRA against the [Tribe], it will be free to continue its proceedings."[134] While the harm to the Tribe without an injunction is irreparable, the only "harm" the Board would suffer with one is a temporary pause in a single case pending appellate review.

D. An injunction is in the public interest.

In this case, several federal interests conflict. But compared to longstanding policies of federal Indian law, federal labor policy is in its infancy. And, with respect to the Board, field-occupying[135] federal Indian-law policy carries more weight than gap-filling[136] federal labor

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[129] NLRB Br., Dkt. 11, Pg ID 585.
[130] 25 U.S.C. § 2702(1).
[131] 25 U.S.C. § 2701(5).
[132] *E.g., Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1250, 1253 (10th Cir. 2001) (citing *Seneca-Cayuga Tribe of Okla. v. Oklahoma,* 874 F.2d 709, 716 (10th Cir.1989) ("[T]he injunction promotes the paramount federal policy that Indians develop independent sources of income and strong self-government.").
[133] *E.g.*, Obama Memo.; Bush Exec. Order, *supra* note 29.
[134] *Chickasaw Nation*, Dkt. 8-2, Pg ID 564; *Pueblo of San Juan*, 276 F.3d 1275.
[135] U.S. Const., Art. I, § 8, Cl. 3.

policy because it determines how the federal government—including the Board[137]—will treat sovereign Indian nations. As Justice Black well stated, and the Supreme Court has since echoed, "Great nations, like great men, should keep their word."[138] In this case, that means affording due respect to the well-established canons of federal Indian law that demand protection of sovereign and treaty-protected rights unless Congress expressly and unequivocally mandates a contrary result.

CONCLUSION

This case is not about the NLRA or the Board; it's about Indian law. The Tribe respects the Board's authority to promote federal labor policy and enforce that policy against private employers. But the NLRA—including its exhaustion requirement—is silent as to Indian tribes. Nothing in the statute requires the Tribe to prove to the Board that its governmental operation of the casino is sufficiently Indian to persuade the Board to leave it alone or even allows the Board to demand such a charade. Rather, allowing the Board to proceed against the Tribe, contrary to the Tribe's exercised sovereign and treaty-protected rights, even for the limited purpose of allowing the Board to determine whether it has jurisdiction, would do violence to centuries of Indian law and to the Tribe's history of government-to-government relations with the United States. Such injury is significant and it is irreparable. But with a preliminary injunction, it is entirely avoidable. The Tribe respectfully requests that this Court exercise its jurisdiction to enter a preliminary injunction to protect the status quo while it continues on to decide the significant questions of statutory interpretation that this case presents.

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[136] *Pueblo of San Juan*, 276 F.3d at 1283 ("Section 14(b) [of the NLRA] constitutes an express congressional exemption from the view that the NLRA preempts the entire field of labor law.").
[137] *Worcester*, 31 U.S. at 553; *Seminole Nation v. U.S.*, 316 U.S. 286, 296-97 (1941).
[138] *C.I.A. v. Sims*, 471 U.S. 159, 175, n.20 (citing *Tuscarora*, 362 U.S. at 142 (Black, J., dissenting)).

Dated: November 21, 2011

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

Saginaw Chippewa Indian Tribe of Michigan,

Plaintiff,

Case No. 11-cv-14652
Hon. Thomas L. Ludington

v.

The National Labor Relations Board, et al.

Defendants.

Certificate of Service

I hereby certify that on November 21, 2011, I electronically filed the foregoing paper with the Clerk of the Court using the ECF System, which will send notification of such filing to the following: Nancy E. Kessler Platt, attorney for Defendants, and I hereby certify that I have mailed a copy of the filing by United States Postal Service the paper to the following non-ECF participants:

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