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 OF AMICI CURIAE CHICKASAW NATION, GILA RIVER INDIAN COMMUNITY, AND UTE MOUNTAIN UTE TRIBE IN SUPPORT OF GRANTING THE LITTLE RIVER BAND OF OTTAWA INDIANS TRIBAL GOVERNMENT'S PETITION FOR REVIEW AND DENYING THE NATIONAL LABOR RELATIONS BOARD'S CROSS-PETITION FOR ENFORCEMENT

DOUGLAS B. L. ENDRESON
LLOYD B. MILLER
FRANK S. HOLLEMAN
SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY, LLP
1425 K Street, N.W., Suite 600
Washington, DC 20005
(202) 682-0240
dendreson@sonosky.com

Counsel for Amicus Curiae
Chickasaw Nation

JENNIFER H. WEDDLE
TROY A. EID
MARANDA S. COMPTON
GREENBERG TRAURIG, LLP
1200 17th Street, Suite 2400
Denver, CO 80202
(303) 572-6565
weddlej@gtlaw.com

Counsel for Amici Curiae
Ute Mountain Ute Tribe and
Gila River Indian Community

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DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST

Pursuant to Sixth Circuit Rule 26.1, the Chickasaw 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.

/s/ Douglas B. L. Endreson

DOUGLAS B. L. ENDRESON
LLOYD B. MILLER
FRANK S. HOLLEMAN
SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY, LLP
1425 K Street, N.W., Suite 600
Washington, DC 20005
(202) 682-0240
dendreson@sonosky.com

Counsel for Amicus Curiae
Chickasaw Nation

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DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST

Pursuant to Sixth Circuit Rule 26.1, the Gila River Indian Community 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.

/s/ Jennifer H. Weddle

JENNIFER H. WEDDLE
TROY A. EID
MARANDA S. COMPTON
GREENBERG TRAURIG, LLP
1200 17th Street, Suite 2400
Denver, CO 80202
(303) 572-6565
weddlej@gtlaw.com

Counsel for Amici Curiae
Gila River Indian Community

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DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST

Pursuant to Sixth Circuit Rule 26.1, the Ute Mountain Ute 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.

/s/ Jennifer H. Weddle

JENNIFER H. WEDDLE
TROY A. EID
MARANDA S. COMPTON
GREENBERG TRAURIG, LLP
1200 17th Street, Suite 2400
Denver, CO 80202
(303) 572-6565
weddlej@gtlaw.com

Counsel for Amici Curiae
Ute Mountain Ute Indian

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STATEMENT OF THE IDENTITY AND INTEREST OF THE *AMICI CURIAE*

Amici, the Chickasaw Nation, the Gila River Indian Community and the Ute Mountain Ute Tribe, are federally-recognized Indian tribes that regulate and operate tribal gaming on their lands in the exercise of their rights of self-government, and in accordance with the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721. *Amici* support the position of the Little River Band of Ottawa Indians Tribal Government ("Little River Band" or "Band") in this case, and submit that the National Labor Relations Board's Decision and Order, *Little River Band of Ottawa Indians Tribal Government*, Case No. 07-CA-051156 (Mar. 18, 2013), is contrary to federal law and should be vacated. *Amici* submit this brief to demonstrate that the governmental-commercial test upon which the Board relies to apply the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. §§ 151-169 (2006), to Indian tribes, *see* Decision and Order at J.A. 14; *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1055, 1057-64 (2004), violates federal law. All parties have consented to the filing of this brief.[1]

[1] No person or entity other than *amici* and their counsel authored this brief in whole or in part, and no person or entity other than *amici* contributed money that was intended to fund the participation and submission of this brief.

SUMMARY OF ARGUMENT

The Board claims authority to divide tribal governmental activity into two categories, "traditional tribal governmental functions" and "commercial business[es]," and to apply the NLRA to any tribal activities that it deems "commercial." 341 N.L.R.B. at 1057-64. The Board views tribal gaming enterprises as "typical commercial enterprise[s]" to which the Act applies. *Id*. at 1064. But that contention is wrong, and the governmental-commercial test on which the Board relies is contrary to federal law. As the Supreme Court held in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), and as the Congress reaffirmed in IGRA, Indian tribes conduct gaming as a governmental activity, in order to raise revenues to operate their governments and provide essential governmental services to their communities. In enacting IGRA, Congress further recognized that Indian tribes have exclusive authority over the regulation of Indian gaming, including authority over the employment of personnel. The Board is bound by these determinations of federal law, and has no authority to reach a different result by imposing the governmental-commercial test. Indeed, the Supreme Court has expressly rejected that test as a basis for limiting tribal sovereign immunity, and has determined in an analogous context that the test is unsound, unworkable and produces arbitrary results.

The Board insists that applying the NLRA to tribal gaming enterprises would "do[] little harm to the Indian tribes' special attributes of sovereignty." *Id.* 341 N.L.R.B. at 1063. That contention is simply wrong. Subjecting Indian tribes to the Board's power to divide their governments into "governmental" and "commercial" pieces, and subordinating their sovereignty to the requirements of the NLRA, as enforced by the Board, would destroy Indian tribes' rights of self-government, which include the right to determine their own form of government, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62-64 (1978), to make their own laws and be ruled by them, *Williams v. Lee*, 358 U.S. 217, 220 (1959), to engage in and regulate economic activity, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983), and to conduct gaming to raise revenue to operate their governments and provide tribal services. *Cabazon*, 480 U.S. at 216-19 (1987). For the same reasons, applying the NLRA would negate the tribes' right to conduct gaming under IGRA in order to raise revenue for essential tribal governmental functions. Congress in the NLRA never authorized this result. The Act is silent with respect to Indian tribes, and under settled law, silence is an insufficient basis on which to apply a statute that would abrogate tribal rights of self-government. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17-18 (1987); *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1195-96 (10th Cir. 2002).

ARGUMENT

I. THE BOARD'S GOVERNMENTAL-COMMERCIAL TEST VIOLATES FEDERAL LAW AND IS UNPRINCIPLED, UNWORKABLE, AND PRODUCES ARBITRARY RESULTS.

A. Indian Tribes Conduct Gaming In The Exercise Of Their Right of Self-Government.

All three branches of the federal government agree that Indian tribes conduct gaming in the exercise of their rights of self-government, in order to raise revenue to operate their governments and provide tribal services. The Board has no authority to determine otherwise.

1. The Federal Self-Determination policy supports tribal economic development as a means of raising revenue for essential governmental functions.

For nearly half a century, the federal government has been committed to strengthening tribal self-government through tribal economic development. President Nixon made this commitment in 1970, stating in his historic Self-Determination Message that "it is critically important that the Federal government support and encourage efforts which help Indians develop their own economic infrastructure." Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. DOC. NO. 91-363, at 7 (1970). The President also advanced specific legislative proposals, the centerpiece of which became the Indian Self-Determination and Educational Assistance Act, 25 U.S.C. §§ 450-458bbb, in which Congress committed to "supporting and assisting Indian

tribes in the development of strong and stable tribal governments, capable of administering quality programs and *developing the economies of their respective communities*." 25 U.S.C. § 450a(b) (emphasis added). Congress has steadfastly maintained that commitment. *E.g.*, Indian Tribal Energy Development and Self-Determination Act of 2005, 25 U.S.C. §§ 3501-3506; Native American Business Development, Trade Promotion and Tourism Act of 2000, 25 U.S.C. §§ 4301-4307. The Executive Branch has done so as well. Only three weeks ago, the President reaffirmed the federal government's commitment to "honor treaties and recognize tribes' inherent sovereignty and right to self-government under U.S. law . . . by . . . promoting sustainable economic development . . . ." Exec. Order No. 13,647, 78 Fed. Reg. 39,539 (June 26, 2013).

The Supreme Court has expressly held that tribal self-sufficiency and economic development are core goals of the Self-Determination policy, and that Indian tribes must have the power to engage in economic activity in order to further those goals:

> [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. We have stressed that *Congress' objective of furthering tribal self-government encompasses far more than encouraging tribal management of disputes between members, but includes Congress' overriding goal of encouraging "tribal self-sufficiency and economic development*." In part as a necessary implication of this broad federal commitment, *we have held that tribes have*

> *the power to manage the use of its territory and resources by both members and nonmembers, to undertake and regulate economic activity within the reservation, and to defray the cost of governmental services by levying taxes*.

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334-36 (1983) (emphasis added) (footnotes and citations omitted).

The Board's contrary contention – that "[r]unning a commercial business is not an expression of sovereignty in the same way that running a tribal court system is," *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1055, 1062 (2004) – fundamentally misstates federal Indian policy. The Self-Determination policy embraces *both* tribal economic development and tribal courts, *and* it relies on the former to raise revenues to operate the latter. They are inseparable.

2. The Supreme Court and the Circuit Courts have squarely held that Indian gaming is an exercise of the right of self-government, which raises revenue for essential governmental functions.

The Supreme Court has squarely held that tribal governments conduct gaming in the exercise of the right of self-government in order to raise revenue for governmental purposes. In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), the Court declared that Indian gaming furthers "the congressional goal of Indian *self-government*, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development," *id*. at 216 (quoting *New Mexico*, 462 U.S. at 334-35) (emphasis added), by providing "revenues for the

operation of the tribal governments and the provision of tribal services." *Id*. at 218-19. This is essential to tribal self-government because "[s]elf-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members." *Id*. at 219.[2]

In these critical respects, Indian gaming furthers tribal self-government in precisely the same manner as the tribal taxing power. That power is "an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982). Reaffirming that holding in *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 201 (1985), the Court emphasized that "the Navajos can gain independence from the Federal Government only by financing their own police force, schools and social programs." *Id*. (citing President Reagan's Statement of Indian Policy, 19 WEEKLY COMP. PRES. DOC. 98, 99 (Jan.

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[2] The Court also relied on the Executive Branch's commitment to the Self-Determination policy, quoting an affidavit submitted by the Bureau of Indian Affairs Director of Indian Services:

> "It is the department's position that tribal bingo enterprises are an appropriate means by which tribes can further their economic self-sufficiency, the economic development of reservations and tribal self-determination. All of these are federal goals for the tribes."

Id. at 227 n.21 (quoting *Cabazon Band of Mission Indians v. County of Riverside*, 783 F.2d 900, 904-05 (9th Cir. 1986)).

24, 1983)). Indian gaming serves the exact same purposes. Indeed, in *Cabazon* the tribe's gaming "provide[d] the sole source of revenues for the operation of tribal government and the provision of tribal services." *Id*., 480 U.S. at 218-19.

The Tenth Circuit has echoed these holdings. In *Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Oklahoma Tax Commission*, 829 F.2d 967 (10th Cir. 1987), the Circuit held that the Creek Nation's operation of a bingo hall was protected by its right of self-government, *id*. at 974-76, and that by conducting gaming "'[t]he Tribes in this case are engaged in the traditional governmental function of raising revenue. They are thereby exercising their inherent sovereign governmental authority.'" *Id*. (quoting *Cabazon v. Riverside*, 783 F.2d at 906). *See also Seneca-Cayuga Tribe of Oklahoma v. Oklahoma ex rel. Thompson*, 874 F.2d 709, 713 (10th Cir. 1989) (upholding a preliminary injunction to prevent the State of Oklahoma from interfering with tribal bingo games, which "promote the important congressional policy of encouraging tribal self-sufficiency and economic development.").

The Board urges that Indian gaming is not an exercise of self-governance, because it attracts patrons and has employees who are not Indians. Decision and Order at 3, J.A. 14; *San Manuel*, 341 N.L.R.B. at 1061. This contention is foreclosed by *Cabazon*, wherein the Court acknowledged that the Tribe competed with private and state-run gaming to attract non-Indian patrons, 480 U.S. at 210-

11, 216, and held that by "provid[ing] comfortable, clean, and attractive facilities and well-run games in order to increase attendance at the games," tribal governments "are generating value on the reservations through activities in which they have a substantial interest." *Id*. at 219-20. In turn, that value "*generates funds for essential tribal services and provides employment for tribal members*." *Id*. at 220 (emphasis added). Thus, contrary to the Board's view, by attracting non-Indian patrons, Indian gaming *enhances* tribal sovereignty. Necessarily, then, employing non-Indians at a tribal gaming facility does so too. And by accepting tribal employment, those employees establish a consensual relationship with the tribe, and thereby become subject to tribal regulatory and licensing authority. As the Court held in *Montana v. United States*, 450 U.S. 544 (1981):

> A tribe may *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.

Id. at 565 (emphasis added). Thus, employing non-Indians also enhances tribal sovereign authority.

In sum, the Supreme Court has already determined that Indian gaming is conducted in the exercise of the right of tribal self-government, as a revenue-raising activity, including gaming which employs non-Indians and attracts non-Indian patrons. The Board has no authority to rule otherwise.

3. In enacting IGRA, Congress confirmed that Indian gaming is a governmental activity that raises revenue for essential governmental functions.

IGRA reaffirms these conclusions in terms that are clear and controlling. Congress enacted IGRA 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*," 25 U.S.C. § 2702(1) (emphasis added), and specifically recognized that Indian tribes engage in gaming "as a means of generating tribal governmental revenue." *Id*. § 2701(1). Congress also established the National Indian Gaming Commission ("NIGC") in order "to meet congressional concerns regarding gaming and *to protect such gaming as a means of generating tribal revenue*," *id*. § 2702(3) (emphasis added), and expressly required that tribal gaming revenues be used only to fund tribal government operations and programs, provide for the general welfare of the tribe, promote tribal economic development, and for charitable and local purposes. *Id*. § 2710(b)(2)(B).

The Circuit Courts of Appeals have readily agreed that Indian tribes engage in gaming under IGRA as a *governmental* activity to raise revenues for essential government functions. This Circuit, in upholding the right of the Grand Traverse Band to conduct gaming under IGRA, recognized that gaming had enabled the Band to "fund hundreds of tribal government positions responsible for

administering programs such as health care, elder care, child care, youth services, education, housing, economic development and law enforcement." *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of the U.S. Attorney for the W. Dist. of Mich.*, 369 F.3d 960, 962 (6th Cir. 2004). Similarly, the Ninth Circuit has observed that:

> the furtherance of "an economic community" on Indian lands [i]s a goal related to Congress' special trust obligations. IGRA and the Tribal–State Compacts further that goal by authorizing gaming. Congress recognized that the revenue generated from pre-IGRA tribal gaming operations "often means the difference between an adequate governmental program and a skeletal program that is totally dependent on Federal funding."

Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712, 736 (9th Cir. 2003) (citation omitted). The Circuit added that "Class III gaming helps generate jobs and revenues *to support the governmental services and programs of the tribes that enter into compacts*." *Id*. at 741 (emphasis added). The Ninth Circuit later underscored that:

> the [Tribal] Casino is not a mere revenue-producing tribal business (although it is certainly that). The IGRA provides for the creation and operation of Indian casinos to promote "tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1).

Allen v. Gold Country Casino, 464 F.3d 1044, 1046 (9th Cir. 2006). *See also United States v. Garrett*, 122 F. App'x 628, 633 (4th Cir. 2005) (recognizing that

IGRA's promotion of tribal economic development is an "important federal interest"). In sum, these decisions all recognize that "[o]ne of the ways that Congress has promoted tribal sovereignty through economic development is . . . the authorization of Indian gaming." *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1183 (10th Cir. 2010).

The Board has no authority to ignore Congress' considered judgment in IGRA, long-recognized by the courts, that Indian gaming is a quintessentially governmental activity, engaged in by tribes to raise revenues for the provision of essential governmental functions.

4. IGRA commits the regulation of Indian gaming, including authority over the employment of gaming personnel, to Indian tribes.

In enacting IGRA, Congress also determined 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." 25 U.S.C. § 2701(5). In order to conduct class III gaming, *i.e.*, all gaming other than traditional Indian gaming, bingo and bingo-related games, *see* § 2703(8)), an Indian tribe must enact an ordinance regulating that activity, which the Chairman of the NIGC must approve. § 2710(b)(1)(B), (d)(1)(A). The ordinance must provide for a system that requires background investigations of

primary management officials and key employees of the gaming enterprise, as well as ongoing oversight of such officials, § 2710(b)(2)(F)(i); licensing of primary management officials and key employees, § 2710(b)(2)(F)(ii)(I); and a standard for determining ineligibility for employment based on a person's activities, prior criminal record, or associations, § 2710(b)(2)(F)(ii)(II).[3] IGRA also requires a Tribal-State gaming compact for class III gaming, § 2710(d)(1)(C), which is to address the governmental regulation of the activity, § 2710(d)(3)(A) (compacts "govern[] the conduct of [class III] gaming activity").[4] These provisions make

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[3] These detailed requirements recognize that tribal regulatory authority over gaming includes the power to regulate employment at gaming enterprises. Their importance is underscored by IGRA's second stated purpose, which is: "to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences." § 2702(2).

[4] Tribal governmental interests in the compacting process mirror those acknowledged in *Cabazon* and explicitly recited in IGRA, as the Senate Report on the Act makes clear:

> In the Committee's view, both State and tribal governments have significant governmental interests in the conduct of class III gaming. . . . A tribe's governmental interests include raising revenues to provide governmental services for the benefit of the tribal community and reservation residents, promoting public safety as well as law and order on the Tribal Lands, realizing the objectives of economic self-sufficiency and Indian self-determination, and regulating activities of persons within its jurisdictional borders.

S. REP. NO. 100-466, at 13 (1988).

clear that the regulation of Indian gaming is committed to Indian tribes under IGRA, and that the terms on which this is to be done are to be spelled out in tribal law and the Tribal-State Compact.

Congress emphasized that IGRA was not intended to interfere with tribal inherent sovereign authority, and that Indian tribes retain such authority unless it has been expressly relinquished. The Senate Report said this well:

> In determining what patterns of jurisdiction and regulation should govern the conduct of gaming activities of Indian lands, the Committee has sought to preserve the principles which have guided the evolution of Federal-Indian law for over 150 years. In so doing, the Committee has attempted to balance the need for sound enforcement of gaming laws and regulations, with the *strong Federal interest in preserving the sovereign rights of tribal governments to regulate activities and enforce laws on Indian land. The Committee recognizes and affirms* the principle that by virtue of their original tribal sovereignty, tribes reserve certain rights when entering into treaties with the United States, and *that today, tribal governments retain all rights that were not expressly relinquished*.

S. REP. NO. 100-466, at 5 (emphasis added). This commitment was underscored by a colloquy engaged in by Senators Evans and Inouye, both co-sponsors of S. 555, 100th Cong. (1987), the bill that was eventually passed as IGRA. 134 CONG. REC. 24,016, 24,027-28 (1988). Senator Evans stated:

> The inherent sovereign rights of the Indian tribes were reserved by the tribes for the fullest and unencumbered benefit of the Indian people. These rights have been recognized time and time again by the highest courts of

> our Nation, and they continue in existence except in rare instances where the Congress has exercised its power to restrict them. When this body has chosen to restrict the reserved sovereign rights of tribes, the courts have ruled that such abrogations of tribal rights must have been done expressly and unambiguously.
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> . . . .
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> . . . .
>
> . . . [T]he Indian gaming regulatory act should not be construed, either inside or outside the field of gaming, as a derogation of the tribes' right to govern themselves and to attain economic self-sufficiency.

Id. Senator Inouye agreed. *Id*. at 24,028. "As a statement of one of the legislation's sponsors, this explanation deserves to be accorded substantial weight in interpreting the statute." *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976).

In enacting IGRA, Congress also expressly recognized tribal sovereign authority over the employment of gaming personnel, and determined that IGRA would *not* interfere with the tribes' ongoing exercise of that authority. Congress explicitly rejected a scheme that would have removed this authority by providing for federal control of gaming employees, analogous to the authority the NLRB now claims. The Senate bill proposed a Commission that would have had authority to enact "rules setting out the requirements for employment in a bingo establishment and for any bingo license required for employment in or other connection with a bingo establishment," Indian Gambling Authorization and Regulation Act of 1986,

S. 2557, 99th Cong. (1986), § 305(2), and "rules concerning the amount of compensation that may be paid to employees of bingo establishments," § 305(10), as well as the power to determine "which classes of bingo employees shall be licensed as a condition of employment or connection with, or of continued employment or connection with, a bingo establishment." § 308.

By contrast, H.R. 1920 provided a stronger regulatory role for tribal government, and a lesser role for the Commission. *Compare* S. 2557 *with* H.R. 1920, 99th Cong. (1986). The Senate Select Committee on Indian Affairs recommended an amended version of H.R. 1920, explaining that:

> The most important difference in the three bills is in the role of tribes in the regulation and management of games. H.R. 1920 as passed by the House and as amended and reported out by the Select Committee on Indian Affairs recognizes a far stronger role to be played by the governments of the Indian tribes than would the legislation proposed by the Administration.
>
> *The Administration proposal, by contrast, would pre-empt nearly every authority currently exercised by the tribes, including . . . employment of personnel. . . .*
>
> Given the very strong role of the gaming commission established under the bill reported by Committee, and the lack of evidence of any significant criminal involvement in the operation of these games to date, *the Committee does not believe that such a heavy Federal hand is appropriate at this time and has opted for continued tribal control*, but subject to a strong Federal presence to assure the integrity of the games, and assurance that the tribes themselves derive the benefits from the operation of the games.

S. REP. NO. 99-493, at 1-2 (1986) (emphasis added). The amended version of H.R. 1920 formed the basis for S. 555, which was introduced and passed in the next Congress. S. REP. NO. 100-466, at 3-4. As enacted, Congress maintained the limits on federal control provided in the House bill.

In sum, IGRA confirms exclusive tribal inherent governmental authority over the regulation and employment of personnel at tribal gaming enterprises, and establishes that Congress intended that authority to be free from federal interference. Further, in enacting IGRA, Congress "intended to expressly preempt the field in the governance of gaming activities on Indian lands." S. REP. NO. 100-466, at 6. This Circuit should not allow the NLRB to replace tribal governmental regulation of gaming employment with Federal control that Congress unambiguously rejected when it enacted IGRA.

B. The Board Lacks Authority To Impose The Governmental-Commercial Test, Which Is Unprincipled, Unworkable, And Produces Arbitrary Results.

The Board's governmental-commercial test must be rejected because it violates federal law. The Supreme Court has held that only Congress can impose such a distinction as a basis for limiting tribal sovereign immunity, and that principle applies equally here. The Board has no such authority. In addition, the distinction on which the *San Manuel* test relies is "unsound in principle and unworkable in practice," as the Supreme Court held in rejecting the very same test

as a means of delimiting Congress' commerce powers over state governments, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985), and must be rejected for that reason too.

1. Only Congress can make the "governmental-commercial distinction" on which the *San Manuel* decision relies.

If tribal activity is to be divided into commercial and governmental categories for purposes of limiting Indian rights, only Congress can do so. In *Kiowa Tribe v. Mfg. Tech., Inc.*, 523 U.S. 751 (1998), the Court expressly rejected a commercial activity exception to tribal sovereign immunity, holding that it was up to Congress alone to decide whether to impose such a limitation. "Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests" that such proposals present. *Id*. at 759. Similarly in *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), the Court *rejected* both the argument that "tribal business activities . . . are now so detached from traditional tribal interests that the tribal-sovereignty doctrine no longer makes sense," and the contention that tribal immunity should be limited to the tribal courts and internal affairs of tribal government. *Id*. at 510. The same principle applies here: only Congress can determine whether to apply the NLRA to the so-called commercial activities of Indian tribes. Indisputably, Congress has not done so.

2. The commercial-governmental test has been rejected by the Supreme Court and must be rejected here for the same reasons.

In *Garcia*, the Court found judicial efforts to apply the commercial-governmental distinction had led to a string of confusing and contradictory rulings by federal courts on what constitutes a "traditional," and (it was urged) therefore "governmental," function of government. *Id*. at 538. Some federal courts had determined that the regulation of public roads was not a traditional government function, *see Friends of the Earth v. Carey*, 552 F.2d 25, 38 (2d Cir. 1977), while others had found that operating a highway authority was, *see Molinsa-Estrada v. P.R. Highway Auth.*, 680 F.2d 841, 845-46 (1st Cir. 1982). Similarly, some courts had determined that the regulation of air transportation was not a traditional governmental function, *see Hughes Air Corp. v. Pub. Utils. Comm'n of Cal.*, 644 F.2d 1334, 1340-41 (9th Cir. 1981), while others had ruled that operating a municipal airport was. *See Amersbach v. City of Cleveland*, 598 F.2d 1033, 1037-38 (6th Cir. 1979). And the regulation of ambulance services was held to be a traditional governmental function in *Gold Cross Ambulance v. City of Kansas City*, 538 F. Supp. 956, 967-69 (W.D. Mo. 1982) *aff'd on other grounds*, 705 F.2d 1005 (8th Cir. 1983), yet the operation of a mental health facility was held not to be in *Williams v. Eastside Mental Health Ctr., Inc.*, 669 F.2d 671, 680-81 (11th Cir. 1982). The Supreme Court "f[ound] it difficult, if not impossible, to identify an

organizing principle that places each of the cases in the first group on one side of a line and each of the cases in the second group on the other side." 469 U.S. at 539.

Having rejected the traditional/non-traditional distinction as unworkable, the Court then dismissed the alternatives. *Id*. at 543. The Court rejected reliance on historical precedent to identify traditional functions because such an approach "prevents a court from accommodating changes in the historical functions of States, changes that have resulted in a number of once-private functions like education being assumed by the States and their subdivisions." *Id*. at 543-44. Instead, "[r]eliance on history as an organizing principle results in line-drawing of the most arbitrary sort. . . ." *Id*. at 544. A standard that only protected "uniquely" governmental functions was likewise unmanageable and had been rejected elsewhere. *Id*. at 545 (citing *Indian Towing Co. v. United States*, 350 U.S. 61, 64-68 (1955) (rejecting such a standard for purposes of governmental tort liability)). A standard that protected so-called "necessary" governmental functions – services that would be provided inadequately or not at all without the government – was also probably useless, because "[t]he set of services that fits into this category . . . may well be negligible" and courts are not well equipped to determine what they are. *Id*. Finally, a standard that distinguished between traditional state functions and other functions on the basis of whether the federal government had historically been involved with that function would be faulty because federal involvement in

many areas is of relatively recent vintage, yet the recency of that involvement does not diminish asserted federal or state interests in those functions. *Id*. at 544 n.10.

In sum, the Supreme Court has comprehensively evaluated and expressly rejected federal court involvement in the making of so-called commercial-governmental distinctions. The *San Manuel* decision relies on that very same test, which should be rejected for the very same reasons.

C. Application Of The Board's Governmental-Commercial Test To Indian Gaming Is Barred By Federal Law Because It Would Abrogate Tribal Rights Of Self-Government In The Absence Of Express Congressional Authorization.

The Board insists that exercising jurisdiction over tribes under the governmental-commercial test will "do[] little harm to the Indian tribes' special attributes of sovereignty or the statutory schemes designed to protect them," *San Manuel*, 341 N.L.R.B. at 1063, and that the effects of the Act would not extend "beyond the tribe's business enterprises and regulate intramural matters." *Id*. at 1063-64; *see also* Decision and Order at 4, J.A. 15. This contention is specious. Applying the NLRA to tribal regulation and operation of gaming would abrogate core elements of tribal rights of self-government, and create a legal and administrative quagmire that would effectively undo rights secured to tribes under IGRA.

1. The NLRA's right to strike would grant labor organizations the power to prevent tribal governments from operating until their demands are met.

Granting an Indian tribe's so-called "commercial" employees the right to strike under the Act, 29 U.S.C. § 157, would enable labor organizations to shut down tribal gaming enterprises, and halt the flow of revenue needed to support basic government functions in accordance with IGRA. *See* 25 U.S.C. § 2710(b)(2)(B). The very operation of tribal government – the delivery of health care, elementary education, police and fire protection – would depend on whether the tribe met the demands of the labor organizations representing tribal employees. Tribal governments would have to choose between capitulating to those demands, and jeopardizing their communities' health, welfare, and safety – a Hobson's choice.

President Roosevelt warned that "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," calling such action "unthinkable and intolerable." Letter from President Roosevelt to the President of the National Federation of Federal Employees (Aug. 16, 1937), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=15445 [hereinafter "President Roosevelt's Letter"]. His words apply equally here. A more complete divestiture of the right of self-government is difficult to conceive. To borrow from *Merrion*,

"[r]equiring the consent of the [union] deposits in the hands of the [union] the source of the tribe's power, when the power instead derives from sovereignty itself. Only the Federal Government may limit a tribe's exercise of its sovereign authority." 455 U.S. at 147 (citing *United States v. Wheeler*, 435 U.S. 313, 322 (1978)). Congress could not possibly have intended such a complete divestiture of the Nation's right of self-governance in a statute which does not even mention Indian tribes. *San Juan*, 276 F.3d at 1196.

2. The NLRA would improperly vest the Board with the power to restructure and reorganize tribal governments.

If the Board had the jurisdiction it claims, it would possess the power to split a tribal government into two parts – one part comprised of whatever the Board, in its sole discretion, decided were "commercial enterprise[s]," and the other of "traditional tribal government functions." *San Manuel*, 341 N.L.R.B. at 1062-63. All so-called "commercial enterprises" would be subject to the NLRA. A tribe's "traditional tribal government functions" might or might not be subject to the NLRA. Perhaps not, if a tribe was operating only within the "particularized sphere of traditional tribal or governmental functions," which the Board claims the power to define. *Id*. at 1063. But this would depend on how much "leeway" the Board decided to afford a tribe "in determining how they conduct their affairs." *Id*.

It would be impossible for a tribe to know into which category an activity fell unless the Board had adjudicated the issue. This uncertainty would never end,

because an unfair labor practice charge can be made at any time and is resolvable only by the Board. 29 U.S.C. § 160(a). And any change in the structure of the tribal government, or even in the composition of a tribe's work force or its patrons, could be said to raise anew even a previously-decided question. A tribe could not avoid the chilling effect of this uncertainty, or the time and cost of Board adjudications (many of which take years to complete, as this case illustrates).

Furthermore, the Board's determination that an activity was "commercial" would only begin the process of applying the NLRA to a tribe. Within each "commercial enterprise" the Board would assert authority under the Act to determine what "bargaining units" to recognize. *Id*. § 159(b). The Board might recognize multiple bargaining units within each so-called "commercial enterprise," or it might recognize just one – all "commercial enterprise[s]." This decision would be made without regard to the organizational choices and employee classifications made by a tribe as a governmental employer. A tribe's constitution, laws, and court rulings would be meaningless – everything would be up to the Board.

Subjecting a tribal government to the Board's plenary power to restructure it in this manner would virtually extinguish a tribe's rights to determine its own form of government, *Santa Clara Pueblo*, 436 U.S. at 62-64, to engage in economic

activity through its government, *New Mexico*, 462 U.S. at 335, and to make its own laws and be ruled by them. *Williams*, 358 U.S. at 220.

3. Subjecting Indian tribes to the collective bargaining process would compel tribes to negotiate over the application of their own laws.

Were Indian tribes required to engage in collective bargaining over "wages, hours, and other terms and conditions of employment" as defined in the Act, 29 U.S.C. § 158(d), any of the tribe's laws affecting employment, even those implementing IGRA's background and licensing requirements, *see* 25 U.S.C. § 2710(b)(2)(F), those required by the tribe's Compact, and the tribe's Indian hiring preference laws could be the subject of a collective bargaining request. Only the Board, in resolving an unfair labor practice charge under the Act, could determine which tribal laws were subject to collective bargaining.[5] In so doing, the Board might also invalidate tribal law, for example, by holding that an Indian employment preference interferes with collective bargaining rights, or is discriminatory. 29 U.S.C. § 158(a)(1), (a)(3).

Ultimately, the tribe would be required to bargain over *all* tribal laws and policies the Board found to be "terms and conditions" of employment, even those requiring drug and alcohol testing. In such a process, the tribe's representatives

[5] An unfair labor practice charge could also be used to challenge any tribal court decision that fell even arguably within the scope of the NLRA – such as one resolving an employee dispute.

would be negotiating to obtain the consent of tribal employees to the application of tribal law. As President Roosevelt explained, this process simply does not work when applied to a sovereign:

> All Government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service. . . . The very nature and purposes of Government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with Government employee organizations. The employer is the whole people, who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employees alike are governed and guided, and in many instances restricted, by laws which establish policies, procedures, or rules in personnel matters.

President Roosevelt's Letter. In this context, the collective bargaining process cannot work because the tribe's negotiators are themselves subject to and controlled by the tribal "laws which establish policies, procedures, or rules in personnel matters." *Id*.

And at the end of the bargaining process, the tribe itself would be subject to a *de facto* statute – the collective bargaining agreement – which would govern all conditions of employment, and effectively void all inconsistent tribal law. There might well be as many such agreements as there were bargaining units, and the terms of each would be enforceable only by the Board under the Act, 29 U.S.C. § 160(a); the tribal courts would have no role in this process.

In sum, requiring tribal governments to bargain collectively would abrogate their right of self-government, which includes the power to "make their own laws and be ruled by them," *Williams*, 358 U.S. at 220, and to exercise judicial authority. *Id.* at 223; *Santa Clara Pueblo*, 436 U.S. at 65. These outcomes will become a reality for the Little River Band if the Board's Decision and Order is enforced. Section 1(a)(iii) of the Board's order, J.A. 17, strikes down the Band's licensing requirements for labor organizations as they apply to the Little River Casino Resort. Little River Band of Ottawa Indians Tribal Code, Fair Employment Practice Code ("FEP Code") § 16.08, J.A. 99. In Section 1(a)(ii), the Board strikes the tribal code provisions prohibiting activity that has the effect of interfering with, or threatening, or undermining the Governmental Operations of the Band. Board Order 4 n.10, 17 (quoting FEP Code §§ 16.06(a), 16.15(b)(1)); J.A. 15-17. The Board, in Order Section 1(a)(v), also strikes down tribal laws allowing labor disputes to be heard in tribal court and requiring they be settled pursuant to tribal law if they "discourage employees from filing charges" with the Board. Board Order 4 n.10, 6, J.A. 16, 17 (quoting FEP Code §§ 16.12(b), 16.24(d), 17.1(c)). The Order subjects tribal law to the collective bargaining process while excluding the Band's courts from adjudicating that process. In short, the order vitiates the Band's ability to govern itself by its own laws.

4. Applying the NLRA to Indian tribes violates federal law because it would divest the tribes of their right of self-government.

Subjecting Indian tribes to the Board's plenary power to divide their governments into "governmental" and "commercial" pieces, and subordinating their sovereignty to the requirements of the NLRA, as enforced by the Board, would abrogate tribal rights of self-government, and effectively deny the tribes their right under IGRA to conduct gaming to raise revenue for essential governmental functions. Under the Board's *San Manuel* rule, a tribe could avoid these impacts only by limiting its activities to those that reflect – cryptically, if not mysteriously – "the unique status of Indians in our society and legal culture," as determined by the Board. 341 N.L.R.B. at 1062-63. Neither gaming, nor any other economic development that involved non-Indians as patrons or as employees would be within the right of tribal self-government.

Congress in the NLRA never authorized the Board to exercise such plenary power over tribal governments. The Act and its legislative history are utterly silent with respect to Indian tribes, *San Juan,* 276 F.3d at 1196; *San Manuel,* 341 N.L.R.B. at 1058, and that silence is an insufficient basis on which to apply a statute that would so fundamentally abrogate tribal rights of self-government. As the Supreme Court held in *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), even the ubiquitous diversity statute does not limit tribal court jurisdiction

because it "makes no reference to Indians and nothing in the legislative history suggests any intent to render inoperative the established federal policy promoting tribal self-government." 480 U.S. at 17 (discussing 28 U.S.C. § 1332). "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact." *Id*. at 18 (quoting *Merrion*, 455 U.S. at 149 n.14) (ellipses in original).[6] That rule applies here.

This is illustrated by the Tenth Circuit's ruling in *San Juan* that the NLRA does not preempt tribal sovereign authority to enact a right-to-work ordinance. The Court rejected the Board's argument that under the Act, 29 U.S.C. § 164(b), only states or territories could prohibit union security agreements otherwise authorized by the NLRA. *Id*. § 158(a)(3). The Court held that the Pueblo's right-to-work ordinance was an exercise of its "retained sovereign authority," 276 F.3d at 1195, and that the Act could be construed to work a divestiture of that sovereignty only if "Congress ha[d] made its intent clear that we do so." *Id*. Finding that the Act is silent as to Indian tribes, the Circuit held that "[s]ilence is not sufficient to . . . strip Indian tribes of their retained sovereignty to govern their

[6] That holding reflects the longstanding rule that when tribal sovereignty is at stake, "we tread lightly in the absence of clear indications of legislative intent." *Santa Clara Pueblo*, 436 U.S. at 60.

own territory." *Id*. at 1196. As the Tenth Circuit summarized in *Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1284 (10th Cir. 2010)), "Congressional silence exempted Indian tribes from the National Labor Relations Act."

CONCLUSION

The Little River Band's petition for review should be granted, the Board's cross-petition should be denied, and the Board's decision should be vacated.

Respectfully submitted this 15th day of July, 2013.

/s/ Douglas B. L. Endreson
DOUGLAS B. L. ENDRESON
LLOYD B. MILLER
FRANK S. HOLLEMAN
SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY, LLP
1425 K Street, N.W., Suite 600
Washington, DC 20005
(202) 682-0240
dendreson@sonosky.com

Counsel for Amicus Curiae
Chickasaw Nation

/s/ Jennifer H. Weddle
JENNIFER H. WEDDLE
TROY A. EID
MARANDA S. COMPTON
GREENBERG TRAURIG, LLP
1200 17th Street, Suite 2400
Denver, CO 80202
(303) 572-6565
weddlej@gtlaw.com

Counsel for Amici Curiae
Ute Mountain Ute Tribe and
Gila River Indian Community

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of FED. R. APP. P. 29(d) and 32(a)(7)(B). The brief contains 6,877 words, excluding the parts of the brief exempted by FED. R. APP. P. 29(d) and 32(a)(7)(B)(iii).

Dated: July 15, 2013

/s/ Douglas B. L. Endreson
DOUGLAS B. L. ENDRESON

Counsel for Amicus Curiae
Chickasaw Nation

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2013, I served this Brief of Amici Curiae Chickasaw Nation, the Gila River Indian Community and the Ute Mountain Ute Tribe with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the Court's CM/EFC 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.

Dated: July 15, 2013

/s/ Douglas B. L. Endreson
DOUGLAS B. L. ENDRESON

Counsel for Amicus Curiae
Chickasaw Nation