Case Nos. 13-1464 and13-1583

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 PETITIONER/CROSS-RESPONDENT LITTLE RIVER BAND OF OTTAWA INDIANS TRIBAL GOVERNMENT

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DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, the Little River Band of Ottawa Indians Tribal Government 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.

Dated: July 8, 2013

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STATEMENT REGARDING ORAL ARGUMENT

By order dated May 21, 2013, this Court granted the motion to expedite filed by petitioner Little River Band of Ottawa Indians Tribal Government ("Band" or "Tribe"), including a request for oral argument during the Court's session commencing September 30, 2013. Given the profound importance of the federal Indian law issues presented by this case, the Band requests oral argument.

JURISDICTIONAL STATEMENT

Respondent National Labor Relations Board ("NLRB" or "Board") purported to rest its jurisdiction on 29 U.S.C. § 160(a) (2006), but as explained *infra* had no authority to proceed against the Band. The Board issued its Decision and Order, a final order disposing of all claims, on March 18, 2013. The Band filed a timely petition for review on April 15, 2013. This Court has jurisdiction under 29 U.S.C. § 160(f).

STATEMENT OF THE ISSUE

Whether, without express congressional authorization, the NLRB can destroy the operational public sector labor laws of the Band, enacted and implemented in accordance with its inherent sovereign authority.

INTRODUCTION

No federal agency has ever been permitted to invoke a federal statute to strike down an exercise of the sovereign functions of a federally recognized Indian tribal government. In the only other case on point, an action by the NLRB to preempt a tribe's labor law, the en banc Tenth Circuit unequivocally held that such an undertaking violates fundamental principles of federal Indian law. Yet by order dated March 18, 2013, the NLRB, invoking the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. §§ 151-169, has directed the Band either to rescind its operational public sector labor laws or to announce that they are no longer effective.

The Band has enacted and implemented these laws pursuant to its inherent sovereign authority as a government, confirmed by a long line of Supreme Court cases and supported by the established national policy of Congress to promote tribal self-government. The Band's laws reflect the careful deliberations and sensitive policy judgments of a unique Indian nation, and they are fully operational within the Band's territory. Under authority of these laws, multiple union elections have been conducted, bargaining impasses have been resolved, alleged unfair labor practices have been adjudicated, and collective bargaining agreements have been executed.

According to the most basic principles of federal Indian law, this exercise of tribal governmental power cannot be destroyed under color of a federal statute without express congressional authorization, which is indisputably lacking here. For a central tenet of federal Indian law is that the sovereign authority of tribes must be protected and held inviolate unless Congress has manifested a clear intent to destroy it. Courts and federal agencies are not free to undertake that destruction if Congress has been silent on the subject.

The Board's March 18 decision violates these bedrock principles and is therefore void and unenforceable.

STATEMENT OF THE CASE

In its March 18 Decision and Order, the NLRB rejected the Band's argument that without express congressional authorization, which is lacking here, it cannot strike down or render ineffective the Band's operational public sector labor laws. The NLRB therefore granted the relief sought in a complaint brought by the Board's Acting General Counsel and Local 406, International Brotherhood of Teamsters ("Teamsters"). It held that the Band's laws as applied to its reservation gaming facility, operating pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721 (2006), constitute unfair labor practices in violation of the NLRA insofar as they vary from the Act, and it ordered the Band to rescind the laws or otherwise announce that they are no longer in effect. This

case consolidates the Band's petition for review of the NLRB's March 18 order and the NLRB's cross-application to enforce it.

STATEMENT OF FACTS

A. The Little River Band Of Ottawa Indians

1. History

The Band is a federally recognized Indian tribe. 25 U.S.C. § 1300k-2(a) (2006). It has continued to exist as a distinct political and cultural community within its ancestral homeland in Michigan's Lower Peninsula along the shore of Lake Michigan from treaty times to the present. *See id.*; S. REP. NO. 103-260, at 5-6 (1994) ("Senate Report"); H.R. REP. NO. 103-621, at 7 (1994) ("House Report").

While never ceasing to exist as an established Indian tribal government, due to gross dereliction on the part of federal officials, the Band fell out of official federal recognition after the 1855 Treaty of Detroit. *See* Senate Report 1-5; House Report 2-4. In 1994, Congress corrected this historic mistreatment of the Band by enacting Pub. L. No. 103-324, 108 Stat. 2156 (2004) (codified at 25 U.S.C. §§ 1300k to 1300k-7 (2006)) (the "Reaffirmation Act"), to reaffirm the Band's status as a recognized tribe, thereby allowing the Band to restore its land base and its government services to its members. *See* Senate Report 1-5; House Report 2-4. Pursuant to the Reaffirmation Act, Congress confirmed that the Band has all the

powers and rights of federally recognized Indian tribes established by federal law. 25 U.S.C. § 1300k-2(a).

Congress went out of its way in the Reaffirmation Act to announce that the Band has all the benefits of the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. §§ 461-479. *See* 25 U.S.C. 1300k-2(a). This landmark legislation inaugurated the modern-day policy of federal support for tribal self-government. The Band had missed out on the opportunities offered by the IRA during the dismal period in which federal authorities improperly ignored its status as a sovereign tribal government. Pursuant to the Reaffirmation Act, Congress expressly confirmed that this mistake was corrected.

2. Government

The Reaffirmation Act has led to the revitalization of the Band's governmental, social, and economic infrastructure. Pursuant to that law, the Band adopted a Constitution and amendments thereto, which, in accordance with the IRA, have been approved by the Secretary of the Interior. Record ("R.") 08.03.11, Parties' Stipulated Facts ("Stip.") ¶3, Appendix to Brief of Petitioner ("App.") 28-29.

The Constitution confirms the Tribe's three branches of government: a legislature, the office of the Tribal Council; an executive, the office of the Tribal Ogema; and a judiciary, the Band's Tribal Court. R.08.03.11, Stip.¶5, App.29.

The Constitution provides that "[t]he Tribe's jurisdiction over its members and territory shall be exercised to the fullest extent consistent with th[e] Constitution, the sovereign powers of the Tribe, and federal law," and it empowers the Tribal Council "[t]o exercise the inherent powers of the ... Band by establishing laws ... to govern the conduct of members of the … Band and other persons within its jurisdiction." R.08.03.11, Stip.¶¶6, 20, App.29, 34. The Band exercises governmental authority over more than 1,200 acres of land at or near its aboriginal territory, which, in accord with the Reaffirmation Act, the United States holds in trust for the Tribe. R.08.03.11, Stip.¶¶7-8, App.29; *see* 25 U.S.C. § 1300k-4.[1]

Through the exercise of its governmental authority, the Band provides an array of services and programs to its members, including housing for tribal members and elders; health services; education support for its youth; counseling and support for tribal member families and children; natural resources management; a tribal judicial system and prosecutor's office; public safety services; and reservation economic development with the provision of employment

[1] This brief refers to lands that the United States has taken into trust on the Band's behalf since the Reaffirmation Act as the Band's "reservation" or "trust lands." The Band's initial reservation lands were established by the 1836 Treaty of Washington and the 1855 Treaty of Detroit. 25 U.S.C. § 1300k(4). The Band's members continue to reside within or near the exterior boundaries of these lands, *see id.*, but due to the neglect of federal officials and a destructive phase of federal Indian policy in the 1890s, much of the Band's original reservation lands were sold off to non-Indians. *See* House Report 3-4. Lands taken into trust for the Band by the United States pursuant to the Reaffirmation Act are "part of the [Band's] reservation." 25 U.S.C. § 1300k-4(d).

opportunities for the Band's members through subordinate organizations, including its reservation gaming operations conducted pursuant to IGRA. R.08.03.11, Stip.¶¶10, 13-14, 19, App.30-32, 34.

Congress' goals under IGRA, to promote "tribal economic development, self-sufficiency, and strong tribal governments," 25 U.S.C. § 2702(1), go hand-in-hand with the Band's revitalization under the Reaffirmation Act and the IRA. The Band's IGRA gaming generates the revenues on which the Tribe's governmental services depend and provides employment opportunities for tribal members. R.08.03.11, Stip.¶¶15-19, App.32-34. The Band's gaming revenues generally account for 100% of the budget for its Tribal Court and prosecutor's office; 80% of the budget for mental health and substance abuse services at its Health Clinic; 77% of the budget for its Department of Family Services; and 62% of the budget for its Department of Public Safety. R.08.03.11, Stip.¶¶17-18, App.33-34.

The Band carries out IGRA gaming through the Little River Casino Resort ("LRCR"), a chartered instrumentality of the Band, which is administered by a five-person Board made up of the Band's citizens and appointed by the Tribal Council. R.08.03.11, Stip.¶25, App.36. Under the Tribe's law, LRCR is a subordinate organization of the Band. R.08.03.11, Stip.¶¶9-10, 24-25, App.30, 36. In accordance with IGRA and the Band's laws, the Band's gaming operations at LRCR must take place on its trust lands, the Band must have "the sole proprietary

interest and responsibility for" the conduct of the gaming, and net revenues from gaming

> are not to be used for purposes other than (i) to fund tribal government operations or programs, (ii) to provide for the general welfare of the Indian tribe and its members, (iii) to promote tribal economic development, (iv) to donate to charitable organizations, or (v) to help fund operations of local government agencies.

25 U.S.C. § 2710(b)(2); *see* R.08.03.11, Stip.¶10, App.30.

3. Public sector labor laws

In 2005, the Tribal Council enacted the Band's Fair Employment Practices ("FEP") Code to govern a variety of employment and labor matters within its reservation, including rights and remedies for employment discrimination, family medical leave, and minimum wages. R.08.03.11, Stip.¶35, App.40. In 2007, the Tribal Council enacted Article XVI of the FEP Code to govern labor organizations and collective bargaining within the Band's public sector. R.08.03.11, Stip.¶36, App.40. Later amendments included Article XVII to protect the integrity of the FEP Code by, *inter alia*, giving primacy to remedies provided by tribal law. R.08.03.11, Stip.¶¶61-62, App.48-49. Articles XVI and XVII apply to the Band's "public employers," meaning any "subordinate economic organization, department, commission, agency, or authority of the Band engaged in any Governmental Operation of the Band," including its IGRA gaming operations at LRCR. R.08.03.11, Stip.¶39, App.41-42.

In enacting Article XVI and subsequent amendments, the Tribal Council determined that it was in the best interests of the Band to allow collective bargaining by employees within its governmental operations, subject to regulations that protect the integrity of those operations, the Band's governmental revenues, and the economic welfare of its members. R.08.03.11, Stip.¶37, App.40-41. To this end, the Tribal Council drew from the public sector labor laws of the state and federal governments and enacted provisions to, *inter alia*, (1) define the rights and duties of the Band's public employers with respect to collective bargaining, including the scope of the duty to bargain in good faith; (2) require labor organizations engaged in organizing these employees to hold licenses issued under tribal authority; (3) establish procedures and remedies for alleged unfair labor practices; (4) prohibit strikes by employees and likewise prohibit employer lockouts; (5) set forth processes for management and exclusive bargaining representatives to resolve bargaining impasses through mediation, fact-finding, and arbitration; and (6) establish jurisdiction within the Band's Tribal Court to enforce the law and collective bargaining agreements entered into pursuant to it. R.08.03.11, Stip.¶¶37-42, 53, 57-59, App.40-42, 45-47.

Over the years, the Tribal Council and its appointed officials and commissions have engaged in further substantial work related to the enactment, implementation, and administration of Articles XVI and XVII. Between 2008 and

2010 alone, the Tribal Council undertook five new enactments or amendments to these articles in accordance with the Band's elaborate legislative processes. *See* R.08.03.11, Stip.¶¶20-22, 36-42, 47-48, 57-65, App.34-35, 40-42, 44, 46-51. Also during that period, the Tribal Council reviewed and approved two labor union licensing regulations promulgated by the Band's Gaming Commission; reviewed and approved four Band-Union Election Procedures Agreements, which govern bargaining unit selection and union election procedures; and appointed a Neutral Election Official with authority to oversee union elections. R.08.03.11, Stip.¶¶48, 51-52, 54-56, App.44-46.

The Band's Gaming Commission has drafted, posted for public comment, and adopted by formal resolution regulations governing the licensing of labor organizations consistent with the FEP Code. R.08.03.11, Stip.¶¶47-48, App.44. The Commission has also processed licensing applications and issued multiple yearly licenses to the United Steel Workers ("USW") in accordance with the FEP Code and its regulations. R.08.03.11, Stip.¶¶48-49, App.44.

As for the Band's Neutral Election Official, he has overseen, and issued declarations in reference to, the qualifications of several bargaining units at LRCR to proceed to secret ballot elections for the USW to serve as their exclusive bargaining representative. R.08.03.11, Stip.¶69, App.52. He has also overseen and certified the tallies of ballots in multiple elections for USW representation of

these bargaining units (affecting over 250 employees) and for decertification elections in reference to the USW for some of those units. R.08.03.11, Stip.¶¶69, 78, App.52, 54.

The on-the-ground operation of Article XVI affects labor and employment relations within the Band's community as intended by the Tribe's lawmakers. Employees, management, and union representatives at LRCR have been engaged in the collective bargaining process in accordance with the law, with tribal members and nonmembers active on all sides. R.08.03.11, Stip.¶¶68-76, App.52-53. This has included over 40 full days of collective bargaining, the resolution of asserted unfair labor practices and bargaining impasses (including hearings before, and written decisions by, fact-finders and arbitrators), and the execution of collective bargaining agreements. R.08.03.11, Stip.¶¶68-79, App.52-54.

This extensive, carefully crafted, and fully operational public sector labor relations regime continues in full swing with ongoing public policy assessments by the Tribal Council and ongoing reliance on the law in the give-and-take of labor organizing and collective bargaining at LRCR. R.08.03.11, Stip.¶¶66, 79, App.51, 54.

B. Proceedings Below

1. The union's charge

This case has its origins in a "Charge Against Employer" filed by the Teamsters on March 28, 2008. R.03.28.08 (Charge), App.23. The charge asserted that the Band committed an unfair labor practice, in violation of the NLRA, by promulgating its Constitution and reserving "authority to govern labor relations including but not limited to regulating terms and conditions under which collective bargaining may or may not occur." *Id*. Thereafter, and continuing through January 2009, the Band and Board representatives corresponded about the Regional Director's intent to proceed against the Band on the charge and related subpoenas, and the Band's position that the Board had no authority to do so. *See Little River Band of Ottawa Indians v. NLRB*, 747 F. Supp. 2d 872, 878-80 (W.D. Mich. 2010).

In February 2009, having received no word that Board officials would refrain from moving forward on the charge, the Band commenced an action for declaratory and injunctive relief in the U.S. District Court for the Western District of Michigan. *See id*. at 881. The Band argued that the NLRB could not strike down its laws through the vehicle of an unfair labor practice proceeding under the NLRA. *See id.* By decision dated September 20, 2010, the district court declined

to address the Band's case, holding that the administrative exhaustion doctrine prevented it from proceeding. *See id*. at 890.

On December 10, 2010, the Board's Acting General Counsel filed an unfair labor practice complaint before the Board. R.12.10.10 (Complaint), App.24. The complaint asserted that, insofar as they vary from the NLRA, the provisions of Articles XVI and XVII constitute unfair labor practices as applied to LRCR and that the Board should strike them down as violations of the Act. *See id.*

The Band timely moved to dismiss on March 4, 2011, R.03.04.11 (Motion to Dismiss), but the Board took no action on the motion. On August 3, 2011, the parties filed a joint motion to transfer the proceeding to the Board on a stipulated record, waiving the right to a hearing before and decision by an administrative law judge. R.08.03.11 (Parties' Joint Motion). The Board granted that motion on December 20, 2011. R.12.20.11 (Order).

2. The Board's decision

On March 18, 2013, the Board issued its Decision and Order. R.03.18.13, App.12. The Board struck down certain provisions of Articles XVI and XVII as "unfair labor practices," on the ground that they vary from the NLRA and apply to LRCR. In so ruling, the Board relied upon its prior decision in *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1055 (2004), *aff'd* 475 F.3d 1306 (D.C. Cir. 2007).

In *San Manuel*, over a vigorous dissent, the Board overruled its longstanding precedent, *Fort Apache Timber Co.*, 226 N.L.R.B. 503 (1976), which had held that Indian tribal governments, like the state and federal governments, are free from the provisions of the NLRA, regardless of the kinds of activities they undertake. *See id.* at 505-06 (treating tribe-owned timber company in same manner as state entity). The Board's *San Manuel* decision reasoned that, as tribal governments "have grown and prospered" through their gaming enterprises under IGRA, they have shed their "traditional" character, and that such enterprises should therefore be treated as "commercial" rather than "governmental" and subject to the NLRA. 341 N.L.R.B. at 1057-62.

In this case, the Board held that its *San Manuel* decision renders the Band's labor laws "illegal" when applied to LRCR to the extent that they vary from the Act. R.03.18.13, App.16. Finding "no merit" to the Band's position that the destruction of its laws "improperly impairs the exercise of the Tribe's sovereign right of self-government," *id*. at 15, the Board struck down the Band's laws. Its order requires the Band to rescind, or announce the ineffectiveness of, a host of its operational laws, including provisions governing the licensure of unions engaged in reservation organizing at LRCR; bargaining impasse resolution procedures that the USW and LRCR management have used as a substitute for employee strikes and employer lockouts; and restrictions on mandatory subjects of bargaining,

including bargaining over substance abuse testing policies, a matter of particular importance to the Band's substance abuse-sensitive community. *See id.* at 16-17.

SUMMARY OF ARGUMENT

When Indian tribal governments exercise their sovereign authority delineated and confirmed by the decisions of the Supreme Court and endorsed by Congress' national policy goals, federal agencies may not destroy it without clear direction from Congress. This rule is grounded in root principles of federal Indian law. In its decision in this case, the NLRB undertook to destroy the inherent sovereign power of the Band without any authority from Congress. Because the order violates fundamental principles of Indian law, it is void.

The Band's enactment of Articles XVI and XVII, and its enforcement of these laws within its IGRA gaming operations, involve the direct, and careful, exercise of its inherent sovereign power to engage in, and regulate, economic activity within its reservation to (a) generate revenues that support governmental services to its citizens and (b) improve their social and economic conditions. They also involve the exercise of the Band's inherent sovereign power to regulate its employment relationships with tribal members and nonmembers, as well as labor organizations that insert themselves into those relationships. The Band's exercise of such governmental authority is fully supported by Congress pursuant to the Reaffirmation Act, the IRA, and IGRA.

A central principle of federal Indian law is that Congress must be presumed to protect, not destroy, tribes' sovereign powers, particularly when, as here, the power at issue is promoted by Congress. In the only case on point, *N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002), the en banc Tenth Circuit recognized and applied this principle to prevent the NLRB from abrogating a Pueblo's reservation labor law in much the same way that the NLRB seeks to destroy the laws of the Band. The Tenth Circuit's holding, which is fully applicable here, was simple: the NLRA cannot be harnessed to destroy tribal sovereignty without express authorization from Congress. The Band here, like the Pueblo there, clearly exercises its inherent sovereign authority by enacting and implementing Articles XVI and XVII within its IGRA gaming operations. And in this case, as in *Pueblo of San Juan*, the Board can point to no congressional authorization for destroying the Band's exercise of its governmental power.

The Board erred by applying a framework for analysis grounded in a statement in a 1960 Supreme Court decision that is (1) *dicta*, (2) inapposite, and (3) inconsistent with prior and subsequent decisions of the Court. But even under this erroneous framework, the Band would prevail. The Band would also prevail under a framework that the D.C. Circuit adopted in 2007. Although it improperly viewed tribal sovereignty on a continuum, with "traditional customs and practices" deserving more protection than the essential attributes of tribal sovereignty, the

D.C. Circuit properly recognized that clear congressional authority is needed before a court (or a federal agency) can significantly impair the exercise of tribal sovereignty. The Board's order here significantly impairs the Band's exercise of inherent sovereign authority. Indeed, it destroys the Band's laws. Congress has not authorized such an abrogation of tribal power in the NLRA. Thus, the Board's order is unenforceable.

STANDARD OF REVIEW

This case presents the question whether the NLRB's abrogation of the Band's public sector labor laws violates tribal sovereignty and is therefore precluded by federal Indian law. That is a question of law that this Court reviews de novo. *Pueblo of San Juan*, 276 F.3d at 1190. "Because the Board's expertise and delegated authority does not relate to federal Indian law," this Court does "not defer to the Board's conclusion." *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1312 (D.C. Cir. 2007); *accord Saginaw Chippewa Indian Tribe of Mich. v. NLRB*, 838 F. Supp. 2d 598, 605 (E.D. Mich. 2011).

ARGUMENT

I. THE NLRB HAS NO AUTHORITY TO INVALIDATE THE BAND'S PUBLIC SECTOR LABOR LAWS.

This case is governed by longstanding principles of federal Indian law establishing that, absent clear congressional authorization, a federal statute cannot be employed to undermine an Indian tribal government's exercise of inherent

sovereign authority. The Band's public sector labor laws involve the exercise of its inherent sovereign authority; the NLRB seeks to destroy that exercise of authority; and there is no express congressional warrant for it to do so. The Board's decision therefore cannot stand.

A. The NLRB Cannot Destroy The Band's Ability To Exercise Its Inherent Sovereign Authority Without Express Authorization From Congress.

1. The principles that govern this case are clear and well-established.

First, Indian tribes are sovereign governments, "distinct, independent political communities," *Worcester v. Georgia*, 31 U.S. 515, 559 (1832), "that exercise inherent sovereign authority over their members and territories," *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991); *accord United States v. Wheeler*, 435 U.S. 313, 322-23 (1978). *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 2, § 4.01, at 206-08 (N. Newton & R. Anderson eds., 2012) ("COHEN"). The sovereign powers possessed by Indian tribes—or "nations"—are not delegated to them by the federal government; they are the inherent attributes of governments, which predate the formation of the United States. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56, 71-72 (1978). *See generally* COHEN § 4.01, at 207. These sovereign powers endure unless expressly eliminated by treaty or congressional enactment, *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987); *Wheeler*, 435 U.S. at 323; *United States v.*

Doherty, 126 F.3d 769, 778 (6th Cir. 1997), with the sole exception of the few that the Supreme Court has deemed to have been implicitly divested because they are incompatible with overriding national interests, *see Wheeler*, 435 U.S. at 323, 326. *See generally* COHEN § 4.01, at 207, § 4.02, at 222-27. To date, the Supreme Court has found this incompatibility only with respect to three attributes of tribal sovereignty (and even then only subject to subsequent revisiting by Congress): the power to engage in foreign relations; criminal jurisdiction over noncitizens; and the authority to freely alienate tribal lands to non-Indians without federal approval. *See Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians,* 471 U.S. 845, 853 n.14 (1985) (citing *Wheeler*, 435 U.S. at 323-26).

Second, by virtue of Article 1, § 8 of the Constitution and the Supreme Court's foundational Indian law decisions, Congress' authority over Indian affairs is "plenary." *United States v. Lara*, 541 U.S. 193, 200 (2004); *Santa Clara Pueblo,* 436 U.S. at 58, 60. As a result, the Court defers to Congress in all matters of Indian affairs, and diligently construes the Acts of Congress so as not to vary from Congress' contemporary goals in the field. *See, e.g.*, *Iowa Mutual*, 480 U.S. at 14 & n.5; *Nat'l Farmers Union,* 471 U.S. at 856 & n.20 (citing cases); *Bryan v. Itasca County*, 426 U.S. 373, 386, 388 & n.14 (1976). Since its enactment of the IRA in 1934, apart from a short-lived policy to "terminate" certain tribes in the 1950s, Congress has been firmly committed to enhancing and protecting the

sovereign authority of Indian tribes. *See* COHEN §§ 1.06-1.07, at 84-108. So deferential is the Court to Congress' support for tribal sovereignty that it will not disturb its own decisions establishing the contours of that sovereignty absent clear direction from Congress. *See, e.g., Okla. Tax Comm'n,* 498 U.S. at 510; *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 341, 343-44 (1983); *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 149 (1982); *Williams v. Lee,* 358 U.S. 217, 223 (1958); *Ex parte Crow Dog,* 109 U.S. 556, 572 (1883); *Memphis Biofuels v. Chickasaw Nation Indus., Inc.,* 585 F.3d 917, 920-21 (6th Cir. 2009); *see also Rice v. Rehner,* 463 U.S. 713, 720 (1983) ("Repeal by implication of an established tradition of immunity or self-government is disfavored").

Third, the attributes of sovereignty that Indian nations retain and exercise within their reservations and trust lands are well identified. Tribes' powers with respect to their own citizens are self-evident: they include the power to (1) determine who is or is not a citizen (or "member") of the tribe, *Santa Clara Pueblo,* 436 U.S. at 55-56; (2) afford reservation employment opportunities to tribal citizens or other Indians before noncitizens, *see Morton v. Mancari,* 417 U.S. 535, 548 (1974); *FMC v. Shoshone-Bannock Tribes,* 905 F.2d 1311, 1315 (9th Cir. 1990); and (3) regulate all domestic relations, including marital rights and child custody matters, inheritance rights, and tort and contract disputes between tribal citizens, *Santa Clara Pueblo,* 436 U.S. at 56 (citing cases).

Tribes also exercise inherent sovereign authority over noncitizens within their reservations and trust lands. A "tribe's traditional and undisputed power to exclude persons from tribal land … gives it the power to set conditions on entry to that land via licensing requirements," because "[r]egulatory authority goes hand in hand with the power to exclude." *Plains Commerce Bank v. Long Family & Cattle Co.*, 554 U.S. 316, 335 (2008) (internal quotation marks omitted); *accord Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 808-09, 811-12 (9th Cir. 2011) (citing cases). The power to exclude is considered "essential to the tribe's identity or its self-governing [authority]." *Nevada v. Hicks*, 533 U.S. 353, 379 (2001) (Souter, J., concurring) (internal quotation marks omitted). Tribes also have inherent power to regulate (a) "consensual relationships" between themselves (or their members) and nonmembers within their reservations and trust lands and (b) activities that directly affect the "political integrity, the economic security, or the health or welfare of the tribe." *See Montana v. U. S.*, 450 U.S. 544, 565-66 (1981).[2]

[2] In *Montana*, the Court identified these sovereign attributes in addressing the Crow Nation's regulatory authority over activities of nonmembers within their own property inside the exterior boundaries of the reservation. 450 U.S. 564-65. These tribal powers over nonmembers are often referred to as the "*Montana* exceptions" to the general view that tribes lack governmental authority over the activities of nonmembers on their own lands. *See generally Water Wheel*, 642 F.3d at 809-19 (discussing *Montana*).

Indian tribes, like all governments, also have the inherent power to engage in, and regulate, economic activity within their jurisdictions to "raise revenues to pay for the costs of government," *Merrion,* 455 U.S. at 144; *accord Mescalero Apache Tribe,* 462 U.S. at 335-36, and, much in the manner of state lotteries, to generate such revenues through gaming, *see California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219 (1986). Congress reinforced and enhanced this attribute of tribal sovereignty by enacting IGRA to provide a federal statutory basis for the conduct of tribal gaming operations, the very purpose of which is to promote "strong tribal governments." 25 U.S.C. § 2702(1).

Each attribute of inherent tribal power is critical to the ability of Indian tribal governments to maintain authority over their members and their territories. Thus, the foregoing attributes do not line up in a neat hierarchy, with some deserving more protection than others. *See Mescalero Apache Tribe*, 462 U.S. at 333 ("[T]ribes retain *any* aspect of their historical sovereignty not inconsistent with the overriding interests of the National Government.") (emphasis added); *Merrion,* 455 U.S. at 149 n.14 ("[T]he Tribe retains *all* inherent attributes of sovereignty that have not been divested by the Federal Government") (emphasis added). The Supreme Court carefully guards the attributes of tribal sovereignty on an equal footing in light of the overarching federal commitment to protect and enhance tribal governmental authority. *See, e.g., Okla. Tax Comm'n,* 498 U.S. at 510

(given Congress' promotion of "Indian self-government," Court will not tamper with tribal sovereign immunity from suit); *Iowa Mutual Ins. Co.*, 480 U.S. at 14-17 (given "the Federal government's longstanding policy of encouraging tribal self-government," Court will not construe diversity jurisdiction statute to undermine inherent adjudicatory authority of tribal courts); *Bryan*, 426 U.S. at 386-88 (Court will construe "the effect of legislation affecting reservation Indians in light of intervening legislative enactments" and not allow statute granting certain states jurisdiction in Indian country to convert tribes into "little more than private, voluntary organizations") (internal quotation marks omitted).

Fourth, undergirding all of this is the trust doctrine of federal Indian law: the United States has a trust obligation to Indian nations of the highest order, which necessarily includes the protection of their sovereign attributes from unintended diminution by state or federal authority. This trust responsibility has its origins in the constitutional responsibility for Indian affairs lodged in Congress and in Chief Justice Marshall's foundational Indian law decisions interpreting that responsibility. *See Worcester*, 31 U.S. at 551-52, 555 (protection that United States owes to Indian nations involves "a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of a master"); *see also Oneida*

County v. Oneida Indian Nation, 470 U.S. 226, 247 (1985) (discussing trust doctrine).

While Congress holds the awesome power to destroy the sovereign authority of Indian nations if it so intends, it otherwise has an obligation to protect it. As the Supreme Court explained more than a century ago:

> From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive, and by Congress, and by this court, whenever the question has arisen.

United States v. Kagama, 118 U.S. 375, 384 (1886). The trust responsibility pervades the field to this day; it is mentioned in almost every federal statute and executive order addressing Indian affairs. *See, e.g.*, 25 U.S.C. § 450a (2006) (Indian Self-Determination and Education Assistance Act of 1975); Exec. Order No. 13647, 78 Fed. Reg. 39,539 (July 1, 2013); Memorandum of Nov. 5, 2009, Tribal Consultation, 74 Fed. Reg. 57,881 (Nov. 9, 2009) (announcing President Obama's commitment to policies and directives of President Clinton's Executive Order 13175).

The federal trust responsibility to Indian tribes is given force by the Supreme Court through a special canon of construction that "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*

Oneida County, 470 U.S. at 247 ("The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians"); *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of U.S. Atty*., 369 F.3d 960, 971 (6th Cir. 2004). This "eminently sound and vital canon," *Bryan*, 426 U.S. at 392 (internal quotation marks omitted), prevents the destruction of tribal sovereignty when Congress fails to make its intention to do so perfectly clear. It applies not only to statutes that are passed for the benefit of tribes, *see, e.g., Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918) (establishing reservation), but to statutes that are not, *see, e.g., Santa Clara Pueblo*, 436 U.S. at 60, 72 (imposing civil rights protections upon tribal governments); *Bryan*, 426 U.S. at 392-93 (imposing state authority), as well as to statutes that do not address tribes at all, *see, e.g., Iowa Mutual*, 480 U.S. at 18 ("in the absence of any indication" by Congress, "tribal sovereignty can[not] be impaired" by application of diversity jurisdiction statute).

2. Given all of this, the governing rule in this case is plain. Absent a clear indication from Congress, the NLRA, like any other congressional enactment, cannot be harnessed to undermine an Indian tribal government's exercise of its inherent sovereign authority. *See Iowa Mutual*, 480 U.S. at 18 ("proper inference" from congressional silence "is that the sovereign power remains intact") (quoting *Merrion*, 455 U.S. at 149 n14); *Santa Clara Pueblo*, 436 U.S. at 60 ("a proper

respect both for tribal sovereignty itself and for the plenary authority of Congress cautions that we tread lightly in the absence of clear indications of legislative intent"); *Ex parte Crow Dog*, 109 U.S. at 572; *Memphis Biofuels*, 585 F.3d at 921. Courts that have addressed situations like the one at hand have applied this principle. *See Pueblo of San Juan,* 276 F.3d at 1195-96, 1200 ("where the matter at stake is a fundamental attribute of sovereignty," NLRA, which is silent on subject, cannot be employed to destroy that sovereignty) (internal quotation marks omitted); *Reich v. Great Lakes Indian Fish & Wildlife Comm'n,* 4 F.3d 490, 493-94 (7th Cir. 1993); *E.E.O.C. v. Fond du Lac Heavy Equip. & Constr. Co., Inc.*, 986 F.2d 246, 250 & n.4 (8th Cir. 1993); *E.E.O.C. v. Cherokee Nation,* 871 F.2d 937, 939 (10th Cir. 1989).

This rule and the foundational Indian law principles that stand behind it apply with full force to the Band in its struggle to maintain its operational labor laws in the face of efforts by the NLRB to set them aside. In 1994, pursuant to the Reaffirmation Act, Congress expressly confirmed the Band's continuing status as an Indian tribal government with (a) all rights and privileges afforded to other federally recognized Indian tribes and (b) a government-to-government relationship with the United States, including the trust responsibility just described. *See* 25 U.S.C. §§ 1300k-2 to 1300k-3 (2006); Senate Report 1, 5; House Report 1, 7. As expressly directed by Congress in the Reaffirmation Act, the Band's

Constitution—the very authority for its enactment and implementation of Articles XVI and XVII—was approved by the Secretary of the Interior in accordance with the IRA, which reflects Congress' commitment to, and protection of, the attributes of tribal sovereignty discussed above. *See* 25 U.S.C. § 1300k-6(a)(1).

Indeed, citing the IRA and Congress' "goal of promoting tribal self-government," the Supreme Court has confirmed that "tribes have the power to manage the use of [their] 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." *Mescalero Apache Tribe,* 462 U.S. at 335–36 & n.17. Recognizing that most tribes, like the Band, lack any tax base, Congress enhanced the ability of tribes to "defray the cost of governmental services" through IGRA. *See* 25 U.S.C. § 2701(1), (4); *see also Cabazon,* 480 U.S. at 218-20 (describing governmental function of gaming and citing, *inter alia, Mescalero Apache Tribe,* 462 U.S. at 341). Pursuant to the Reaffirmation Act, Congress fully intended to confirm, protect, and promote the Band's exercise of this attribute of its inherent sovereign authority. *See* 25 U.S.C. § 1300k-2(a).

In sum, absent express congressional authorization, a federal statute cannot be used to undermine the Band's exercise of its inherent sovereign powers. Given the federal interest in protecting and enhancing the powers of tribal governments,

Congress cannot be deemed to condone the undermining of those powers by silence; the notion of "implicit" divestiture by Congress is at cross-wires with federal Indian law jurisprudence. *See, e.g., Iowa Mutual*, 480 U.S. at 18; *Santa Clara Pueblo*, 436 U.S. at 60; *Memphis Biofuels*, 585 F.3d at 921; *Pueblo of San Juan*, 276 F.3d at 1192, 1195. Thus, the ability of the NLRB to destroy the Band's operational public sector labor laws turns on (i) whether those laws reflect the Band's exercise of its inherent sovereign authority and, if so, (ii) whether Congress expressly authorized the NLRB to destroy that sovereignty in the NLRA. As we next explain, the laws self-evidently reflect an exercise of the Band's inherent sovereign authority and Congress indisputably has provided no express authorization for the NLRB to destroy it.

B. The Band's Public Sector Labor Laws Involve The Exercise Of Its Inherent Sovereign Authority, Which The Board's Order Destroys.

1. The Band's enactment and implementation of Articles XVI and XVII involve the exercise of well-established, and protected, attributes of tribal sovereignty discussed above: the power to engage in and regulate economic activity within its reservation; to do so for the purpose of generating governmental revenues; and to regulate its members and nonmembers who participate in that process. *See Cabazon*, 480 U.S. at 207, 220; *Mescalero Apache Tribe*, 462 U.S. at 335; *see also Pueblo of San Juan*, 276 F.3d at 1192-93 (Pueblo's power to enact

and implement "right to work" law covering non-Indian reservation business grounded in its inherent authority to govern reservation economic activity). They also implicate the Band's inherent authority to regulate reservation employment relations between itself (or one of its departments, agencies, instrumentalities, or subordinate organizations), on the one hand, and its own citizens and noncitizens, on the other.

The Band's authority to regulate its employment relationships with its own citizens is grounded in its inherent authority to govern its "domestic" relations. *See Santa Clara Pueblo,* 436 U.S. at 55-56. Everything the Band has done with respect to the enactment and implementation of Articles XVI and XVI is carefully tailored to the Band's assessment of the unique interests of its citizens. *See* R.08.03.11, Stip.¶¶20-22, 36-38, 57-65, App.34-35, 40-41, 46-51. Indeed, the Band's citizens are deeply involved in the implementation of the law at LRCR, sitting on both the "management" and "labor" sides of the bargaining table. *See* R.08.03.11, Stip.¶¶71-72, App.52-53.

The Band's authority over its employment relations with noncitizens at LRCR stems from its "traditional" power to exclude them from the reservation, *Plains Commerce Bank,* 554 U.S. at 335, and its related authority to regulate their activities while they remain, *id.*; *Merrion,* 455 U.S. at 144-45. As described in Point I.A, the Band's exercise of this power is "essential"; for it is "intimately tied

to a tribe's ability to protect the integrity and order of its territory and the welfare of its members." COHEN § 4.01[2][e], at 221. Indeed, the Band's ability to govern its "domestic" employment relationships with its own members at LRCR cannot be separated from its regulation of those relations with nonmembers who work side-by-side with them. It would be impossible for the Band to regulate labor relations with its own members under one set of laws and, at the same time, regulate labor relations with nonmembers under a different set. *See Mescalero Apache Tribe*, 462 U.S. at 339 (tribal authority over reservation hunting and fishing cannot be undermined by imposing "inconsistent dual system" on members and nonmembers); *Rodriquez v. Wong*, 82 P.3d 263, 267 (Wash. App. 2004) (forcing tribe to apply "different sets of employment rules to members and nonmembers" would undermine its "political integrity").

Furthermore, noncitizen employees at LRCR are engaged in consensual employment relationships with the Band for their personal gain. So the Band separately regulates them under Articles XVI and XVII pursuant to its inherent authority to govern these consensual relationships under *Montana*. *See Montana*, 450 U.S. at 565; *MacArthur v. San Juan Cnty.*, 497 F.3d 1057, 1071 (10th Cir. 2007; *Graham v. Applied Geo Techs., Inc.*, 593 F. Supp. 2d 915, 921 (S.D. Miss. 2008).

The Band's power to regulate nonmember labor organizations pursuant to Articles XVI and XVII is likewise grounded in its inherent power to regulate (a) their reservation presence (from which they also derive economic gain), *Merrion*, 455 U.S. at 144-45, and (b) the consensual employment relationships into which they inject themselves, *see Montana*, 450 U.S. at 565.

In their united effort to strike down the provisions of Articles XVI and XVII, the Board and the Teamsters would destroy the Band's inherent authority to govern these interconnected employment relationships, which, at base, implicate its fundamental right to maintain order and integrity with its own members in its own territory. Little reflection is required to conclude that such a course deeply offends the notions of tribal self-government so fully supported by Congress in the Reaffirmation Act, the IRA, and IGRA, as well as a multitude of decisions of the Supreme Court. *See, e.g.*, *Santa Clara Pueblo*, 436 U.S. at 55-56; *Williams*, 358 U.S. at 221 ("The cases of this Court have consistently guarded the authority of Indian governments over their reservations."). As Senator McCain said in his capacity as a sponsor of the Senate bill that became IGRA, "[f]rom time immemorial, Tribes have been and will continue to be permanent governmental bodies exercising those basic powers of government, as do Federal and State governments, to fulfill the needs of their members." S. REP. NO. 100-446 (1988) ("Senate Report 100-446"), at 34.

2. The Band's interest in exercising these fundamental governmental powers is particularly compelling when it applies Articles XVI and XVII to its IGRA gaming at LRCR. The operation of LRCR is an exercise of the Band's inherent sovereign "power to govern and to raise revenues to pay for the costs of government," *Merrion*, 455 U.S. at 144, including by means of gaming, *see Cabazon*, 480 U.S. at 220-22, which Congress codified, enhanced, and supported by enacting IGRA. *See* Senate Report 100-446, at 4-7. In exercising this power, the Band generates revenues to support over 50% of its governmental budget. R.08.03.11, Stip.¶16, App.32-33, including essentially the entire budget for the Band's Tribal Court and prosecutor's office and the overwhelming bulk of that for its family and health services, R.08.03.11, Stip.¶17, App.33. In accordance with Congress' goal to promote tribal independence, the Band's gaming revenues offset federal dollars otherwise committed to support the Tribe's governmental services. R.08.03.11, Stip.¶18, App.33-34.

The Band's operation of LRCR is also an exercise of its inherent authority to engage in, and regulate, reservation economic activity for the overall benefit of its citizens. *See Cabazon*, 480 U.S. at 220; *Mescalero Apache Tribe*, 462 U.S. at 341. By exercising this authority, the Band generates not only the jobs that its members hold at LRCR, but those of tribal members providing governmental services supported by gaming revenues. R.08.03.11, Stip.¶¶17-19, App.33-34.

The heightened interest of the Band in applying Articles XVI and XVII to its IGRA gaming operations is borne out by considering just a few of the provisions that the NLRB has singled out for attack.

Strikes. The Board's decision requires the Band to repeal Section 16.06 of Article XVI, which prohibits strikes within the Band's public employers, including LRCR. R.03.18.13 (Decision) 5, App.16. A strike against the Band's reservation gaming operations at LRCR would be a direct assault on the Band's exercise of these attributes of its sovereignty, and Congress' full endorsement of them under IGRA, the IRA, and the Reaffirmation Act. Such an affront to tribal sovereignty and Congress' ubiquitous goal to support it would be all the worse under the Board's order; for it would be condoned and enforced through the use of federal power itself, a directive of the NLRB.

There are good reasons why strikes are prohibited in public sector employment relations, as they are by most states and the federal government. *See, e.g.*, 5 U.S.C. § 7116(b)(7)(A) (2006); Mich. Comp. Laws § 423.202 (1995); N.Y. Civ. Serv. Law § 210(1) (1983). Strikes are anathema to governmental stability, and they directly impact the public treasury. *See, e.g., Board of Educ., Tp. of Middletown v. Middletown Tp. Educ. Ass'n,* 800 A.2d 286, 288-90 (N.J. Super. Ct. 2001) (surveying laws and history of public policy against strikes in the public sector); James Duff, Jr., Annotation, *Labor Law: Right of Public Employees to*

Strike or Engage in Work Stoppage, 37 A.L.R.3d 1147, § 2[a], at 1151-52 & n.13 (1971 & Supp. 2007).

The Band exercises its inherent sovereign power in prohibiting strikes at LRCR pursuant to Article XVI just as states do in regulating the right to strike at their revenue-generating enterprises. *See, e.g., N.Y. City Off-Track Betting Corp. v. Am. Fed'n of State, Cnty. & Mun. Employees*, 416 N.Y.S.2d 974 (Sup. Ct. 1979) (New York's prohibition against public sector strikes applies to its off-track betting facility operated to generate state revenues); Mass. Gen. Laws ch. 150E, §§ 1-3 (2009) (state law governing collective bargaining applies to employees of state lotteries). In so doing, the Band has substituted its favored method for resolving bargaining impasses through interest arbitration, tailored to its view of what is in the best interests of the community it governs. R.08.03.11, Stip.¶¶41, 57-58, 65. At the same time, it has protected the critical flow of governmental revenues that support the health and welfare of its community in the manner that states do by prohibiting strikes within their revenue-generating enterprises.

Alcohol and drug testing. In the exercise of its inherent sovereign authority over domestic relations, and to protect the health, safety, and welfare of its community, the Band enacted Section 16.20 of Article XVI, which allows LRCR, and the Band's other departments, agencies, and subordinate organizations, to set the terms and conditions for testing public employees for alcohol and drug use,

"consistent with the laws of the Band," and excludes such policies from the mandatory subjects of collective bargaining. R.08.03.11, Stip.¶¶59, 65, App.47, 51. The Band needs no justification for this exercise of governmental authority. There may be no more destructive influence immediately affecting the health and welfare of Native American communities than alcohol and drug addiction and abuse. *See generally* Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986, 25 U.S.C. § 2401(3)-(8) (2006).

Furthermore, this particular law reflects a policy decision concerning the civil rights of member and nonmember employees: the alcohol and drug testing policies of the Band's public employers must comply with the civil rights protections, equivalent to those provided by the Fourth Amendment, afforded by the Band's Constitution. *See* R.08.03.11, Stip.¶65, App.51.[3] Thus, the Band is regulating substance abuse, not only under its inherent authority to address dangers to the health and welfare of its community, but under its equally important inherent authority over civil rights. *See Santa Clara Pueblo*, 436 U.S. at 60, 72 (imposition of external authority over civil rights matters within the tribe would intrude upon tribal sovereignty and "unsettle a tribal government's ability to maintain authority").

[3] The Band's Constitution protects individuals against unreasonable searches and seizures and is enforceable through actions for injunctive relief in the Tribal Court. R.08.03.11, Joint Exhibit 1 (Art. III, § 1(b) and Art. XI, § (2)(a)), App.62, 75.

Licensing. The Board's order also strikes down Section 16.08 of Article XVI and certain regulations of the Band's Gaming Commission, which regulate the licensing of labor organizations engaged in organizing and collective bargaining within the Band's reservation, including at LRCR. The Supreme Court has made clear that this is an exemplary exercise of an attribute of inherent tribal sovereignty. *See Plains Commerce Bank*, 554 U.S. at 335 (recognizing "tribe's traditional and undisputed power … to set conditions on entry to [tribal] land via licensing requirements") (internal quotation marks omitted). The Band's regulation of labor organizations at LRCR through Article XVI's licensing provisions is also an extension of its inherent power to regulate how it generates revenues to support tribal governmental services, an attribute that (once again) is encouraged by Congress pursuant to IGRA.

* * *

These are only a few examples of what is at stake if Articles XVI and XVII are struck down. There is far more, and all of it involves the deliberative process of governing by a unique Indian nation. *See* R.08.03.11, Stip.¶¶61-65 (describing policy reasons for other provisions attacked by Board, including dispute resolution procedures, tribal court jurisdiction, and timing for challenges to "fair share" agreements), App.48-51. Enforcement of the Board's order would render all of this exercise of tribal sovereignty for naught. It would destroy the Band's powers

of self-governance recognized by longstanding decisions of the Supreme Court, powers that the Band exercises in accordance with Congress' goals under the Reaffirmation Act, the IRA, and IGRA. It is hard to imagine a greater affront to a sovereign's authority (and its dignity) than to topple its own, carefully thought out policy judgments and to substitute those of another power.

C. Congress Did Not Authorize The Board To Destroy Tribal Sovereignty.

The burden rests with the Board to show that Congress expressly authorized the Board to strip the Band of its ability to exercise its inherent sovereign authority by enacting and implementing public sector labor laws. *See Pueblo of San Juan*, 276 F.3d at 1192; *Cherokee Nation*, 871 F.2d at 939. The Board cannot meet that burden. Nothing on the face of the NLRA, or even its legislative history, gives the slightest indication that Congress intended the Act to apply to Indian nations, let alone to destroy their established attributes of tribal sovereignty. Unsurprisingly, therefore, the Board itself has never contended that the NLRA includes any such express authority.

If anything, as explained in Point II.B, the exclusion of Indian nations from a key provision of the NLRA shows that Congress intended to exclude them from the Act in its entirety. Furthermore, in 1934, one year before it enacted the NLRA, Congress committed the Nation to a policy of Indian self-government under the IRA. *See generally* 25 U.S.C. §§ 461-479. It is inconceivable that Congress

would usher in the modern era of federal Indian policy, marked by a deep commitment to enhancing tribal sovereignty through the IRA, *see Morton*, 417 U.S. at 541-42, and one year later impose upon Indian nations the burdens of the NLRA, which, for the multitude of reasons described above, would severely undermine tribal self-government.

D. This Case Is Indistinguishable From *Pueblo Of San Juan*.

1. *Pueblo of San Juan* is the only other case to date in which a court has considered whether the Board can strike down an Indian tribe's reservation labor law because it varies from the NLRA. The en banc Tenth Circuit identified the controlling rule in this setting: absent express authorization by Congress, the NLRB has no power to preempt an operational tribal law enacted pursuant to its inherent sovereign authority. *See Pueblo of San Juan,* 276 F.3d at 1195-96. There is nothing to distinguish this case from *Pueblo of San Juan*. If anything, the situation here presents an even stronger case for preventing the displacement of tribal law.

In *Pueblo of San Juan,* the Pueblo enacted a so-called "right to work" law and applied it to a privately owned lumber company, operating on leased lands within the reservation and employing both Pueblo citizens and noncitizens. 276 F.3d at 1189. The Pueblo engaged in this leasing arrangement for much the same reason that the Band engages in IGRA gaming at LRCR, to generate "tribal income

and as a means of employment for tribal members." *Id.* The NLRB sought to strike down the law on the ground that it intruded upon the NLRA's exclusive authority over private employers; although Congress authorized "states and territories" to enact and implement right-to-work laws affecting private sector labor relations, it did not expressly authorize Indian tribes to do so. *See id.* 1189-91.

Recognizing that the Board was "attacking the exercise of sovereign tribal power," the Tenth Circuit held that it was the Board's burden to show that Congress had authorized the attack. *Id.* at 1190. In so doing, it rejected the essential foundation of the Board's decision here: that the NLRA permits the Board to undermine the authority of an Indian nation because Congress did not expressly provide for the exercise of tribal sovereignty in the Act. *Id.* at 1190-91. The Tenth Circuit held just the reverse: that, by enacting and implementing its right-to-work law, the Pueblo exercised its inherent sovereign power over economic activity within its reservation, fully supported by national Indian policy; and that, "because Congress has not made a clear retrenchment of such tribal power," the Board could not displace it. *Id.* at 1191-95.

Like the Pueblo, the Band has done nothing to attract the attention of the Board other than to enact a labor law, pursuant to its inherent sovereign authority, and to apply it to employment relations within its reservation. Like the Pueblo, the

Band's enactment and implementation of its law exhibits the success of tribal self-government, in full accord with Congress' national policy goals. Indeed, those policy goals are even more at the forefront in this case than in *Pueblo of San Juan*, for they are expressly set forth in IGRA. *See* 25 U.S.C. §§ 2701(4), 2702(1).

Like the Pueblo's, the Band's enactment and implementation of its law is perfectly consistent with what Congress accepted under the NLRA as a proper exercise of sovereign authority when conducted by state governments. *See Pueblo of San Juan*, 276 F.3d at 1197 (discussing NLRA provisions allowing states and territories to enact and implement right-to-work laws). After all, the Band is applying Articles XVI and XVII only to its own departments, agencies, and subordinate organizations, including LRCR, and, as described in Point I.B, that is precisely what states do in applying their labor laws to their own public sector employers, including their lotteries and other revenue-generating activities. *Cf. id.* at 2000 (NLRB made "no showing … that the Pueblo's right-to-work ordinance is a kind of law that a state or territory might not be permitted to enact and enforce").

2. The lessons from *Pueblo of San Juan* are fully applicable here.

First, under the established precedents of the Supreme Court discussed in Point I.A, courts must stand vigilant when the application of a federal statute would thwart the exercise of inherent sovereign authority, because Congress is presumed to protect and promote tribal sovereignty, not to destroy it without

careful consideration. *See Pueblo of San Juan*, 276 F.3d at 1192-96. The trust responsibility and the federal interest in promoting tribal self-government and economic independence require no less. *Id.* at 1194-95.

Second, the Band has done nothing to "nullify the NLRA" or to do what "generally applicable federal law prohibits." *Id.* at 1191. The Band's enactment and implementation of Articles XVI and XVII at LRCR mirror precisely what states may do, without prohibition by the NLRA, in the same manner that the Pueblo's enactment and implementation of its right-to-work law mirrored what states may do without such prohibition. *See id.* at 1200 (Pueblo's right-to-work law similar to those of states permitted by NLRA). As a matter of federal Indian law, the comity principles that leave states free to regulate without intrusion from the NLRA apply equally to tribes. *Id.* at 1195; *accord Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1284 (10th Cir. 2010). The Band is entitled to that comity just as much as the Pueblo—indeed perhaps more so, because the Band's law governs its own labor relations, not those of a separate private entity, and the governmental authority it exercises is promoted by Congress under IGRA.[4]

[4] Indeed, in enacting IGRA, Congress saw every reason to put tribes on a par with states in their ability to engage in, and regulate, their gaming to generate revenues. Upon introducing H.R. 1920, an early version of the legislation, Representative Udall said that tribes should be able to use gaming "as a revenue source," pointing out that "[m]ore and more States are turning … to gambling as a revenue source to supplement tax revenue." H.R. REP. NO. 99-488, at 27 (1985). A subsequent Senate Committee Report on the legislation made the same point. *See* S. REP. NO.

In short, the NLRB has no more authority to strike down the Band's law than it did to attack the right-to-work law in *Pueblo of San Juan*. Its order is unenforceable.

II. THE NLRB'S DECISION IS ERRONEOUS.

In finding a violation of the NLRA, the Board failed to apply fundamental principles of federal Indian law. Ignoring pervasive Supreme Court authority, in particular *Iowa Mutual* and *Santa Clara Pueblo*, as well as myriad court of appeals decisions discussed in Point I.A of this brief, the Board wrongly asserted that tribal sovereignty may receive protection from intrusions under state law, but not from intrusions under federal law. *See* R.03.18.13 (Decision and Order) 4 n.9, App.15. The Board also stated that it "disagree[d] with the court of appeals' decision in *Pueblo of San Juan*," but it did not explain why. R.03.18.13 (Decision) 4 n.8, App.15. And the Board sought to distinguish *Pueblo of San Juan* as a unique case in which the court of appeals was "unwilling to find that Congress implicitly intended to divest the tribe of its sovereign authority to enact the 'right-to-work' ordinance," because Congress gave states leeway to do the same. R.03.18.13 (Decision) 4, App.15. As just explained, however, the Tenth Circuit's decision is not so limited; it emphatically rejected the NLRB's notion that Congress can ever

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99-493, at 5 (1986) (tribal governments, like state governments, are "using gaming as a means of generating revenues to provide governmental services").

be deemed to "implicitly" divest an Indian tribe of its inherent sovereign authority. *Pueblo of San Juan,* 276 F.3d at 1194.

Instead of applying controlling principles of Indian law, the Board applied its own decision in *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1055, grounded in what it described as the "*Tuscarora* doctrine," modified by three exceptions first discussed in *Donovan v. Coeur d'Alene Tribal Farm,* 752 F.2d 1113, 1116 (9th Cir. 1985), which involved the application of the Occupational Health and Safety Act to a tribal farm. As explained below, however, there is no "*Tuscarora* doctrine"; and even if there were, it would provide no basis for the NLRB to strike down the Band's operational public sector labor laws.

A. The Board Employed The Wrong Framework.

1. In *FPC v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), the Supreme Court upheld, under the Federal Power Act ("FPA"), the taking of land owned in fee by the Tuscarora Indian Nation for a storage reservoir as part of the licensing by the Federal Energy Regulatory Commission ("FERC") of a hydroelectric power project. The Court addressed (1) whether the tribe's fee lands constituted a "reservation" under the FPA, in which case FERC would be required by the provisions of the FPA to (a) make a finding that "the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired" and (b) order the licensee to pay an annual fee to the tribe; and, if the lands did not

constitute a "reservation," (2) whether the lands could be condemned by the licensee under the eminent domain provisions of the FPA. *See id.* at 110-14.

Congress expressly defined "reservation" in the FPA to mean "tribal lands embraced within Indian reservations ... and interests in lands owned by the United States." *Id.* at 111 (quoting 16 U.S.C. § 796(2)). The Supreme Court concluded that, because the Tuscarora Nation's land was owned in fee simple, not set aside as a reservation or held in trust by the United States, it did not constitute a "reservation" under the FPA so as to trigger the need for a statutory finding or payment of the annual fee. *Id.* at 114-15. Turning to the question of eminent domain, the Court then held that the FPA did not "overlook[] ... Indians or lands owned or occupied by them," having expressly addressed them in the FPA's definition of "reservation" and in the provision requiring FERC licensees to pay annual fees for the use of tribal lands. *Id.* at 118. Thus, the Court concluded, "the Act gives every indication that, within its comprehensive plan, Congress intended to include lands owned or occupied by any person or persons, including Indians." *Id.*

In *Tuscarora* the Court also stated, in passing, that "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests." *Id.* In support of that proposition,

the Court cited three of its prior decisions addressing the application of taxes to individual Indians. *See id.*

2. There is nothing extraordinary about this statement in *Tuscorara*—and certainly nothing that supports the NLRB's adoption of a "*Tuscarora* doctrine."

First, the statement is *dictum*, as the Tenth Circuit has recognized. *See Cherokee Nation*, 871 F.2d at 938 n.3. It was entirely unnecessary to the Court's decision, which was grounded in the conclusion that Congress expressly addressed the treatment of Indian nations and their lands in the FPA. *See Tuscarora*, 362 U.S. at 118. Indeed, so unremarkable was this statement—and the decision itself—that the Court has rarely cited the case in the 53 years since it was decided, and, as far as we are aware, has *never* cited the statement.

Second, the statement does not address Indian nations, acting as sovereign governments within their reservations or trust lands. So it says nothing about when or how "a general statute in terms applying to all persons," 362 U.S. at 116, applies to an Indian tribe in such a setting. This is obvious from the statute that was before the Court: one provision required specific findings for projects affecting lands set aside as Indian reservations or lands held in trust for tribes by the United States, and another required a fee for the use of such lands, "subject to the approval of the Indian tribe having jurisdiction of such lands as provided [by the IRA]," 16 U.S.C.

§ 803(e)(1). *See* 362 U.S. at 113-14. These FPA provisions, and the Court's holding, simply recognize the well-established principle that Indian nations, within their reservations and trust lands, exercise attributes of sovereignty, and that in those geographic spaces they are generally treated differently than Indian nations and individual Indians engaged in activities on fee lands outside of reservations or trust lands.[5]

Third, if the statement in *Tuscarora* governed the question whether a federal statute may be applied to undermine an Indian tribe's exercise of inherent sovereign authority within its reservation or trust lands, it would stand the Court's established Indian law jurisprudence on its head. Such an approach would be divorced from the principles laid down by the seminal Supreme Court decisions in the field, from *Worcester* to *Williams* and *Merrion*, all discussed in Point I of this brief. Indeed, the Tenth Circuit has concluded that any effort to endow the *Tuscarora dictum* with such force must fail when, as here, "the matter at stake 'is a fundamental attribute of sovereignty,'" implicating, as *Merrion* said, "'the tribe's general authority, as a sovereign, to control economic activity within its jurisdiction.'" *Pueblo of San Juan*, 276 F.3d at 1200 (quoting *Merrion*); *see also*

[5] This is not to say that Indian tribes may not exercise governmental power over certain off-reservation activities of their members or even nonmembers that affect the health and welfare of their citizens. *See, e.g.*, *Reich*, 4 F.3d at 494 (tribes have inherent authority to regulate wages and hours of member and nonmember game wardens overseeing off-reservation hunting and fishing rights).

San Manuel Indian Bingo & Casino, 475 F.3d at 1311 (*Tuscarora* statement is in tension with "longstanding principles" of federal Indian law and of "uncertain significance").

3. The Ninth Circuit in *Coeur d'Alene* nevertheless elevated the *Tuscarora dictum* to a "general rule" for whether "general federal laws" apply to the activities of Indian tribes within their reservations, while building into the *dictum* three exceptions. 751 F.2d at 1116. The NLRB in turn adopted that formulation in *San Manuel Indian Bingo & Casino*, which overruled *Fort Apache Timber Company*. It is the ground on which the Board rested its order in this case:

> In *San Manuel,* the Board … adopted the *Tuscarora* doctrine, which establishes that Federal statutes of general application apply to Indians absent an explicit exclusion…. [Three] exceptions were enumerated by the Ninth Circuit in … *Coeur d'Alene* …, where the court held that general statutes do not apply to Indian tribes if: (1) the law "touches exclusive rights of self-government in purely intramural matters"; (2) application of the law would abrogate treaty rights; or (3) there is "proof" in the statutory language or legislative history that Congress did not intend the law to apply to Indian tribes. "In any of these three situations, Congress must *expressly* apply a statute to Indians before ... it reaches them." *Id.*

R.03.18.13 (Decision) 2-3, App.13-14.

Because the *Tuscarora dictum*, if applied to the sovereign activities of Indian nations within their reservations, is divorced from the foundational principles of federal Indian law, the entire premise of the *Coeur d'Alene* framework is wrong. Indeed, the fact that the Ninth Circuit saw fit to build three exceptions into the *dictum* evidences its infirmity. There is no presumption that

"general" federal laws may be applied to thwart tribal sovereignty unless a tribe can rebut that presumption. On the contrary, the presumption is just the reverse: absent a clear expression of intent, courts presume that Congress protects and enhances the attributes of sovereignty. For the reasons explained in Point I, the Band's public sector labor laws involve the exercise of its inherent sovereign authority and the NLRB's order destroys that authority without express congressional authorization.

B. The Band Prevails Even Under The NLRB's Framework.

Even if the *Coeur d'Alene* formulation were employed here, the Board would have no authority to strike down the Band's laws. This is true for three independent reasons: the NLRA is not a law "of general application"; the first *Coeur d'Alene* exception applies; and the third exception applies.

1. The *Coeur d'Alene* formulation is self-limiting: it operates only with respect to federal statutes "of general applicability," *Coeur d'Alene,* 751 F.2d at 1116, and the NLRA is not such a law. Rather, it excludes sovereign governments exercising authority over their own labor relations within their jurisdictions. *See* 29 U.S.C. § 152(2). Thus, the NLRA cannot be considered a federal law "of general application" to which the *Coeur d'Alene* formulation can apply. *See Pueblo of San Juan,* 276 F.3d at 1199 ("*Tuscarora* does not control" when tribe exercises same authority that NLRA permits states to exercise). On the contrary,

as explained in Point I.D, under the trust responsibility and comity principles, tribes exercising sovereign functions within their reservations and trust lands must be treated the same way that the NLRA treats states.

2. Even assuming that the NLRA is a law "of general application," invalidating the Band's public sector labor laws under the Act would most certainly "touch[] exclusive rights of self-governance in purely intramural matters." *Coeur d'Alene,* 751 F.2d at 1116 (internal quotation marks omitted). As explained in Point I.B, the Band's enactment and implementation of Articles XVI and XVII to govern its labor relations with its own citizens, a right of self-governance respecting a purely intramural matter, is inextricably intertwined with its ability to apply the identical legal standards to nonmembers who work side-by-side with them at LRCR. By employing the NLRA to prevent the Band from governing its reservation labor relations in a uniform way, the Board is using the Act not just to "touch" the Band's "exclusive rights of self-government in purely intramural matters," but to undermine it. The first *Coeur d'Alene* exception therefore applies.

The Board failed to grasp this reality, and instead sought to justify its intrusion by characterizing LRCR as "a typical commercial enterprise," emphasizing that "the majority of the Resort's employees and patrons are non-

Indians." R.03.18.13 (Decision) 3, App.14. This reasoning badly misconceives federal Indian law.

First, as explained in Point I.B, the Band engages in, and governs, reservation gaming at LRCR pursuant to its inherent sovereign power, fully endorsed by Congress in IGRA, the IRA, and the Reaffirmation Act.

Second, the presence of non-Indian employees at LRCR (no matter how many) in no way detracts from the Band's exercise of governmental authority over its intramural reservation affairs; on the contrary, when non-Indians enter the reservations or trust lands of Indian tribes, they are subject to the power of the tribe to exclude them and to condition their presence while they remain. *E.g. Mescalero Apache Tribe*, 462 U.S. at 336; *Merrion*, 455 U.S. at 144, 147. And the Band has full authority to regulate its consensual employment relationships with non-Indians. *See Montana*, 450 U.S. at 565. The Board would condition the Band's sovereign power on the private interests of non-Indians who enter the reservation for economic gain, when in fact the law is just the reverse. *See Merrion*, 455 U.S. at 147 ("Indian sovereignty is not conditioned on the assent of a nonmember; to the contrary, the nonmember's presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose.").

The Band's authority to regulate *patrons* at LRCR stems from the same inherent authority that allows it to regulate noncitizen employees and labor

organizations: its power to exclude them from the reservation and to regulate their conduct while they remain. As explained in Point I, the Supreme Court has variously described this as an "essential," *Hicks*, 533 U.S. at 379 (Souter, J., concurring) (internal quotation marks omitted), "undisputed," and "traditional" attribute of tribal sovereignty, *Plains Commerce Bank*, 554 U.S. at 335 (internal quotation marks omitted), and the leading treatise in the field characterizes it as an "internal matter," COHEN § 4.01[2][e], at 220.

Third, the Board improperly "confuses" the Band's identity as a sovereign government with its functioning as an economic actor. *Merrion*, 455 U.S. at 145. Contrary to the admonition of the Supreme Court, the Board would "denigrate[] Indian sovereignty" by treating this tribal government as a mere private voluntary organization. *Id.* at 146. The Band does not become an appendage to a "commercial enterprise" once it employs non-Indians or they come to an IGRA gaming facility any more than a state government loses authority to regulate its lottery or other economic enterprise when it is visited by out-of-state patrons. On the contrary, the Band is exercising its inherent governmental powers over a critical reservation economic resource.

The Board's "commercial/governmental" distinction is also unworkable. For this very reason, the Supreme Court has rejected just such a distinction when used against states. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528,

546-47 (1985); *see also Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980) ("[i]t is one of the happy incidents of the federal system that a single courageous State may ... try novel social and economic experiments"—in that case, ownership of a cement plant) (internal quotation marks omitted). States regulate labor relations within their "commercial-looking" lotteries and off-track betting facilities, *see, e.g., N.Y. City Off-Track Betting Corp.*, 416 N.Y.S.2d 974; Mass. Gen. Laws ch. 150E, §§ 1-3, and they could do so at their cement plants, *cf. Reeves*, 447 U.S. at 441, and transit authorities, *cf. Garcia*, 469 U.S. at 546-47. Indian tribal governments do the same things as states, and there is no reason to treat them differently, particularly when they do what the Band is doing here: exercise their inherent sovereign power, backed by national policy. On the contrary, deference to Congress' national policy goals, the trust doctrine of Indian affairs, and the related comity owed to tribes eliminate any basis for undermining their sovereign authority more readily than that of states.

3. The *Coeur d'Alene* construct does not apply for an additional reason: "there is proof" in the statutory language "that Congress intended [the NLRA] not to apply" to Indian tribes. *See Coeur d'Alene*, 751 F.2d at 1116 (internal quotation marks omitted). That proof is Congress' decision not to include Indian nations within Section 301 of the Act.

The NLRA is a unified statutory scheme with an overarching goal of promoting workplace harmony within the Nation's private sector through collective bargaining. *See NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 179-80 (1967). Section 301 (29 U.S.C. § 185), enacted in 1947 as part of the Taft-Hartley Act, establishes a private right of action to enforce collective bargaining agreements entered into pursuant to the NLRA and is a lynchpin provision of the Act. The Supreme Court describes it as having preemptive force "so powerful as to displace entirely any state cause of action for violation of contracts between an employer and a labor organization," as well as "claims substantially dependent on analysis of a collective-bargaining agreement." *Caterpillar Inc. v. Williams,* 482 U.S. 386, 394 (1987) (internal quotation marks omitted). But Congress left Indian tribal governments completely out of this provision.

Congress is deemed to know the law affecting the scope and force of its statutes and to act intentionally in light of that knowledge. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990); *Souter v. Jones,* 395 F.3d 577, 598 (6th Cir. 2005). In 1947, when Congress enacted Section 301, it therefore knew that, absent an unequivocal waiver, Indian tribes would retain their sovereign immunity from suit. *See United States v. U.S. Fidelity & Guaranty Co.,* 309 U.S. 506, 512 (1940). Nowhere in the NLRA does Congress waive the sovereign immunity of tribes for actions under Section 301. Thus, the provision cannot be applied to tribes, and

Congress, aware of the constraint of sovereign immunity, must be presumed to have acted intentionally in leaving Indian nations out of this provision. Congress, after all, is "always ... at liberty to dispense with [ ] tribal immunity or to limit it." *Okla. Tax Comm'n,* 498 U.S. at 510.

In this unified law it would make no sense for Congress to leave tribes out of the centerpiece provision and still apply the remainder of the NLRA to them. Indeed, Indian tribes would be the only "employers" in the country excluded from Section 301 while also subject to other provisions of the NLRA. An Act of Congress cannot be construed to operate in such a bizarre manner, *see, e.g., United States v. Turkette,* 452 U.S. 576, 580 (1981) (interpretations that yield "absurd results" are to be avoided); *Smith v. Babcock,* 19 F.3d 257, 263 (6th Cir. 1994) (interpretations that yield internal inconsistencies are to be avoided), particularly when doing so would destroy the uniformity that is so central to the NLRA. Thus, by leaving Indian nations out of Section 301, Congress revealed its intent that they be free from the Act in the same manner as states and the federal government. With this proof of Congress' intent, the Band meets the third *Coeur d'Alene* exception.

The NLRB mischaracterized this argument. *See* R.03.18.13 (Decision) 3 n.6, App.14. It stated that the Band had cited no authority for the proposition that, absent a waiver of sovereign immunity, it would not be subject to suit under

Section 301. In fact the Band cited the same authority it cites here. *See* R.02.24.12 (Band's Brief to Board) 30. The Board also said that the Band's sovereign immunity from suit for actions under Section 301 is immaterial to the Board's ability to proceed, because tribes cannot assert sovereign immunity against the United States or its agencies. *See* R.03.18.13 (Decision) 3 n.6, App.14. That is true, but it misses the point, which is that, by leaving tribes out of Section 301, Congress revealed its intent to leave them out of the NLRA entirely.

III. THE D.C. CIRCUIT'S DECISION IN *SAN MANUEL* PROVIDES NO BASIS FOR UPHOLDING THE BOARD'S DECISION.

A. The D.C. Circuit has also addressed the interplay between the NLRA and the activities of Indian nations within lands over which they exercise jurisdiction. It did so in *San Manuel Indian Bingo & Casino v. NLRB,* 475 F.3d 1306 (D.C. Cir. 2007), upon review of the Board's order in that case.

In issuing the order under review here, the Board chose to follow its own decision in *San Manuel,* resting entirely upon the *Coeur d'Alene* framework. In *San Manuel,* however, the D.C. Circuit gave no deference to the NLRB's adoption of the *Coeur d'Alene* construct and did not adopt it itself. *See id.* at 1311-12. Instead, the D.C. Circuit recognized that the Supreme Court's precedents lead to the rule that "a clear expression of Congressional intent is necessary before a court may construe a federal statute so as to impair tribal sovereignty." *Id.* at 1311 (citing, *inter alia*, *Santa Clara Pueblo,* 436 U.S. at 59-60).

The unfair labor practice charges at issue in *San Manual* involved assertions that managers at the tribe's gaming facility interfered with employees' collective bargaining rights and discriminated against one union in favor of another. *See id.* at 1309. The D.C. Circuit addressed whether "application of the NLRA to the San Manuel's Casino [would] violate federal Indian law by impinging upon protected tribal sovereignty." *Id.* at 1311. "[T]he determinative consideration," according to the court, was "the extent to which application of the general law will constrain the tribe with respect to its governmental functions. If such constraint will occur, then tribal sovereignty is at risk and a clear expression of Congressional intent is necessary." *Id.* at 1313.

While recognizing that the Supreme Court's decisions prevent interference with tribal self-government, the D.C. Circuit nevertheless suggested that some exercises of tribal sovereignty are more deserving of protection than others. It placed the maintenance of "traditional customs and practices" at the high end of the scale and reservation relations with "non-Indians" at the low end. *Id.* at 1313-14. With this "continuum theory" of tribal sovereignty in place, the Court reasoned that unspecified tribal "labor legislation" and the tribe's compact with California "were ancillary" to its "commercial activity" of IGRA gaming. *Id.* at 1315. Without identifying the labor legislation or its content, the D.C. Circuit said that "[t]he total impact on tribal sovereignty at issue here amounts to some

unpredictable, but probably modest, effect on tribal revenue and the displacement of legislative and executive authority that is secondary to a commercial undertaking," and that "this limited impact is [in]sufficient to demand a restrictive construction of the NLRA." *Id.*

Thus, the Court concluded:

> Even applying the more restrictive rule of *Santa Clara Pueblo*, the NLRA does not impinge on the Tribe's sovereignty enough to indicate a need to construe the statute narrowly against application to employment at the Casino. First, operation of a casino is not a traditional attribute of self-government.... Second, the vast majority of the Casino's employees and customers are not members of the Tribe, and they live off the reservation. For these reasons, the Tribe is not simply engaged in internal governance of its territory and members, and its sovereignty over such matters is not called into question. Because applying the NLRA to San Manuel's Casino would not impair tribal sovereignty, federal Indian law does not prevent the Board from exercising jurisdiction.

Id.

As explained below, the D.C. Circuit's decision in *San Manuel* is erroneous and in any event distinguishable.

B. The D.C. Circuit misconceived controlling Supreme Court precedent.

First, the D.C. Circuit's initial premise is wrong. As discussed in Point I.A., the Supreme Court has never placed the attributes of tribal sovereignty in some sort of hierarchical order, giving protection to "traditional customs and practices" over the essential self-governing powers that tribes possess. To take the D.C. Circuit's path would lead to arbitrary and wholly subjective decision-making regarding the

relative importance of various sovereign powers, and the Supreme Court has never condoned such an unbounded expansion of judicial authority. The attributes of sovereignty possessed by Indian nations all stand on an equal footing and include (1) the "traditional and undisputed power" to exclude nonmembers from the reservation and the related power to regulate their reservation activities while they remain, *Plains Commerce Bank*, 554 U.S. at 335 (internal quotation marks omitted), (2) the power to engage in, and regulate, reservation economic activity for the purpose of generating revenue to support tribal government, *see, e.g.*, *Cabazon*, 480 U.S. at 220; *Mescalero Apache Tribe*, 462 U.S. at 335-36; *Merrion*, 455 U.S. at 144, and (3) the authority to regulate consensual employment relationships between the tribe and its members or nonmembers, *see Montana*, 450 U.S. at 565.

Second, IGRA gaming involves all of these equally important attributes of sovereignty. The D.C. Circuit ignored the teachings of *Merrion*, *Cabazon*, and *Mescalero Apache Tribe* and Congress' parallel policies, in lock step with these teachings, in the IRA and IGRA. Like the Board in this case, the court conceived of tribal government as an appendage to a "commercial-looking" IGRA gaming facility, thereby slipping toward the view that Indian nations are little more than private voluntary organizations, whose interests center solely on "Indian" practices. *See San Manuel*, 475 F.3d at 1313-14. It bears repeating that the

Supreme Court has emphatically rejected just such a view. It "denigrates" the governmental status of Indian nations to treat them as culture clubs. *Merrion,* 455 U.S. at 146; *Bryan,* 426 U.S. at 388.

Third, tribal authority over the presence of non-Indian employees and patrons involves the exercise of the power to exclude nonmembers, an attribute that is intimately connected to an Indian tribe's ability to manage its territory and internal affairs. In this respect, too, the D.C. Circuit ignored the established teachings of the Supreme Court set forth in Point I of this brief.

C. Even if the standards employed by the D.C. Circuit in *San Manuel* were applied here, the Board's decision could not stand. This case does not involve an unspecified labor ordinance suffering "some unpredictable, but probably modest" impact. *See San Manuel,* 475 F.3d at 1315. Rather, a full-blown public sector labor law, in full operation, is at stake. *See* R.08.03.11, Stip. ¶¶ 35-79, App.40-54. The Band's law is the product of hours upon hours of careful policy deliberations, carried out through an elaborate legislative process. *See* R.08.03.11, Stip. ¶¶58-65, App.46-51. It has guided hundreds of hours of labor negotiations and resulting collective bargaining agreements that reflect the legal entitlements of management and employees alike. *See* R.08.03.11, Stip. ¶¶67-79, App.52-54.

If, as the D.C. Circuit said, "a clear expression of Congressional intent is necessary" when a federal law "will constrain the tribe with respect to its governmental functions," *San Manuel,* 475 F.3d at 1313, this is just such a case. The myriad ways in which the Board's decision destroys the Band's sovereign authority as an Indian tribal government have been delineated above and will not be repeated here. Suffice it to say that this is not a case in which the NLRA will "not impinge on the Tribe's sovereignty enough to indicate a need to construe the statute narrowly." *Id.* at 1315. The Board's order strikes down a fundamental exercise of sovereignty by an Indian tribal government. Thus, even under the D.C. Circuit's decision in *San Manuel*, the order cannot stand.

CONCLUSION

The Band's petition for review should be granted and the Board's cross-petition for enforcement should be denied.

Respectfully submitted this 8th day of July, 2013.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief contains 13,969 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Dated: July 8, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2013, I served this Brief of Petitioner/Cross-Respondent, Little River Band of Ottawa Indians Tribal Government, by means of the Court's ECF system upon the following through their counsel, who have entered appearances in this matter:

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