Nos. 13-1464, 13-1583

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LITTLE RIVER BAND OF OTTAWA INDIANS TRIBAL GOVERNMENT,

***Petitioner/Cross-Respondent*,**

v.

NATIONAL LABOR RELATIONS BOARD,

***Respondent/Cross-Petitioner*.**

On Petition For Review And Cross-Application For Enforcement
Of An Order Of
The National Labor Relations Board

BRIEF OF AMICI CURIAE THE NAVAJO NATION, MASHANTUCKET PEQUOT TRIBAL NATION, THE NOTTAWASEPPI HURON BAND OF THE POTAWATOMI, THE QUAPAW TRIBE OF OKLAHOMA, THE MOHEGAN TRIBE OF INDIANS OF CONNECTICUT, THE LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS AND THE PORT GAMBLE S'KLALLAM TRIBE IN SUPPORT OF PETITIONER AND REVERSAL OF THE NLRB'S ORDER

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Sixth Circuit Rule 26.1, the Navajo Nation makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? No.

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1. Is said party a subsidiary or affiliate of a publicly owned corporation? No.

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Pursuant to Sixth Circuit Rule 26.1, the Nottawaseppi Huron Band of the Potawatomi makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? No.

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Pursuant to Sixth Circuit Rule 26.1, the Little Traverse Bay Bands of Odawa Indians makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? No.

Pursuant to Sixth Circuit Rule 26.1, the Little Port Gamble S'Klallam Tribe makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? No.

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INTEREST OF AMICI CURIAE[1]

The Navajo Nation, the Mashantucket Pequot Tribal Nation, the Nottawaseppi Huron Band of the Potawatomi, the Quapaw Tribe of Oklahoma, the Mohegan Tribe of Indians of Connecticut, the Little Traverse Bay Bands of Odawa Indians and the Port Gamble S'Klallam Tribe (collectively, "Amici") are all federally recognized Indian Tribes or Nations that own and operate enterprises on their reservations or on trust or restricted lands within their jurisdictions. These enterprises create revenues that are used to support governmental services and to provide employment for their members, other Native Americans, and non-Native persons who live on tribal lands or in nearby communities. In an exercise of their governmental powers, Amici have for many years regulated labor and employment relations within their jurisdictions through duly enacted tribal laws. All Amici have a strong interest in this case due to the precedent this case will set in federal court interpretations of their laws. Amici also have a distinct interest in protecting tribal sovereignty and protecting tribal enterprises that fund governmental activities in furtherance of tribal economic self-sufficiency and self-government.

All parties have given consent to the filing of this brief.

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[1] Amici state that no counsel to a party in this case authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and that no person or entity—other than Amici, their members and their counsel—contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

I. INTRODUCTION AND SUMMARY OF ARGUMENT.

This case stems from an order by the National Labor Relations Board (the "Board" or "NLRB") that requires the Little River Band of Ottawa Indian Tribal Government (the "Band") to rescind its labor relations laws because they differ from the National Labor Relations Act ("NLRA"). (Band App. 12.) In its order, the Board held that the Band, a federally recognized Indian Tribe, is subject to the Board's jurisdiction and therefore subject to the NLRA. (*Id.*)

The primary question this Court must address in this appeal is whether, without express congressional authorization, federally recognized Indian Tribes are subject to the NLRA. In examining this question, the Court must keep in mind the two primary principles of modern Indian law. First, Indian Tribes are sovereign governments and have the right "to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). The Supreme Court has long noted that "tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." *United States v. Mazurie*, 419 U.S. 544, 557 (1975). Even though these aspects of self-government are "subject to the superior and plenary control of Congress," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), unless Congress expressly provides otherwise, tribes retain "the power to manage the use of [their] territory and resources by both members and

nonmembers," and "to undertake and regulate economic activity within the reservation," *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983).

Second, federal Indian policy, expressed through legislation and executive action, embraces and encourages the development of tribal governmental institutions to address matters arising in Indian country. *See id.* at 334-35 ("[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."). This policy was codified in 1934 (one year before the passage of the NLRA) through the Indian Reorganization Act, 25 U.S.C. §§ 461 *et seq.*, the purpose of which was "to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974). Since then, the federal government has continued to promote tribal self-governance. *See, e.g.*, Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 6, 2000) (all branches of the U.S. government espouse the policy of "recogniz[ing] the right of Indian tribes to self-government and support[ing] tribal sovereignty and self-determination").

The Board's decision to exercise jurisdiction over a federally recognized Indian Tribe and strike down tribal law conflicts with these two foundational and well-accepted principles. This decision cannot stand because it not only eviscerates substantial exercises of tribal sovereignty by the Band, but it also

would affect other federally recognized Indian Tribes with their own tribal laws and institutions.

Unsurprisingly, many tribal governments have exercised their sovereign rights and adopted carefully tailored laws to regulate labor and employment covering tribal governmental employers and enterprises. These laws are crafted in light of the unique circumstances tribal governments face. If affirmed, the Board's decision will displace these existing, working and effective tribal labor laws and the institutions that administer and enforce those laws, and replace them with a federal regulatory scheme that does not allow for flexibility to meet the unique needs of tribal governments.

This brief focuses on two significant points for the Court's consideration when evaluating whether federally recognized Indian Tribes are subject to the Board's jurisdiction. *First*, like other governments, many Tribes have adopted labor laws based on the unique factual and legal circumstances within each tribal nation. Application of the NLRA, a statute that was never meant to apply to governmental institutions, would undermine tribal sovereignty and eviscerate tribes' ability to provide essential services to their tribal communities. *Second*, the labor laws adopted by many tribal governments have been implemented and are actively functioning in Indian country. Application of the NLRA would displace tribal governmental systems.

For the reasons explained below, the Court should overturn the Board's decision and uphold tribal governments' sovereign right to enact and develop their own labor laws based on their own unique circumstances and needs as sovereigns.

II. TRIBES, LIKE OTHER GOVERNMENTS, HAVE ADOPTED LABOR LAWS THAT ADDRESS THE UNIQUE ISSUES FACING TRIBES.

Many tribes, as sovereign governments, adopt labor laws that often resemble other public sector labor laws[2] and contain provisions that are *necessary* based on tribal sovereignty and the unique circumstances tribal governments face on their reservations. The need for tribes to craft their own labor laws is akin to the same need states and the federal government have as employers: to protect their ability to provide essential public services and to address their own labor relations on their own terms. In addition to these overarching governmental interests, tribal governments have certain unique interests, including their sovereign right to enact laws providing employment preferences to Indians and to exclude non-members

[2] Many tribes have enacted labor laws that allow workers to organize. *See, e.g.*, Navajo Nation Code Ann. tit. 15, §§ 601 *et seq.*; Mashantucket Pequot Labor Relations Law, 32 M.P.T.L. ch. 1; Mohegan Tribal Code §§ 4 - 400 *et seq.*; Quapaw Tribe, Res. No. 072012-A §§1-12; Title V Nottawaseppi Huron Band of the Potawatomi Tribal Code ch. 3; Pokagon Band of Potawatomi Indians, Labor Organizations & Collective Bargaining Code §§ 1-9; Title 27 Port Gamble S'Klallam Tribe Law & Order Code chs. 1-6; Title 14 Waganakising Odawa Tribal Code chs. 2-3; Title 3 Jamestown S'Klallam Tribal Code ch. 3.03. This brief focuses on those laws enacted by Amici.

from their reservations. These particular needs illustrate why the Board cannot, and should not, extend its jurisdiction to cover federally recognized Indian Tribes.

A. States and the Federal Government Have the Ability to Craft Their Own Laws to Govern Their Workers.

In enacting the NLRA, Congress recognized that governments possess attributes that distinguish them from private employers in the context of labor-management relations. Congress thus excluded governments and their enterprises from the NLRA's definition of "employer" to ensure that governments could continue to craft their own labor laws to meet their unique needs. 29 U.S.C. § 152(2).

These unique needs are based on the fact that unlike private employers, governments undertake activities for the benefit of their citizens and their territories. They may relate to health and safety, economic development, generating governmental revenue, education, and building and maintaining infrastructure. Congress' exclusion of governments from the NLRA was in large part based on an understanding that labor laws should not enable governmental employees to impede the operations of a government, however they may be defined. *See NLRB v. Natural Gas Util. Dist. of Hawkins Cnty., Tenn.*, 402 U.S. 600, 604-05 (1971). Indeed, the Supreme Court has recognized that the NLRA's exclusion of governments extends beyond the government itself and also includes public corporations. *See id.* at 605-09 (holding that a public utility company that

had all the powers of a private corporation, but was run by individuals responsible to public officials, was exempt from the NLRA); Mass. Gen. Laws ch. 150E, § 1 (state labor laws cover employees of state lottery commission).

In addition, state and federal law has long recognized that the collective bargaining rights of governmental employees must differ from those of private employees. *See* 5 U.S.C. § 7117 (prohibiting federal employees from negotiating over proposals inconsistent with government-wide regulations); *see also U.S. Dept. of Air Force v. FLRA*, 952 F.2d 446, 451 (D.C. Cir. 1991) (noting government employees are necessarily in a different position than private employees for purposes of collective bargaining); *Virgin Islands Port Auth. v. S.I.U. de Puerto Rico*, 354 F. Supp. 312, 313 (D.V.I. 1973) (noting common law has generally prohibited certain collective bargaining activities against the government), *aff'd*, 494 F.2d 452 (3d Cir. 1974). In large part, this means that state and federal government workers do not have the right to strike, or even belong to organizations that assert the right to strike against the government. *See* 5 U.S.C. § 7311 (prohibiting federal employees from striking or belonging to an organization that asserts the right to strike against the government); *Local Union No. 370, Int'l Union of Operating Eng'rs v. Detrick*, 592 F.2d 1045, 1046 (9th Cir. 1979) (noting governments have no duty to allow their employees to strike because "strikes impede government economy and performance of services").

Because governmental employees are in such different positions than those of private employees, and labor disputes in the public sector could undermine governmental prerogatives, governments should be left to craft their own labor laws to meet their unique needs. *See, e.g.*, Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135. Allowing governments to craft their own labor laws thus helps protect the undertakings of any government and the resulting benefits, including economic development and the generation of governmental services derived therefrom.

B. Tribal Governments Have the Same Authority and Need as the States and Federal Government to Craft Their Own Labor Laws to Govern Their Workers.

Indian tribes are sovereign governments. *Williams*, 358 U.S. at 220; *Mazurie*, 419 U.S. at 557. They share many of the same attributes of other governments, *see White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980), including the same basic need and authority to enact tailored labor laws geared to their unique governmental operations and services.

Just like states and the federal government, tribal governments are responsible for providing essential services to their citizens and communities. Most tribal governments consist of a comprehensive governmental infrastructure that provides invaluable public safety, regulatory, judicial, health, educational, cultural, economic development and social services to their tribal communities.

See, e.g., Mohegan Tribal Code ("M.T.C.") §§ 5-21 *et seq.* (Mohegan Tribal Public Health Code); Navajo Nation Code Ann. tit. 2, §§ 1 *et seq.* (2005) (establishing the three branches of the Navajo Nation government); 26 Mashantucket Pequot Tribal Law ("M.P.T.L.") ch. 1 (establishing regulatory structure regarding food safety);[3] *see also* Band App. 31-32. The development of this comprehensive infrastructure is encouraged by federal policy, which has long recognized an interest in promoting and protecting tribal self-governance. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987) (noting the Supreme Court has "repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government"); 25 U.S.C. § 2701(4) ("[A] principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government."). The ability to enact a well-considered, finely tailored, and pertinent legal infrastructure helps protect and promote tribal self-governance and allows tribal governments to provide essential services to their communities. An important part of this legal infrastructure is labor laws that are drafted to ensure that labor disputes do not interfere with a tribal government's ability to operate and

[3] All laws and regulations of Amici referenced in this brief, along with all referenced agreements and other tribal documents, are found in the Addendum filed contemporaneously with this brief.

provide its members and others[4] with the essential public services upon which they rely.[5]

But tribal governments are also unique in ways that make it even more important that they retain the ability to enact their own labor laws. Unlike the states and federal government, tribes do not have a significant tax base upon which to raise revenue. (*See, e.g.*, Band App. 32.) Most tribes rely on enterprises such as tribally owned gaming facilities, hotels, and oil and gas operations to raise revenue, and these enterprises are often responsible for funding a tribe's governmental services budget.[6] *E.g.*, Indian Gaming Regulatory Act, 25 U.S.C. § 2701; M.T.C. §

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[4] These services are essential to non-tribal members such as visitors to the reservation as they include fire and police departments and other public safety services. Further, some tribes, including the Navajo Nation, and the Mashantucket Pequot and Mohegan Tribes, have cooperative agreements to assist state and local governments with fire protection, public health, and emergency medical services in off-reservation communities.

[5] While Indian tribes have the power to levy taxes, *see Cohen's Handbook of Federal Indian Law* § 4.01[2][c] at 216-217 (2012 ed.), most Indian tribes have lost much of their land holdings, which severely limits their viable tax base, *id.* § 16.03[2] at 1072-74.

[6] Enterprises that Indian tribes use to generate revenues for governmental functions and services do not serve a "commercial" purpose, but rather are used to fund tribal *governmental* operations, and thereby provide a substitute for Indian tribes' lack of viable tax bases. *See Native Am. Distrib. v. Seneca- Cayuga Tobacco Co.*, 546 F.3d 1288, 1291-92 (10th Cir. 2008). Indeed, Congress recognized this in the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.*, which recognizes that revenues from tribal gaming are government funds dedicated to fund tribal governmental services.

2-62(a)(3). The revenue generated from these tribal enterprises often provide the means for a tribe to finance the development of roadways, utilities and other infrastructure within the reservation, provide elder care and other social services to its tribal members, and provide many other essential services for the protection of public health and safety.[7] Any interruption of these enterprises' revenue stream would have swift and dramatic consequences for the tribe and its ability to provide essential government services. Therefore, tribal governments have a significant need to ensure their labor laws protect the governments' ability to generate revenue.

Just as states and the federal government need to protect their unique institutions and their ability to provide the public with essential services, tribal governments need to craft their own labor laws for the same reasons. Displacing tribal law with a federal law that is applicable only to private, not governmental, entities would leave these sovereign governments without the ability to exercise their policy judgments to protect their own institutions and ability to fund and deliver essential services to their communities. This Court should not permit the

[7] While most corporations and other enterprises obtain financing by using real property to collateralize debt, tribes cannot mortgage the fee interest in their land as collateral. Legal title to tribal trust lands is held in "trust" for a tribe's benefit by the United States, and the tribe cannot generally alienate or mortgage its lands without federal approval. *See* Indian Non-Intercourse Act, 25 U.S.C. § 177; 25 C.F.R. § 152.22(b).

Board to expose tribal governments and their communities to this significant threat.

C. Tribes Have Enacted Labor Laws With Provisions That Are Necessary to Adequately Protect Their Sovereign Rights.

Tribal governments that have enacted labor laws have done so in a way that protects their ability to provide essential public services. Tribal governments have also crafted their labor laws to avoid undermining their rights as a sovereign.

1. Prohibition of strikes and lockouts while providing for interest arbitration.

Like many other public sector labor laws, many tribal labor laws prohibit strikes and lockouts of any kind for government workers. *See, e.g.*, 32 M.P.T.L. ch. 1 § 11; Navajo Nation Code Ann. tit. 15, § 606(A); Title V Nottawaseppi Huron Band of the Potawatomi Code ("N.H.B.P.C.") ch. §§ 7.01-7.03, 8.01. Also similar to other public sector laws, many tribes' labor laws provide for interest arbitration. The importance of leaving sovereign governments free to decide how to address their labor disputes is exemplified by the trend of a number of tribes to provide for interest arbitration while prohibiting strikes. *See, e.g.*, 32 M.P.T.L. ch. 1 § 10(c); M.T.C. § 4-411(4).

In the private sector, almost half of all newly certified or recognized unions are unable to persuade employers subject to the NLRA to agree to a collective bargaining agreement. Catherine L. Fisk & Adam R. Pulver, *First Contract*

Arbitration and The Employee Free Choice Act, 70 La. L. Rev. 47, 47 (2009). This is largely a result of the NLRA's failure to provide a system that requires binding dispute resolution in contract negotiations, failure to permit a party to insist on the inclusion of an interest arbitration clause in collective bargaining agreements, and failure to allow interest arbitration at all with respect to subjects other than wages, hours, and other terms and conditions of employment. *See NLRB v. Mass. Nurses Ass'n*, 557 F.2d 894, 897 (1st Cir. 1997); *Mulvaney Mech., Inc. v. Sheet Metal Workers Int'l Ass'n, Local 38*, 288 F.3d 491, 505 (2d Cir. 2002), *vacated and remanded for further consideration*, 538 U.S. 918 (2003). Instead, contract disputes are resolved by parties' reliance on economic pressure. Employees put economic pressure on employers through strikes, where employees seek to inhibit their employer's ability to continue its business by withholding labor. On the other hand, employers place financial pressure on employees by locking them out and hiring permanent replacements for striking workers. This prevents employees from earning a paycheck and places the employees at risk of losing their jobs altogether.

In contrast to this method of dispute resolution, interest arbitration provides an efficient means to resolve contract disputes for governments that provide essential public services. This generally means that when parties are unable to reach agreement, a disinterested third party hears arguments from both sides and

then makes a binding resolution to fully resolve the disputed issues in order to conclude an agreement between the parties.

Tribes that have adopted this approach in their tribal labor ordinances have chosen to avoid the disruption and economic hardship attendant to strikes, and instead provide a certain path to a collective bargaining agreement. This is consistent with many other governmental employers, which often use interest arbitration to resolve bargaining disputes for public sector employees. *See, e.g.*, N.Y. Civ. Serv. Law § 209; Mich. Comp. Laws Ann. § 423.273; Minn. Stat. Ann. § 179A.16; *see generally* Fisk & Pulver, *supra*, at 51 (collecting states that utilize interest arbitration for bargaining disputes with public sector employees).

For tribes that depend on revenues from tribal enterprises to fund the essential public services they provide to their communities, these provisions are unquestionably necessary. If employees of tribal enterprises were permitted to strike, tribal governments would shut down based on a lack of funding. This is contrary to the purpose of the NLRA. *See Natural Gas Util.*, 402 U.S. at 604 (noting Congress's purpose behind exempting governments from the NLRA was to ensure governmental employees did not enjoy the right to strike).

Moreover, interest arbitration protects employees' rights to contract with an employer, while at the same time protecting tribal sovereignty by ensuring that tribes can continue to provide essential public services. Application of the NLRA

would replace this effective procedure and enable employees of tribal governments to strike and thus harm the tribal public as a means to force tribal governments' hand during disputes. Prohibiting strikes and lockouts while providing for interest arbitration exemplifies the unique exercise of tribal sovereignty by Indian nations to resolve disputes with their employees.

2. Enforcement of tribal preference laws.

Unlike other employers, tribal governments often adopt laws requiring tribal employers to give employment preferences to tribal members and to members of other Indian tribes. These Indian preference policies and laws have been recognized by Congress and repeatedly upheld by federal courts as designed to further the cause of Indian self-governance. *See* 42 U.S.C. § 2000e-2(i) (excluding Indian preference laws from Title VII); *Morton*, 417 U.S. at 554 (holding tribal preference laws do not constitute racial discrimination or even racial preference, but rather are "reasonably designed to further the cause of Indian self-government" and do not violate the Fifth Amendment). Indeed, allowing tribal governments to give employment preferences to tribal members is significant as it promotes tribal self-governance, helps eliminate tribal reliance on the federal government, and helps combat the significant unemployment present on many reservations. *Morton*, 417 U.S. at 554.

Consistent with these preference laws, many tribal labor laws prohibit bargaining concerning existing Indian preference laws. *See, e.g.*, 32 M.P.T.L. ch. 1 § 9(d); Navajo Nation Code Ann. tit. 15, § 606(B); M.T.C. § 4-408(2)(b); Title V N.H.B.P.C. ch. 3 § 17.03. But there is no doubt that aspects of tribal preference laws—promotions, layoffs and recall rights—are generally considered mandatory subjects of bargaining under the NLRA, *see* 29 U.S.C. § 158(d), and are bargained over and addressed in virtually every collective bargaining agreement. Thus, while tribal labor laws ensure the protection of tribal preference laws, the NLRA would negate these laws and the substantial federal policy of promoting tribal self-governance by allowing bargaining over their enforcement. Tribal legislative bodies have therefore included provisions in their labor laws that forbid bargaining over preference laws, which prevents the undermining of tribal governments' sovereign right to have and enforce preference laws.

3. Tribes' power to exclude non-members.

Similar to their right to give employment preferences to Native Americans, tribes enjoy a well-established and unchallenged authority to exclude individuals from their territories. *See Mescalero*, 462 U.S. at 333. This right to exclude includes the lesser right of requiring compliance with tribal laws and rules as a condition of continuing presence on the reservation. *See Merrion v. Jicarilla*

Apache Tribe, 455 U.S. 130, 185 (1982). Application of the NLRA would undermine this well-settled sovereign prerogative.

For instance, tribal governments have enacted laws that allow the government or tribal enterprises to exclude individuals who violate certain tribal laws from both employment and the reservation. *See, e.g.*, 3 M.P.T.L. ch. 1 § 6; M.T.C. § 2-83; Navajo Nation Code Ann. tit. 17, § 1901 *et seq*.; Title V N.H.B.P.C. ch. 3 §§ 9.01-9.04. Many tribal labor laws also require labor organizations and business agents to register or be licensed by the tribe as a condition to being present and conducting organizing activities on tribal land. *See* M.T.C. §§ 4-403 & 4-404; Title V N.H.B.P.C. ch. 3 §§ 9.01-9.04; 32 M.P.T.L. ch. 1 §§ 14 & 15. But application of the NLRA would conflict with these laws by allowing a tribe's authority to exclude non-members to become a subject of bargaining, which would precipitate additional litigation regarding the interaction between the tribe's sovereign right to exclude non-members and the Board. *See NLRB v. Unbelievable, Inc.*, 71 F.3d 1434, 1438 (9th Cir. 1995) (access to an employer's premises is ordinarily a mandatory subject of bargaining under the NLRA).

Empowering employees with the ability to negotiate over a tribe's exercise of its sovereign rights is inconsistent with the very premise of tribal sovereignty. Under the fundamental principles of federal Indian law discussed above, this Court

should not permit the Board to undermine tribal sovereignty in such a far reaching manner.

III. THE COURT SHOULD NOT ALLOW THE DESTRUCTION OF TRIBES' EXERCISE OF SOVEREIGN AUTHORITY OVER LABOR RELATIONS IN THEIR JURISDICTIONS.

Perhaps the most important factor for the Court to consider is that, should it uphold the Board's jurisdiction over federally recognized Indian Tribes, it will sanction the displacement of existing and working tribal institutions. Allowing the Board to extend its jurisdiction to federally recognized Indian Tribes is thus destructive of tribal sovereignty. It is also contrary to the settled and time-honored principle that courts should not find that Congress intended to diminish tribal authority unless such intent is clearly expressed. *See Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 152-53 (1980); *Merrion*, 455 U.S. at 148 n.14 ("[T]he proper inference from silence . . . is that the sovereign power . . . remains intact."); *see also Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1283 (10th Cir. 2010) ("[R]espect for Indian sovereignty means that federal regulatory schemes do not apply to tribal governments exercising their sovereign authority absent express congressional authorization.").

Similar to the Little River Band of Ottawa Indians, other tribes have working labor relations systems that should not be disturbed. Two examples of tribes with working labor laws—that of the Navajo Nation and the Mashantucket Pequot

Tribal Nation—will help illustrate the point. These two tribes have enacted laws that allow workers to organize and that establish, *inter alia*, election procedures, rules regarding prohibited conduct of employers and labor organizations, and procedures for impasse resolution. Employees and labor organizations have used these laws to organize and resolve labor disputes. Application of the NLRA to tribal government employers would displace these laws and the working tribal government institutions that are tasked with enforcing the tribal law. This would be a gross infringement on tribal sovereignty and against federal Indian policy.

A. The Navajo Nation.

The Navajo Nation has had a lengthy experience with designing and implementing labor laws to permit labor organizing. The Nation first enacted its comprehensive labor and employment code in 1985, entitled the Navajo Preference in Employment Act ("NPEA"). Navajo Nation Code Ann. tit. 15, §§ 601 *et seq.* The purposes of the NPEA include to "promote the [Nation's] economic development, . . . lessen the . . . Nation's dependence upon off-Reservation sources of employment, . . . foster the economic self-sufficiency of Navajo families, . . . protect the health, safety, and welfare of Navajo workers, . . . and . . . foster cooperative efforts with employers to assure expanded employment opportunities for the Navajo work force." *Id.* § 602(1)-(7). Consistent with those purposes, the NPEA affirms the right of workers, whether employees of the Nation's

government or of other governmental organizations, to organize and bargain collectively. *Id.* § 606. While the NPEA does not permit employees of the Nation itself to strike or picket, disputes are resolved through mediation and, where that fails, interest arbitration. *See* Human Services Committee of the Navajo Nation, Resolution No. HSCJY-63-94, Section 7 (July 25, 1994).

In addition, the Navajo Nation's governmental employees have also organized. In accordance with the Nation's laws, collective bargaining agreements for all Navajo Nation governmental employees are implemented by the Office of Navajo Labor Relations. This Office has worked with the United Mine Workers of America and certified it as the bargaining representative for employees of three different units of the Navajo Nation government: (1) the Department of Head Start; (2) the Division of Public Safety; and (3) Blue/White Collar Executive Branch. The Nation has subsequently executed a collective bargaining agreement for the Department of Head Start in 2006, and executed a similar agreement for the Division of Public Safety in 2013. Grievances are heard by the Navajo Office of Hearings and Appeals, a tribunal empowered to hear grievances by all Navajo Nation employees under Navajo law. *See* Collective Bargaining Agreement Between the Navajo Nation Division of Public Safety and International Union, United Mine Workers of America, Art. III(A), XXIII(B) (April 4, 2013); Navajo

Nation Department of Early Childhood Development and International Union, United Mine Workers of America, Art. III(A), XXIII(B) (April 26, 2006).

The Nation has also exercised its sovereign prerogatives in other labor matters. For example, Navajo Nation President Ben Shelley recently executed a Memorandum of Understanding with five union organizations to collaborate on training and placement of skilled Navajo trade workers on public work projects. *See* Memorandum of Understanding Between the Navajo Nation and the NAL-NiSHii Federation of Labor AFL-CIO, *et al.* (April 11, 2013). That agreement similarly recognizes the primacy of Navajo Nation labor and employment law in creating relationships with union organizations. *E.g., id.* ("WHEREAS, the Navajo Nation exercises its inherent sovereign authority to regulate employment and require preference for qualified Navajo workers on the Navajo Nation through the Navajo Preference in Employment Act."). Those organizations accept Navajo law as the governing law and work within the Navajo system to promote the rights of their represented employees.

B. The Mashantucket Pequot Tribal Nation.

Similar to the Navajo Nation, the Mashantucket Pequot Tribal Nation also has a functioning and effective system of labor laws and institutions. In 2007, the Tribal Nation enacted the Mashantucket Pequot Labor Relations Law ("MPLRL"), 32 M.P.T.L. ch. 1, which protects employees' right to organize and regulates labor

relations on the Reservation. The Tribal Nation also established the Mashantucket Employment Rights Office ("MERO")[8], which is the tribal agency that oversees the administration and enforcement of the MPLRL, as well as the Mashantucket Pequot Tribal and Native American Preference Law. *See* 31 M.P.T.L. ch. 2 § 2. Since 2007, four separate labor organizations have been certified under the MPLRL as the exclusive bargaining representatives for different bargaining units with the Tribal Nation. The experiences of these labor organizations exemplify the working nature of the MPLRL.

In October 2008, the Tribal Nation recognized and certified under tribal law the International Union, U.A.W., AFL-CIO ("UAW"), as the exclusive bargaining representative for a group comprised of dealers at the Tribal Nation's gaming enterprise, an arm of the Tribal government established to fund government operations. *See* 4 M.P.T.L. ch. 1 § 1(a). The UAW and the Gaming Enterprise entered negotiations pursuant to the MPLRL for their first contract. When the parties failed to reach an agreement, the UAW filed a Petition for Impasse Resolution under 32 M.P.T.L. ch. 1 § 10. *See UAW v. Mashantucket Pequot Gaming Enter.*, IR-2009-001. The parties selected a MERO Board[9] to hear the

[8] MERO maintains a website at www.mptnlaw.org that includes links to MERO guidance, forms, procedure manuals and business agent licensing information.

[9] MPLRL provides the parties with the option to select a MERO Board to hear a dispute. 32 M.P.T.L. ch. 1 §§ 7(a), 10(c) & 12(b). Each party selects a member of

impasse resolution case; however, prior to the MERO Board issuing a decision, the parties came to an agreement and a collective bargaining agreement was concluded and signed, the first such agreement under the Mashantucket Pequot Labor Relations Law.

The Tribal Nation's MERO has also certified the International Union of Operating Engineers, Local Union No. 30, AFL-CIO ("Operating Engineers"), the United Food and Commercial Workers, Local 371 ("UFCW"), and the International Association of Fire Fighters AFL-CIO CLC ("Fire Fighters") to represent various bargaining units. Each of these organizations filed petitions to represent groups of tribal workers under the MPLRL. *See Fire Fighters' Petition*, RC-2008-100 (the petition was filed on December 16, 2008, and the union was certified on March 20, 2009); *Operating Engineers' Petition*, RC-2010-001 (the petition was filed on April 19, 2010, and the union was certified on October 18, 2010); *UFCW Petition*, RC-2011-001 (the petition was filed on May 2, 2011, and the union was certified on June 1, 2011). In each case, the MERO conducted elections, resolved any issues raised, and certified the results, which ultimately led to the certification of each of these labor organizations.

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the Board and then the parties' board members select the third member of the Board. If the parties do not elect a MERO Board, a special master is appointed by the Mashantucket Pequot Tribal Court to hear the matter. *Id.*

While the Operating Engineers and the Fire Fighters each negotiated and entered collective bargaining agreements with the respective tribal employer, the UFCW and the tribal employer were unable to reach a negotiated agreement. The UFCW, with agreement from the employer, subsequently filed a petition for impasse resolution under Section 10 of the MPLRL. *See UFCW v. MPGE*, IR-2012-002. In accordance with Section 10, the parties selected a MERO Board to hear the impasse resolution, and the MERO Board is currently in the process of considering and deciding the petition.

Further, each collective bargaining agreement entered into with these labor organizations contains important provisions that recognize the unique circumstances of employment on the Mashantucket Pequot Reservation and the applicable provisions of Mashantucket Pequot tribal law. For instance, each agreement recognizes the applicability of the Tribal Nation's Tribal and Native American Preference law, and the Tribal Nation's ability to enforce that law. *See* 33 M.P.T.L. ch. 1; *see also* 32 M.P.T.L. ch. 1 §9(d). The collective bargaining agreements also contain important provisions whereby the labor organizations agree not to engage in strikes or lockouts, in accordance with the Tribal Nation's no-strike provision in its labor laws. *See* 32 M.P.T.L. ch. 1 § 11. Each labor organization is also registered with the Tribal Nation pursuant to tribal law, and their business agents are licensed through MERO in conjunction with the

Mashantucket Pequot Trial Gaming Commission. *See* 32 M.P.T.L. ch. 1 §§ 14 & 15.

Moreover, in addition to using the MPLRL's process and procedure for elections and impasse resolution, several labor organizations and employees have filed prohibited practice cases with the MERO. Labor organizations have filed these claims alleging violations of Section 6(a) of the MPLRL for such things as unilateral changes to terms and conditions of employment, while employees have filed claims against both their employer and labor organizations under Sections 6(a) and 6(b) for issues such as a challenge to a union security provision and claimed breach of duty of fair representation. *See, e.g.*, *UAW v. MPGE*, PP-2009-100 (claiming unilateral and discriminatory failure to promote dealers); *UAW v. MPGE*, PP-2009-101 (claiming unilateral changes and refusal to recognize union); *Fire Fighters v. MPTN*, PP-2009-102 (claiming, *inter alia*, unilateral and discriminatory change in vacation practices); *McDonough v. UAW*, UPP-2011-001 (claiming breach of duty of fair representation); *Chabotte v. MPGE*, PP-2012-002 (claiming unlawful union security provision). To date, all prohibited practice claims have been resolved through either a MERO mediated settlement or a non-MERO settlement.

* * * * * *

Together, the Navajo Nation and the Mashantucket Pequot Tribal Nation provide two examples of operating tribal labor systems—created through each tribe's exercise of its tribal sovereignty—that application of the NLRA would eviscerate. These tribal governments have evaluated the unique needs and circumstances of their governments, as well as their communities and workforce, and have followed other governments and crafted laws to regulate labor relations within their reservations.

Since at least the late 1960s, promotion of functioning, effective and strong tribal governmental institutions has been a centerpiece of federal policy. Each President since President Johnson, as well as Congress and the courts, have underscored the centrality and importance of this principle. But if this Court enables the Board to apply its jurisdiction over federally recognized Indian Tribes, it will damage tribal autonomy and undermine the right of tribes "to make their own laws and be ruled by them." *Williams*, 358 U.S. at 220. This Court should not tear asunder tribal laws and institutions that are precisely the kind and nature that federal policy has long promoted.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Review, reverse the NLRB's Order, and hold that the Board's jurisdiction does not extend to federally recognized Indian Tribes.

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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2013, I electronically filed the foregoing using the Court's CM/ECF System. Counsel for all parties are registered CM/ECF users and will be served with the foregoing document by the Court's CM/ECF System.

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