Case Nos. 13-1464 and 13-1583

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 FOR THE NATIONAL CONGRESS OF AMERICAN INDIANS AND THE WHITE MOUNTAIN APACHE TRIBE AS AMICI CURIAE IN SUPPORT OF PETITIONER AND GRANTING THE PETITION

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Sixth Circuit Rule 26.1, the National Congress of American 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 White Mountain Apache 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

The National Congress of American Indians, founded in 1944, is the nation's oldest and largest association of Indian tribal governments, representing 252 tribal governments and many individuals.[1] NCAI serves as a forum for consensus-based policy development among its member Tribes from every region of the country. Its mission is to inform the public and all branches of the federal government about tribal self-government, treaty rights, and a broad range of federal policy issues affecting tribal governments.

The White Mountain Apache Tribe is a federally recognized Indian Tribe. Its wholly-owned timber enterprise was the respondent in the National Labor Relations Board's 1976 ruling in *Fort Apache Timber Company*, discussed below, in which the Board properly ruled that the National Labor Relations Act did not apply because the Tribe was a sovereign governmental entity. Since that time, the Tribe continued to operate the timber company as a means of managing the Tribe's timber resources, promoting economic development, and providing employment and management opportunities for Tribe members.

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than amici, their members, or their counsel made any monetary contribution toward the preparation or submission of this brief. The parties have consented to the filing of this brief.

PRELIMINARY STATEMENT

In 2007, the Little River Band of Ottawa Indians enacted a labor-relations law to govern labor organizations and collective bargaining within the Band's governmental departments, agencies, authorities, subordinate organizations, and commissions. Band Br. 8. As a federally-recognized Indian Tribe with the power of self-government, the Band modeled its enactment on public-sector labor laws of state and local governments, and "carefully considered … the values and interests of the Band in order to establish fair processes, rights, and remedies for the parties and interests at stake." FEP Code § 17.1(b) (Pet. App'x 112). Among other things, the Band's labor-relations law prohibits strikes by tribal government employees, requires labor organizations to apply for and obtain a license before organizing on tribal lands, and excepts the issue of drug and alcohol testing from the duty to bargain in good faith. Band Br. 9, 33-36. Under the law, union elections have been held; alleged unfair labor practices have been resolved; bargaining impasses have been surmounted; and a collective bargaining agreement has been executed. *Id.* at 10-11.

In the decision under review, the National Labor Relations Board held that the National Labor Relations Act applies to the Band and nullifies certain provisions of its law. Applying recent Board precedent that reversed seven decades of previous practice, the Board asserted jurisdiction over a gaming

enterprise carried on by the Band on land over which the Band exercises governmental authority.

That extension of the NLRA cannot be sustained. In view of the unique status of Indian Tribes under federal law, the historical context in which the NLRA was enacted, the Act's and the Board's exclusion of all other governments (including all federal instrumentalities) from the scope of the Act, and the central role that federal Indian law and policy have long assigned to "commercial" enterprises operated by tribal governments, it is clear that Tribes do not fall within the class of private employers covered by the Act. Developments since 1935, including Congress's continued fostering of tribal self-government and self-determination through economic development, reinforce that conclusion. Moreover, the Board's decision to assert jurisdiction over tribal activities it deems "commercial" but not those it deems "governmental" finds no home in the statute, strays well beyond the Board's expertise, and ignores Supreme Court precedent rejecting efforts to rely on such distinctions in other contexts.

ARGUMENT

I. EXTENSION OF THE NLRA TO TRIBAL GOVERNMENT ENTERPRISES IS INCONSISTENT WITH THE HISTORY AND PURPOSES OF THE ACT FROM THE SPECIAL PERSPECTIVE OF FEDERAL INDIAN LAW

"For nearly two centuries now, [the Supreme Court] ha[s] recognized Indian tribes as 'distinct, independent political communities,' qualified to exercise many

of the powers and prerogatives of self-government." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008). 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).

Among the governmental prerogatives Tribes normally retain are "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); *see also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982). Tribes have the "power to make their own substantive law in internal matters, and to enforce that law in their own forums," including those "appropriate … for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians" on reservations. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56, 65 (1978) (citations omitted). They have the power, even where reservation lands have passed to non-Indians, to "regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts,

leases, or other arrangements." *Montana v. United States*, 450 U.S. 544, 565 (1981).[2]

While all these aspects of self-government are "subject to the superior and plenary control of Congress," *Martinez*, 436 U.S. at 58, in the absence of clear congressional direction the Supreme Court has "'consistently guarded the authority of Indian governments over their reservations.'" *Mazurie*, 419 U.S. at 558. This is reflected, for example, in two powerful canons of construction pertinent here. First, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *see also, e.g., Grand Traverse Band of Ottawa & Chippewa Indians v. U.S. Att'y*, 369 F.3d 960, 971 (6th Cir. 2004); *San Manuel Indian Bingo*

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[2] *Montana* held that Tribes presumptively retain jurisdiction to regulate activities of non-Indians on tribal lands, 450 U.S. at 557, but may exercise that jurisdiction with respect to non-Indian fee land only if the non-Indian has entered into a "consensual relationship" with a Tribe or its members or the conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," *id.* at 564-566. This distinction between tribally-owned and non-Indian-owned reservation lands for purposes of a Tribe's civil regulatory jurisdiction was confirmed in later cases. *See, e.g., El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 484-485 & nn.6-7 (1999). It formed the basis for previous Board decisions permitting assertion of jurisdiction over activities undertaken outside a Tribe's reservation, but not over activities on land within the Tribe's jurisdiction. *See Sac & Fox Indus., Ltd.*, 307 N.L.R.B. 241, 242 (1992). The Board's *San Manuel Indian Bingo & Casino* decision (341 N.L.R.B. 1055 (2004)), discussed below, replaced that distinction with an inappropriate and untenable inquiry into whether particular activities are what the Board considers properly "governmental." *See infra* Part II.

& Casino v. NLRB, 475 F.3d 1306, 1311 (D.C. Cir. 2007) (collecting cases). Second, "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in th[e] area [of Indian affairs] cautions that [courts] tread lightly in the absence of clear indications of legislative intent." *Merrion*, 455 U.S. at 149; *see also Grand Traverse Band*, 369 F.3d at 971 ("The State has pointed to no evidence of Congressional intent that would forbid this Court from invoking the canon of statutory construction applied to statutes affecting Indians and their trust relationship with the United States.").

A. Congress Framed The NLRA To Cover Ordinary Private-Sector Employers, Not Governments Or Special Entities

These background principles must inform this Court's consideration of a central question presented here: Whether the term "employer" in the NLRA extends to tribal governments engaged in activities on tribal land. The Supreme Court has explained that the "very broad terms" Congress used in framing the NLRA must be understood in light of the historical context of the Act's adoption in 1935. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 504 (1979). "The concern that was repeated throughout the debates was the need to assure workers the right to organize to counterbalance the collective activities of employers which had been authorized by the National Industrial Recovery Act." *Id.* Thus, "congressional attention focused on employment in private industry." *Id.* Indeed,

the Court observed that, even after the Act had been in operation for twelve years, congressional debate over a 1947 amendment revealed a "consensus … that nonprofit institutions in general did not fall within the Board's jurisdiction because they did not affect commerce." *Id*. at 505. While that understanding of the Act's scope has been superseded, the Court has made clear that, as a matter of statutory construction, the Act does not cover every entity that could be described as an "employer." Thus, given reason to pause by the special First Amendment status of religious institutions, the Court reasoned that "Congress simply gave no consideration to church-operated schools," *id*. at 504, and certainly "did not contemplate" that their labor relations would be regulated by the Board, *id*. at 506. Given those circumstances, the Court concluded, the term "employer" does not not include such schools. *Id*. at 507.

One category of potential employers Congress did consider was governments. Section 2(2) of the Act expressly excludes from the coverage of the Act "the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof." 29 U.S.C. § 152(2). That exclusion reflects Congress's unwillingness to subject its own instrumentalities, or to seek to subject other governments within its jurisdiction, to regulation under the Act. In particular, it shows unwillingness to extend to the employees of *any* governmental employer a federal right to strike—a right that is

otherwise "part and parcel of the system that the Wagner and Taft-Hartley Acts [*i.e.*, the NLRA] have recognized." *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 488-489 (1960).

At the time the NLRA was enacted, "governmental employees did not usually enjoy the right to strike." *NLRB v. Natural Gas Util. Dist. of Hawkins County*, 402 U.S. 600, 604 & n.3 (1971). Such strikes were barred at common law, *Virgin Islands Port Auth. v. SIU de P.R.*, 354 F. Supp. 312, 313 (D.V.I. 1973), *aff'd*, 494 F.2d 452 (3d Cir. 1974), and generally remain so today in the case of federal and most state employees, *see, e.g.*, 5 U.S.C. § 7116(b)(7). The legislative history of the NLRA includes a 1934 letter to the New York Times from Senator Walsh, Chairman of the Senate Committee on Education and Labor, emphasizing the importance of precluding public employees from striking. 1 *Legislative History of the National Labor Relations Act* 1117 (1949) (letter dated June 3, 1934). Similarly, in 1937, just three years after he signed the NLRA, President Roosevelt argued forcefully that strikes by public employees were inconsistent with effective government:

> [M]ilitant tactics have no place in the functions of any organization of Government employees …. [A] strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of Government until their demands are satisfied. Such action, looking toward the paralysis of Government by those who have sworn to support it, is unthinkable and intolerable.

Norwalk Teachers' Ass'n v. Board of Educ., 83 A.2d 482, 484 (Conn. 1951) (quoting letter to the National Federation of Federal Employees (Aug. 16, 1937) (alteration in original)).

In general, then, Congress clearly accepted the proposition that public-employee strikes are "contrary to the notion of government," in part because a governmental activity

> is usually undertaken by the government precisely because it is critically important to a large segment of the public, and the public is therefore especially vulnerable to "blackmail" strikes by workers in this field.

Virgin Islands Port Auth., 354 F. Supp. at 313. In any event, Congress declined to enact a federal law imposing either collective bargaining or related rights, including the right to strike, on other governments within the federal system. Instead, it left those governments free to make these significant policy choices through their own laws.

The NLRA's governmental exclusion makes express reference only to the most commonly considered governments in the American system—the United States and "any State or political subdivision thereof." 29 U.S.C. § 152(2). Federal courts have nonetheless interpreted the provision to reach the governments of Puerto Rico and the Virgin Islands. *See Chaparro-Febus v. Int'l Longshoremen Ass'n, Local 1575*, 983 F.2d 325, 328-330 (1st Cir. 1992); *Virgin Islands Port Auth.*, 354 F. Supp. at 313; *cf. San Manuel*, 341 N.L.R.B. at 1070 (Member

Schaumber, dissenting); *see also* 29 C.F.R. § 102.7 (current Board regulation defining "State" to include the District of Columbia and all U.S. territories and possessions (promulgated Apr. 18, 1936, *see* 1 Fed. Reg. 207, 208)). And until 2004, the Board had likewise recognized—most prominently in a case involving amicus the White Mountain Apache Tribe—that it was "clear beyond peradventure that a tribal council … is a government both in the usual meaning of the word, and as interpreted and applied by Congress, the Executive, and the Courts," and thus outside the intended coverage of the Act, at least when operating on land over which the Tribe exercises governmental authority. *Fort Apache Timber Co.*, 226 N.L.R.B. 503, 506 (1976) (footnote omitted); *see Sac & Fox*, 307 N.L.R.B. at 243-244 (distinguishing off-reservation activities).[3] The only federal court to address the question had agreed. *Roberson v. Confederated Tribes of Warm Springs of Or.*, 103 L.R.R.M. 2749, 1980 WL 18759, at *2 (D. Or. Feb. 4, 1980) ("*Fort Apache*

[3] Seven years before *Fort Apache*, the Board affirmed without opinion a district director's decision finding no jurisdiction over a hydroelectric facility owned by the Metlakatla Indian Community because the Tribe was implicitly included in the government exemption. *Metlakatla Indian Cmty. v. Local Union No. 1547*, No. 19-RC-5180 (Reg'l Dir. Oct. 7, 1969), *review denied* (Nov. 13, 1969). Similar opinions were later issued with respect to the Mississippi Band of Choctaw Indians (Aug. 13, 1998) and the Eastern Band of Cherokee Indians (Mar. 8, 2002). *See also* Quarterly Report of the General Counsel, R-1851 (N.L.R.B. Apr. 5, 1989) (reporting Board determination to decline jurisdiction over Tribal employer), *available at* http://www.nlrb.gov/reports-guidance/general-counsel-memos.

Timber Company holds that an Indian tribe cannot be an employer under 29 U.S.C. § 152(2). The conclusion reached in *Fort Apache* is correct." (citation omitted)).

Not until its 2004 decision in *San Manuel Indian Bingo & Casino* did the Board assert that the NLRA extends to the governments of federally-recognized Indian Tribes. It has since maintained that position, in this case and others. But, as the Band explains (*see, e.g.*, Br. 37) the Board's new construction of the Act is implausible, especially when the Act's adoption in 1935 is considered in conjunction with the immediately preceding and succeeding enactment of the Indian Reorganization Act in 1934 and the Oklahoma Indian Welfare Act in 1936. As discussed below, the adoption of those Indian-specific Acts was driven by the desperate state of tribal affairs at that time, reflected a sharp turning point in federal Indian policy, and embodied a renewed commitment by the United States to deal with Tribes on a government-to-government basis. In light of that context, the fact that Congress did not mention Tribes specifically in the NLRA cannot support treating them—alone among American governments—as "employers" within the meaning of the Act. *See Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 337 (1988) (emphasizing importance of considering "Congress' silence … in the appropriate historical context"); *Neztsosie*, 526 U.S. at 487 (concluding Tribes should be treated like States under Price-Anderson Act because Act's silence on

issue was probably inadvertent); *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1196 (10th Cir. 2002) (en banc).

B. Between 1934 And 1936, Congress Would Have Thought Of Indian Tribes As Governments In The Process Of Reconstruction, Not As Private-Sector Employers

The United States originally conducted its legal relations with Tribes as a matter of treaties with independent Nations. *See, e.g.*, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 542-548 (1832); *Cohen's Handbook of Federal Indian Law* 23-30 (Newton et al. eds. 2012 ed.). Eventually, however, it "began to consider the Indians less as foreign nations and more as a part of our country." *Organized Village of Kake v. Egan*, 369 U.S. 60, 72 (1962). In 1871, Congress ended the practice of dealing with Tribes by treaty. 25 U.S.C. § 71. Moreover, contrary to the government's many existing promises of protection, officials "tried to substitute federal power for the Indians' own institutions by imposing changes in every aspect of native life." S. Rep. No. 101-216, at 3 (1989) (report of special investigative committee on federal mismanagement of Indian affairs).

One particularly important attack on tribal governments was the General Allotment Act of 1887, 24 Stat. 388, which formally implemented policies of "allotment and assimilation" and envisioned "elimination of tribal institutions, sale of tribal lands, and assimilation of Indians as individuals into the dominant culture." *Duro v. Reina*, 495 U.S. 676, 691 (1990). An avowed goal was "the

dissolution of tribal affairs and jurisdiction" and "the ultimate destruction of tribal government." *Montana*, 450 U.S. at 559 n.9. These policies, however, "proved to be a disastrous failure." *Hagen v. Utah*, 510 U.S. 399, 425 (1994). Eventually, federal policy began to shift back toward respect for Tribes as distinct communities and the promotion of tribal self-government and community-based economic development. *Cohen's Federal Indian Law* 79-81.

A critical turning point was the 1928 Meriam Report, which described the deplorable conditions created by the assimilation policy and quickly became a "primary catalyst for change." *Cohen's Federal Indian Law* 80; *The Problem of Indian Administration* (Meriam et al. eds. 1928) (Meriam Rep.). It detailed how "[a]n overwhelming majority of the Indians [were] poor" and "living below any reasonable standard of health and decency." Meriam Rep. 3, 433-434. They "generally eke[d] out an existence," largely "through unearned income from leases of [their] land, the sale of land, per capita payments from tribal funds, or in exceptional cases through rations given [them] by the [federal] government." *Id.* at 5. "Little [was] done on the reservations," and many Indians had "no resources but their labor," which was mostly "temporary" and "unskilled." *Id.* at 15, 519. They were "not adjusted to the economic and social system of the dominant white civilization," *id.* at 3, and experience as business owners and employers was "almost entirely wanting," *id.* at 430.

After the 1932 election, Congress concluded that "[t]he overly paternalistic approach of prior years had proved both exploitative and destructive of Indian interests," and "institutional changes were required." *Morton v. Mancari*, 417 U.S. 535, 553 (1974). Proper fulfillment of the Nation's trust obligations required a complete shift in approach, "turning over to the Indians a greater control of their own destinies." *Id*. This led to the "sweeping" statutory changes embodied in the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. §§ 461 *et seq*., whose "overriding purpose" was "to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically," *Morton*, 417 U.S. at 542. Importantly, the 1934 Act aimed to promote self-determination by Indian communities through both (i) renewed political recognition and (ii) economic development *undertaken directly by the Tribes as Tribes*. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 n.5 (1987); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151-152 (1973). The IRA encouraged Tribes both to "reorganize"—to "revitalize their self-government" (*Mescalero*, 411 U.S. at 151) through the adoption of tribal constitutions, 25 U.S.C. § 476—and to invigorate their economies through the creation of federally-chartered tribal corporations, *id*. § 477. These changes all emphasized "the expression of retained tribal sovereignty." *Duro*, 495 U.S. at 690-692; *see Merrion*, 455 U.S. at 134 & n.3, 137-141, 145-146 & n.12, 130 (noting Tribe's

organization under political and corporate provisions of IRA, reaffirming inherent sovereign authority to tax, and stressing Tribe's dual roles "as commercial partner … [and] as sovereign"); 78 Cong. Rec. 11125 (1934) (statement of co-sponsor Sen. Wheeler) (IRA sought "to give the Indians the control of their own affairs and of their own property"). "Instead of forcing the assimilation of individual Indians, the IRA was intended to enable the tribe to interact with and adapt to modern society as a governmental unit." *Cohen's Federal Indian Law* 81.

Thus, focusing specifically on its power and responsibilities with respect to Indian affairs, Congress fundamentally changed federal policy in an effort to achieve two distinct but inseparable objectives for Tribes: political self-governance and economic self-sufficiency. By promoting both, the Act sought to "'rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" *Mescalero*, 411 U.S. at 152 (quoting H.R. Rep. No. 73-1804, at 6 (1934)). Renewed support for tribal governments was directly linked to the policy of promoting economic development through which a Tribe could "generate substantial revenues for the education and the social and economic welfare of its people." *Id.* at 151.

As passed in 1934, the IRA did not cover Tribes in Oklahoma. Between 1934 and 1936, however—which is to say, during the exact period in which it was considering and passing the NLRA—Congress held hearings focusing specifically

on those Tribes. Commissioner of Indian Affairs John Collier explained that, as a result of the allotment policy, members of the Oklahoma Tribes were "at present wholly landless" and their poverty had become "very great." *To Promote the General Welfare of the Indians of Oklahoma: Hearings Before the H. Comm. on Indian Affairs on H.R. 6234*, 74th Cong. 9-10 (1935). "The per capita per annum income of the … Tribes, excluding a few who are rich from zinc or oil or other minerals, runs around $48, a figure arrived at by totaling all that they consume. I mean all they wear and eat in a year. They are very poor; desperately poor." *Id*. In 1936, Congress enacted the Oklahoma Indian Welfare Act (OIWA), extending most provisions of the IRA to the Oklahoma Tribes. *See* 25 U.S.C. §§ 501 *et seq.*; *Morris v. Watt*, 640 F.2d 404, 409 n.11 (D.C. Cir. 1981).

In 1935—the year between adoption of the IRA and the OIWA—Congress enacted the NLRA. As discussed above, that Act established a new national regime of collective bargaining, "focused on employment in private industry and on industrial recovery." *Catholic Bishop*, 440 U.S. at 504. Against the backdrop of the contemporaneous developments in federal Indian law, it is inconceivable that Congress intended to include Indian Tribes within that new regime.

First, given the picture that had been graphically painted of the economic devastation visited on Tribes by the federal policies of the previous decades, the most reasonable explanation for the lack of any specific mention of Tribes in the

NLRA's text and legislative history is that reached by the D.C. Circuit: "[T]he NLRA was enacted by a Congress that in all likelihood never contemplated the statute's potential application to tribal employers." *San Manuel*, 475 F.3d at 1310.[4]

That conclusion is underscored by Congress's failure to include any abrogation of tribal sovereign immunity from suit for actions to enforce collective bargaining agreements under Sections 301 or 303 of the Act. *See Roberson*, 1980 WL 18759, at *1 (finding no abrogation). Such abrogations "cannot be implied but must be unequivocally expressed." *Martinez*, 436 U.S. at 58. It would have been surpassingly odd for Congress to include tribal government enterprises within the coverage of the NLRA through the definition of "employer," but then to provide employees and labor organizations no authority to sue Tribes to enforce the Act. In the absence of an abrogation provision, the only logical conclusion is that Congress never contemplated application of the Act to tribal enterprises in the first place. *See* Band Br. 52-55.

Second, if the question had been raised when the NLRA was being drafted in the 1930s, Tribes would likely have been considered legally "instrumentalities" of

[4] In making this statement the court clearly rejected the reasoning of the Board majority in *San Manuel*, 341 N.L.R.B. at 1058, that Congress "purposely chose" not to exclude Tribes from the Act's coverage. Amici are aware of no legislative history or other evidence that would support a conclusion that Congress adverted to the question of tribal governments and decided that they should be covered by the Act.

the federal government, and thus derivatively covered by the Act's express exemption of the United States itself. The period 1914 through 1938—during which the NLRA was passed—witnessed "the reign of the treatment of Indian reservations as federal instrumentalities." *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 184 n.8 (1980) (Rehnquist, J., concurring in part, concurring in the result in part, dissenting in part). Thus, in 1937, when the Solicitor of the Department of the Interior was asked to opine on the question whether Tribes were required to pay unemployment insurance and Social Security taxes when they handled funds under the Indian Reorganization Act, he reasoned:

> It is my opinion that the Indian tribes, even if employers, are not subject to either tax for two reasons; first, that it is highly doubtful whether a general tax law of this kind would be held to apply to an Indian tribe unless the statute so indicated, and secondly, and principally, because an Indian tribe, particularly when operating under a trust agreement, can be considered an instrumentality of the United States and, therefore, that employment by a tribe *is* within the exceptions to the kind of employment upon which taxes are laid.

1 Op. Solic. Dep't Indian Affairs 767, 768 (D.O.I. June 30, 1937); *see also* 1 Op. Solic. Dep't Indian Affairs 484, 491 (D.O.I. Dec. 13, 1934) (interpreting the 1934 IRA) ("The Indian tribes have long been recognized as vested with governmental powers, subject to limitations imposed by Federal statutes…. The tribe is, therefore, so far as its original absolute sovereignty has been limited, an instrumentality and agency of the Federal Government.").

Third, as discussed above, the whole thrust of Congress's Indian-specific enactments in 1934 and 1936 was to re-establish a federal policy of recognizing and dealing with Tribes *as governments*—subsidiary to and dependent on the United States to be sure, but governments nonetheless. Thus, if Congress had contemplated the special case of Tribes in the context of the NLRA and thought it needed to treat them as separate from the United States itself for this purpose, the only reasonable conclusion is that it would have included them within the list of governments expressly excluded from coverage. Notably, in a regulation promulgated in 1936 to prescribe procedures under the new Act, the Board itself uncontroversially defined the term "State" to include other governments not expressly mentioned in the text of Section 2(2): "the District of Columbia and all … Territories, and possessions of the United States." 29 C.F.R. § 102.7 (promulgated Apr. 18, 1936, *see* 1 Fed. Reg. 207, 208). There is no basis for treating tribal governments as covered by the Act while recognizing that the governments of other federal territories, "possessions," or enclaves are not. *See United States v. Lara*, 541 U.S. 193, 203-204 (2004) (comparing Tribes directly to Hawaii before statehood, the Northern Mariana Islands, the Philippines, and Puerto Rico—each "a dependent sovereign that is not a State").[5]

[5] "From an early time in the history of the [federal] government," Congress has acted with respect to Indians and "Indian Country" in part under the Territory Clause (art. IV, § 3) of the Constitution. *United States v. Celestine*, 215 U.S. 278,

Fourth, the fact that some Tribes now conduct successful commercial activities along with their other functions does not detract from the conclusion that Congress would have viewed Tribes as governments in 1935. Undertaking direct economic activities to promote development and tribal self-sufficiency was one of the things that Congress in 1934 and 1936 specifically intended tribal *governments* to do. *See, e.g.*, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987) (noting Congress's "'overriding goal' of encouraging tribal self-sufficiency and economic development").[6] Indeed, if Congress had thought of these fragile and often fledgling entities in terms of the right to strike—one of the signal reasons for distinguishing between private and governmental employers under the Act—it would no doubt have had *special* concern about their vulnerability to disruption and the choking off of public funds. *See, e.g.*, Band Br. 32-37.

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284 (1909); *see also, e.g.*, *United States v. Antelope*, 430 U.S. 641, 648-650 (1977); *Minnesota v. United States*, 305 U.S. 382, 386-388 (1939); *Hallowell v. United States*, 221 U.S. 317, 324 (1911); *cf. Lara*, 541 U.S. at 200-203 (discussing other sources and uses of congressional authority over Indian affairs).

[6] Tribal governments have in fact undertaken an array of development initiatives in many areas, including agriculture, oil and gas, timber, construction, and retail sales, among others. *See, e.g.*, *Quantum Entertainment, Ltd. v. DOI*, 848 F. Supp. 2d 30, 34 (D.D.C. 2012) (gas station); *Fort Apache*, 226 N.L.R.B. at 503 (timber company).

C. The Further Development Of Federal Indian Law Since 1936 Strongly Supports Construing The NLRA Not To Reach Indian Tribes

Since 1936, the Political Branches have further strengthened the policies of tribal self-determination and economic self-sufficiency embodied in the IRA and the OIWA. *See, e.g.*, *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 172 (1973) (recounting history); *Mescalero*, 462 U.S. at 334-335.[7] "Both the tribes and the Federal Government are now firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986). Congress has repeatedly declared that "there is a government-to-government relationship between the United States and each Indian tribe" and that "the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government." Indian Tribal Justice Act, 25 U.S.C. § 3601. Contemporary federal statutes consistently treat Indian Tribes as governments. *See, e.g.*, Indian Tribal Government Tax Status Act of 1982, 26 U.S.C. § 7871; Clean Water Act, 33 U.S.C. § 1377; Clean Air Act, 42 U.S.C. § 7601(d). And through enactments such as the Indian Financing Act, 25 U.S.C. § 1451, and the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.*,

[7] A temporary post-war revival of termination policies was later "repudiated by the President and Congress." *City of Roseville v. Norton*, 348 F.3d 1020, 1022 (D.C. Cir. 2003).

Congress has sought to facilitate, among other things, the development of tribal enterprises on Indian lands as a means of improving the economic circumstances and stability of tribal communities. *See, e.g.*, 25 C.F.R. §§ 101.1, 101.2(b)(1) (authorizing loans "[t]o eligible tribes … to finance economic enterprises operated for profit, the operation of which will contribute to the improvement of the economy of a reservation and/or the members thereon"); 25 U.S.C. § 2702 (Act intended "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").

The Executive and Judicial Branches have likewise strongly supported tribal self-government. *Cf.* Pet. Br. 24-25, 26-27, 31. Executive Orders expressly acknowledge the government-to-government relationship between the United States and the Tribes and require federal agencies to "consult and coordinate" with Tribes on matters affecting them. *See, e.g.*, *Memorandum for the Heads of Executive Departments and Agencies: Government-to-Government Relationship with Tribal Governments*, 74 Fed. Reg. 57,881, 57,881 (Nov. 5, 2009); Exec. Order No. 13084 (Consultation and Coordination with Indian Tribal Governments), 63 Fed. Reg. 27,655 (May 14, 1998). And the Supreme Court has consistently recognized the "traditional understanding of the tribes' status a 'domestic dependent nations'"—that is, that each Tribe is "'a distinct political society,

separated from others, capable of managing its own affairs and governing itself.'" *Lara*, 541 U.S. at 204-205 (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16-17 (1831)). All these declarations and embodiments of federal law and policy run directly counter to the NLRB's decision in *San Manuel*, 341 N.L.R.B. at 1064, applied again in this case, to treat Tribes *not* as governments but "just as it treats any other private sector employer." That construction of the NLRA cannot be sustained.

II. THE NLRB HAS NO EXPERTISE OR PROPER ROLE IN PURPORTING TO ASSESS EFFECTS ON TRIBAL SOVEREIGNTY OR TO IMPOSE DIFFERENT RULES ON "GOVERNMENTAL" AND "COMMERCIAL" ACTIVITIES OF TRIBAL GOVERNMENTS

Having wrongly concluded that it had statutory authority to act in this case, the Board further decided to exercise that authority, as a matter of discretion, on the ground that the Band's operation of a casino is a "commercial" rather than "governmental" activity, and accordingly that subjecting it to direct federal regulation under the NLRA would not impinge significantly on tribal sovereignty. Pet. App'x 14-15. But "the Board's expertise and delegated authority does not relate to federal Indian law," *San Manuel*, 475 F.3d at 1312, and it is thus in no position to make that determination. That is especially the case where the Board purports to exercise its discretion by distinguishing between "commercial" and "governmental" activities—an analytic distinction that the Supreme Court has

repeatedly abandoned as unworkable and an affront to both sovereignty and democratic governance.[8]

The Board's determination that federally regulating commercial tribal entities does not impede tribal governance is manifestly wrong, especially in view of the purposes of both federal Indian policy and the NLRA's exclusion of governments from the Act's coverage. *See, e.g.*, Band Br. 32-37, 59-60. For Tribes that have them, tribal enterprises such as casinos typically provide a very large percentage of the revenue used by the tribal government to fund its operations. *See* Pet. App'x 32-34 (Statement of Stipulated Facts ¶¶ 15-19). The revenues produced by tribal businesses fund utilities, including water, sewer, telecommunications, and energy; health care; natural resource management; elders programs; social services; tribal court systems; law enforcement; tribal schools; and adult education. *See id.*; *see also, e.g.*, *Grand Traverse Band of Ottawa & Chippewa Indians v. U.S. Att'y*, 198 F. Supp. 2d 920, 926 (W.D. Mich. 2002), *aff'd*, 369 F.3d 960 (6th Cir. 2004).

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[8] Before *San Manuel*, the Board asserted jurisdiction over commercial activities undertaken outside a Tribe's reservation, but not over such activities occurring on land within the Tribe's jurisdiction. *See Sac & Fox*, 307 N.L.R.B. at 242. While that line had no basis in the text or history of the NLRA, it was at least clear and readily applied, and found some grounding in decisions that recognize "a significant territorial component to tribal power." *Merrion*, 455 U.S. at 142; *see* note 2, *supra*.

As one court put the point, "[r]aising revenue and redistributing it for the welfare of a sovereign nation is manifestly a governmental purpose." *Cohen v. Little Six, Inc.*, 543 N.W.2d 376, 379 (Minn. Ct. App. 1996), *aff'd*, 561 N.W.2d 889 (Minn. 1997).[9] This is particularly clear in the case of a gaming enterprise operated by a Tribe in accordance with the Indian Gaming Regulatory Act. *See* Chickasaw Nation Amicus Br. Section I.A. In that Act, Congress responded to the Supreme Court's holding that "the congressional goal of Indian self-government" supported Tribes' operation of gaming enterprises. *Cabazon*, 480 U.S. at 216; *see id*. at 218-219 ("The tribal games at present provide the sole source of revenues for the operation of the tribal governments and the provision of tribal services.… Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members. The Tribes' interests obviously parallel the federal interests."). The Act specifically recognizes Tribes' gaming enterprises—which it generally requires be owned directly by tribal governments, 25 U.S.C. § 2710(b)(2)(A)—as "a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." *Id.*

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[9] *See also Allen v. Gold Country Casino*, 464 F.3d 1044, 1046-1047 (9th Cir. 2006) ("The compact that created the Gold Country Casino provides that the Casino will 'enable the Tribe to develop self-sufficiency, promote tribal economic development, and generate jobs and revenues to support the Tribe's government and governmental services and programs.' With the Tribe owning and operating the Casino, there is no question that these economic and other advantages inure to the benefit of the Tribe.").

§ 2702(1). Such an operation is not, as the Board would have it, nothing more than a "typical commercial enterprise." *San Manuel*, 341 N.L.R.B. at 1063. It is "an exercise of self-governance." *Id*.

Tribal governments have at least as urgent a need for uninterrupted funding as their national, state, and local counterparts. *See* Band Br. 33-34. And they have just as much of a sovereign prerogative to determine for themselves whether and how to balance that need against, for example, the potential desirability of according some categories of public employees the right to strike in some circumstances, or permitting drug and alcohol testing to be made a subject of collective bargaining rather being required by government policy. Yet the Board's decision in this case and others like it imposes on Indian tribes, alone among all governments otherwise recognized within the U.S. federal system, both direct regulation by the NLRB and exposure to strikes through which employees pursuing private economic interests can threaten to cripple public operations that are critical to the well-being of Tribes and their members. That is a very direct and serious impingement on tribal sovereignty—and, given the history of the Act, one particularly germane to proper interpretation of the NLRA.

Moreover, the Board's entire mode of reasoning, relying on a purported differentiation between "commercial" and "governmental" activities, is inappropriate under the NLRA, both in general and especially for Indian Tribes.

See Chickasaw Nation Amicus Br. Section I.B. No other government is subjected to regulation under the Act as to *any* of its activities. *See NLRB v. Natural Gas Util. Dist.*, 402 U.S. at 605 (setting out test for whether political subdivision of State is an "employer" under the NLRA, without regard to nature of enterprise operated). And Congress adopted the exemption in that categorical form even though it had before it arguments that a governmental exemption would give States and localities an unfair advantage over private entities unless it were limited just as the Board would now limit it for Tribes—to governments functioning "purely [as] governmental agencies." *See* 1 *Legislative History of the National Labor Relations Act* 325 (1949) (letter from J.W. Cowper (Mar. 13, 1934)). Thus, Congress advertently chose to look to the nature of the governmental entity, not to the particular activities it might carry on.

Accordingly, as the Band explains (*e.g.*, Br. 57-58), the proposed line between "commercial" and "governmental" activities that lies at the heart of the Board's analysis in this case is badly misconceived. In other contexts, the Supreme Court has repeatedly experimented with such distinctions but ultimately found them untenable, because no neutral principle limits what roles or activities are properly "governmental" and because that decision is, therefore, one to be made by the constituents of a given government themselves. As Justice Black observed in 1938: "There is not, and there cannot be, any unchanging line of

demarcation between essential and non-essential governmental functions. Many governmental functions of today have at some time in the past been nongovernmental." *Helvering v. Gerhardt*, 304 U.S. 405, 427 (1938) (Black, J., concurring); *see also Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-547 (1985) ("reject[ing], as unsound in principle and unworkable in practice, a rule … that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional'"). And while the Court has emphasized the analytical difficulty in distinguishing between traditional and non-traditional government functions, it has also explained that the very process of parsing that distinction "disserves principles of democratic self-governance." *Garcia*, 469 U.S. at 547. Self-governing sovereigns, the Court explained, "within the realm of authority left open to them …, must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else—including the judiciary—deems state involvement to be." *Id.* at 546. Sovereign activities—be they "governmental" or "proprietary"—are entitled equally to the immunity that attaches to the sovereign because of its status as a government. *See Reeves, Inc. v. Stake*, 447 U.S. 429, 442 n.16 (1980).

There is no reason to think that it is any more appropriate for the Board (or reviewing courts) to seek to apply a distinction between "governmental" and "commercial" activities in the current context—or that the Supreme Court would

approve of the attempt. *See Kiowa Tribe of Okla. v. Manufacturing Techs., Inc.*, 523 U.S. 751, 754 (1998) (rejecting argument that Tribe lost sovereign immunity when it engaged in off-reservation commercial transaction); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 510 (1991) (rejecting argument that tribal sovereign immunity should be set aside when asserted by Tribe in connection with conduct of business).

CONCLUSION

The Court should grant the petition for review.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-volume limitation provided in Federal Rule of Appellate Procedure 32(a)(7)(B). The foregoing brief uses Times New Roman (14-point) proportional type, and contains 6,869 words, exclusive of exempted portions.

/s/ Edward C. DuMont
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CERTIFICATE OF SERVICE

I certify that on July 15, 2013, I electronically filed the foregoing Brief of the National Congress of American Indians and the White Mountain Apache Tribe as Amici Curiae with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit 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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