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

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

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INTRODUCTION

The National Labor Relations Board ("NLRB" or "Board") has struck down the enactment by the Little River Band of Ottawa Indians Tribal Government ("Band" or "Tribe") of Articles XVI and XVII of its Fair Employment Practices Code ("FEPC"), and the application of those laws to regulate the Band's own reservation economic activity at the Little River Casino Resort ("LRCR"). That economic activity and the Band's regulation of it constitute an exercise of inherent tribal sovereignty under established principles of federal Indian law, an exercise of tribal power that Congress has unequivocally endorsed from 1934 to the present. By exercising such prerogatives, the Band is able to generate essential governmental revenues to support the provision of critical governmental services to the Band's citizens.

In defending its order striking down the Band's exercise of governmental authority, the NLRB does violence to well-established tenets of federal Indian law, advocating a principle of interpretation at odds with Supreme Court precedent and Congress' longstanding goals in the field. The proper course, consistent with established principles of Indian law, is to leave the Band's exercise of governmental authority undisturbed absent a clear expression of intent by Congress. There being no such expression of intent in the National Labor Relations Act ("NLRA" or "Act"), the Board's order cannot stand.

ARGUMENT

I. THE ISSUE IN THIS CASE, WHICH THIS COURT DECIDES DE NOVO, IS WHETHER FEDERAL INDIAN LAW PRECLUDES THE NLRB FROM INVALIDATING THE BAND'S PUBLIC-SECTOR LABOR LAWS.

A. In this case, a federal agency, the NLRB, seeks to act in derogation of a federally recognized Indian tribe's sovereign powers based on authority purportedly granted it by a federal statute, the NLRA. There exists no dispute that whether the NLRB can so act is governed by principles of federal Indian law; the dispute here centers on what the relevant principles are and how to apply them. The NLRB concedes as much. It asks this Court to adopt a "doctrine, developed in light of federal Indian policy," that is "derived" from a Supreme Court decision and "modified" by Indian law decisions of lower courts. NLRB Br. 11, 22-23; *see also id.* at 12, 23-24.

In light of this concession, it is puzzling that the NLRB has seen fit to argue, in Point A of its brief (at 12-19), that, because Indian nations are not expressly mentioned in the NLRA's statutory exemptions, they are covered by the Act. The implication of this argument seems to be that the NLRA applies to Indian tribes in all circumstances. But the NLRB does not take that position. It recognizes, for example, that the NLRA does not apply to tribal law enforcement officers (*see* NLRB Br. 39-40, 45), even though there is no express exemption for this situation either. Point A of the NLRB's brief is thus largely beside the point. By

recognizing that principles of tribal sovereignty constrain the application of the NLRA to Indian nations in at least some settings (*see, e.g.*, NLRB Br. 11-12, 23-24, 29-30), the NLRB acknowledges that the absence of an express mention of Indian tribes in the statute does not mean that the NLRA always applies to them.

The Board's citation of provisions of Title VII of the Civil Rights Act and the Americans with Disabilities Act that expressly exclude Indian tribes, and its argument that those provisions show that "Congress knows how to exclude Indian tribes" when it wants to, NLRB Br. 17-18, are likewise inapposite. The Board's argument utterly fails to support its actual position in this case, which is that Indian law principles determine whether Indian nations are covered by the NLRA and that, pursuant to those principles, Indian nations are not covered by the NLRA in at least some circumstances. Not surprisingly, moreover, the courts that have considered simplistic comparisons akin to that posited by the NLRB have rejected them. *See EEOC v. Fond du Lac Heavy Equip. & Const. Co., Inc.*, 986 F.2d 246, 250-51 (8th Cir. 1993) (refusing to infer that Congress meant to apply ADEA to tribes because it expressly excluded them from Title VII); *EEOC v. Cherokee Nation*, 871 F.2d 937, 939 (10th Cir. 1989) (same).

B. The NLRB claims that, on the question this case *does* present (how federal Indian law governs the application of the NLRA to Indian nations), its position is entitled to deference. It says that its "interpretation of the NLRA must

be upheld if reasonably defensible" (NLRB Br. 10), and it repeatedly asserts that its position is in fact "reasonable" (*see, e.g.*, *id.* at 8, 11, 15, 41, 57).

But none of this is so. "Because the Board's expertise and delegated authority does not relate to federal Indian law," this Court should "not defer to the Board's conclusion" and instead should "decide de novo" how principles of Indian law apply to the NLRA. *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). *See generally Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002) (courts do not defer to NLRB's "preferences" when "such preferences potentially trench upon federal statutes and policies unrelated to the NLRA"). Tellingly, none of the decisions that the NLRB cites in support of its claim to deference (NLRB Br. 10 n.3) are Indian cases. It is also noteworthy that the NLRB's position on the merits is not supported by any other federal agency, including the Department of the Interior, which has far greater expertise in applying principles of federal Indian law.

Accordingly, the question here is not whether the Board's position is "reasonable," as the NLRB maintains, but whether, on de novo review by this Court, it is correct. As we explain below, it is not.

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

As our opening brief explains (at 17-42), a federal statute cannot be employed to undermine a tribal government's exercise of inherent sovereign authority without clear congressional authorization; the Band's public-sector labor laws involve the exercise of inherent sovereign authority; the NLRB seeks to destroy that exercise; and there is no clear congressional warrant for the Board to do so. The NLRB's attempts to rebut these points do not withstand scrutiny.

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

As explained in our opening brief (at 25-28, 40-42, 55) and the brief of *amici* American Indian Law Scholars ("Scholars") (at 16-18), it is a well-established principle of federal Indian law that Congress will not be found to have acted in derogation of tribal sovereign powers absent a clear expression of its intent to do so. This principle is rooted in the federal trust responsibility to tribes and the recognition that Congress' plenary power over Indian affairs carries the concomitant responsibility to exercise that authority with deliberation and clarity. It also accords with the modern-day policy of both the executive and the legislative branches to safeguard and reinvigorate tribal sovereignty. The NLRB's brief reflects several fundamental misunderstandings of this clear-expression principle.

1. The NLRB first conflates the clear-expression principle with the canon requiring that ambiguities in Indian treaties or statutes be construed in the Indians' favor. NLRB Br. 20-22. This allows the NLRB to claim that the principle applies only in instances of statutory ambiguity, as opposed to statutory silence. But while there is a relationship between the two interpretive principles, they are not the same.

As discussed by the Scholars, the clear-expression principle enables courts to "play the institutionally appropriate role of requiring Congress to be clear when it exercises its prerogatives" to "diminish tribal sovereign powers." Scholars Br. 16. This keeps courts out of the messy business of undermining the established sovereign powers of Indian tribal governments, an undertaking that, in all but a few rare circumstances, has always been left to Congress. By definition, then, the interpretive principle extends beyond situations involving a specific textual ambiguity. It requires Congress to express itself clearly in order to effectuate a derogation of tribal sovereignty.

As the Supreme Court emphasized in *Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9 (1987), silence no more satisfies this standard than does ambiguity:

> Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts *unless affirmatively limited* by a specific treaty provision or federal statute. 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. In the absence of any indication that Congress intended the diversity statute to limit the jurisdiction of the tribal courts, we decline petitioner's invitation to hold that tribal sovereignty can be impaired in this fashion.*

Iowa Mutual, 480 U.S. at 18 (internal quotation marks and citations omitted) (emphasis added); *see also N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1196 (10th Cir. 2002) (en banc) ("[S]ilence [does not] establish[ ] this statute's plain intent to preempt tribal authority. Silence as to tribes can constitute a latent or intrinsic ambiguity.").

2. Again conflating the clear-expression principle with the Indian canon, the NLRB next asserts that the principle applies only to Indian-specific statutes. Br. 20-23. This assertion, too, finds no basis in the law.

Two of the leading cases applying the clear-expression principle are *United States v. Dion*, 476 U.S. 734 (1986), which addressed the impact on tribal treaty rights of the Eagle Protection Act, a federal statute not specific to Indian affairs, and *Iowa Mutual*, which concerned the effect on common-law tribal sovereignty rights of the federal diversity-jurisdiction statute, which also is not specific to tribes. Thus, the clear-expression principle protects the attributes of tribal sovereignty from congressional abrogation, whether the statute in question is Indian-specific or not.[1] The Seventh, Eighth, and Tenth Circuits have all applied

[1] The clear-expression principle protects both attributes of tribal sovereignty set forth in a treaty and those established by federal common law. *See, e.g., Fond du*

the principle to statutes that are not. *See Fond du Lac*, 986 F.2d at 250-51 (employing *Dion*'s interpretive rule to determine whether tribe's common-law "right of self-government" could be undermined by applying ADEA); *Cherokee Nation*, 871 F.2d at 939 (employing *Dion*'s interpretive rule to determine whether treaty right could be undermined by applying ADEA and observing that same rule applies to abrogation of general "Indian sovereignty rights"); *Reich v. Great Lakes Indian Fish & Wildlife Comm'n,* 4 F.3d 490, 493-94 (7th Cir. 1993) (Posner, J.) (citing *Dion* and *Cherokee Nation* and refusing to undermine tribe's inherent sovereign authority by applying Fair Labor Standards Act); *see also NLRB v. Pueblo of San Juan*, 276 F.3d at 1191-92 (applying interpretive rule adopted by *Cherokee Nation* to NLRA).[2]

Lac, 986 F.2d at 249 n.4 ("[t]he identical right should not have a different effect because it arises from general treaty language rather than recognized, inherent sovereign rights") (internal quotation marks omitted). This makes sense, because tribes' common-law powers antedate treaties and endure unless expressly divested by treaties or federal statutes. *See Iowa Mutual*, 480 U.S. at 18; *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

[2] The NLRB says that this Court's decision in *United States v. Dakota*, 796 F.2d 186 (6th Cir.1986), held that "the pro-Indian canon is not applicable to the interpretation of general federal laws that do not address tribal interests." NLRB Br. 20. But *Dakota* did not address the clear-expression principle and it was a criminal case, involving individuals acting in violation of federal criminal law. *See* 796 F.2d at 187. Cases that focus on the application of federal law to individual Indians are entirely different from those involving the imposition of federal law upon an Indian tribal government in a manner that impairs its sovereign prerogatives.

This is as it should be. There is no logical reason why Congress should be presumed to effectuate an infringement on tribal sovereignty with greater ease when it is legislating in a broader context than when it is doing so in an Indian-specific one. The NLRB's position is grounded neither in precedent nor in principle.

3. The Board's final claim (*e.g.*, N.L.R.B. Br. 23-24, 30, 38-39, 47-48) is that the clear-expression principle is contrary to the "superior sovereignty" of the United States, which compels a presumption that federal authority trumps the tribal prerogatives at issue here. This is a remarkable contention, one that turns the trust doctrine on its head. It is precisely *because* Congress possesses plenary power over Indian affairs that it will not be presumed to act in derogation of tribes' sovereign powers without careful deliberation; the "superior sovereignty" of the United States carries with it a presumption that Congress acts to protect, not to intrude upon, these powers. *See* Band Br. 23-24; Scholars Br. 8, 12, 17.

Relying on its "superior sovereignty" theory, the Board implies that the clear-expression principle might have force to protect "retained sovereign tribal powers beyond internal self-governance" when threatened by states, but not when threatened by the federal government—or, as here, by a single federal agency. NLRB Br. 37-38. Even a cursory review of *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987), and *Santa Clara Pueblo v. Martinez*,

436 U.S. 49, 56-60 (1978), the two decisions the Board cites (NLRB Br. 38 nn.86-87), shows that neither supports such a view. The latter case, in fact, unequivocally supports the clear-expression principle in the face of federal authority. *See Santa Clara Pueblo*, 436 U.S. at 60 (courts "tread lightly" before undermining an attribute of sovereignty under color of a federal statute without "clear indications of legislative intent").[3] It is no wonder that no other arm of the federal government has lent its support to the radical propositions espoused by the NLRB in this case.

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

The NLRB denies that its order constitutes a direct attack upon the sovereign powers of the Band. It asserts (a) that the Supreme Court decisions on which the Band relies are inapposite (NLRB Br. 36-38); (b) that the Band's laws should be likened to a private employer's "work rule" or "personnel policy" (*id.* at 10 n.6, 46); and (c) that the Board's order striking down the Band's laws, which it euphemistically describes as "federal scrutiny of the FEPC," does "not interfere

[3] The Board also cites its own decision in *San Manuel Indian Bingo and Casino*, 341 NLRB 138 (2004), and this Court's decision in *United States v. Dakota* (NLRB Br. 23-24 & n.43, 38 n.36). As explained in our opening brief (at 43-48) and the Scholars' brief (at 18-24), the Board's *San Manuel* decision is divorced from established principles of federal Indian law and entitled to no more weight than the Board's decision applying *San Manuel* in this case. As for this Court's decision in *Dakota*, as discussed in footnote 2 above, it had nothing to do either with the clear-expression principle or with an intrusion upon tribal sovereignty.

with core tribal self-government" (*id.* at 45). These arguments reflect a fundamental misunderstanding of federal Indian law and belittle the dignity of an Indian tribal government engaged in the exercise of its established inherent sovereign authority with the full backing of Congress.

1. As our opening brief explains (at 18-23, 28-31), the Supreme Court has confirmed the inherent sovereign power of Indian tribes to exercise governmental authority over their members and their territories, to engage in economic activity within their reservations, and to regulate such activity to raise revenues to support the governmental services they provide to their citizens. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983); *Cabazon*, 480 U.S. at 216, 219-22. Congress, moreover, has encouraged this exercise of tribal sovereignty. The Board asserts that the cases on which we rely are inapposite. It argues that the above attributes of tribal sovereignty, confirmed and protected by the Supreme Court in *Mescalero Apache Tribe* and *Cabazon* when threatened by *states*, are less cognizable or worthy of protection when placed in jeopardy by *federal* authority. NLRB Br. 36-38.

There is no basis for this distinction, and the Board's attempt to draw it—without support from the Interior Department or any other federal agency—demonstrates its ignorance of federal Indian law. The Supreme Court has consistently described the inherent powers of Indian tribes that deserve protection

from intrusions under federal law by referring to the same powers that are protected from state intrusion. *See, e.g.*, *Iowa Mutual*, 480 U.S. at 18 (citing three cases involving state intrusions on tribal sovereignty for the proposition that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty"); *Santa Clara Pueblo*, 436 U.S. at 59 (citing two cases involving state intrusions on tribal sovereignty for the proposition that subjecting "matters involving commercial and domestic relations" arising on the reservation "to a forum other than the one they have established for themselves" may infringe upon the authority of tribal courts).

Cases including *Mescalero Apache Tribe*, *Cabazon* and *Merrion* fully confirm the attributes of tribal sovereignty that the Band exercises in this case: (1) the power to engage in and regulate economic activity within the reservation, *Mescalero Apache Tribe*, 462 U.S. at 335-36; *Merrion*, 455 U.S. at 137, including gaming, *Cabazon*, 480 U.S. at 216, 219-22, and (2) the power to exclude nonmembers from the reservation, which encompasses the attendant power to regulate their conduct while they remain, *Mescalero Apache Tribe*, 462 U.S. at 333; *Merrion*, 455 U.S. at 144. The Board, moreover, makes no mention of *Montana v. United States*, 450 U.S. 544 (1981), which confirms another attribute of sovereignty exercised by the Band in this case: the "inherent sovereign power" of tribes to "regulate, through taxation, licensing, or other means, the activities of

nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* at 555. These sovereign powers support the Band's regulation of nonmember employees and nonmember unions pursuant to Articles XVI and XVII of the FEPC. *See* Band Br. 21 & n.2, 30-31.

2. In defending its order, the Board argues that the Band's public-sector labor laws and their implementation at LRCR should be viewed as mere work rules or personnel policies of a commercial enterprise. NLRB Br. 46. This argument reveals a serious misunderstanding of the attributes of tribal sovereignty involved in reservation gaming to raise governmental revenues, confirmed by *Cabazon* and the Indian Gaming Regulatory Act ("IGRA"). *See* Band Br. 22, 27, 31-33; Chickasaw Br. 4-12. More fundamentally, the Board's argument reflects a striking failure to comprehend the workings of a modern Indian tribal government exercising governmental powers encouraged by Congress. The Band's promulgation of Articles XVI and XVII, and its implementation of those provisions at its IGRA gaming operations, reflect carefully thought out public-policy decisions about how best to order its reservation economy, as well as the significant governmental undertaking of putting those decisions into practice.

For example, the Band's law requires labor organizations doing business at LRCR to apply and qualify for annual licenses, a critical exercise of regulatory

authority that ensures that outsiders engaged in reservation activity for economic gain (especially within an IGRA gaming facility) are properly vetted. *See* Record ("R.") 08.03.11, Parties' Stipulated Facts ("Stip.") ¶¶42-49, Appendix to Brief of Petitioner ("App.") 43-44. The law requires labor organizations and public employers to resolve bargaining impasses through mandatory interest arbitration, *id.* ¶¶58(c), 60(d), App.20-21, reflecting a policy preference for negotiated resolution of bargaining impasses instead of the use of raw economic force, *id.* ¶65, App.23. Like the public-sector labor laws of many states, moreover, the Band's law does not leave the final resolution of bargaining impasses over economic terms solely to a third-party arbitrator, but gives that prerogative to the Band's governing Tribal Council, *id.* ¶¶58(e), 60(e), 63(c)(ii), 65, App.20-23, reflecting the fact that economic terms in public-sector collective-bargaining agreements affect public finances, which are the responsibility of elected officials, not unaccountable outsiders, *see id.* ¶65, App.23 (Tribal Council has final say on economic terms "because such terms affect the treasury of the Band"). *See generally* Anderson and Krause, *Interest Arbitration: The Alternative to the Strike*, 56 FORDHAM L. REV. 153, 169-72 (1987) (discussing legal challenges to leaving resolution of economic terms to arbitrators).

The Band's law also requires parties alleging unfair labor practices to engage in good-faith settlement negotiations and, if those fail, to proceed to

binding arbitration, *id.* ¶¶58(b), 60(c), 63(c), App.19-23, reflecting a policy preference for a limited dispute-resolution process over other more cumbersome and costly alternatives, *id.* ¶65, App. 24. And it gives the Tribal Court certain adjudicatory powers, including authority to enforce licenses issued to labor organizations and the terms of collective-bargaining agreements, limited review of arbitrators' decisions resolving bargaining impasses and unfair labor practices, and authority to adjudicate employee claims for breach of the duty of fair representation by labor organizations and for discrimination by public employers or labor organizations. *Id.* ¶¶40, 59, 60(c), 60(e), App.2-21.

The Band's court exercises its powers in accordance with the Band's Constitution. *See* R.08-03-11, Joint Exhibit 1 (Constitution) Art. VI, § 8(a), App.70. And, in accordance with that Constitution, the Tribal Council exercised its authority to waive the sovereign immunity of its public employers to render them subject to suit under Articles XVI and XVII, including actions to enforce collective bargaining agreements. *See id.* Art. XI, § 1, App.75; *id.*, Stip. ¶59, App.47.

All of the above reflects hours upon hours of painstaking work by the Band's elected legislative branch (its Tribal Council), its executive, and its regulatory commission overseeing licensing. *See id.* ¶¶40-48, 57-65, App.10-24. All of it involves serious policy decisions about how best to regulate fundamental

economic relationships within the Band's jurisdiction. *See, e.g., id.* ¶¶57, 63, 65, App.22-24, 46. All of it reflects a substantial dedication of the Band's governmental resources to provide for the regulatory apparatus to make the law work as planned. *See, e.g., id.* ¶¶51-56, 67-69, 78 (App.17-19) (elections administration); ¶¶42-49 (App.15-17) (licensing administration); ¶¶70, 74-76 (App.25-26) (unfair-labor-practice and bargaining-impasse resolutions). And none of it is cost-free. For example, the Band retains a Neutral Election Official to oversee bargaining unit determinations and related union elections, it pays for a Tribal Court system that must be prepared to fulfill the responsibilities allocated to it under the laws, and it pays for the convening of arbitrators to resolve bargaining impasses and unfair labor practices. *See id.* ¶¶54-56, 67-69, 78 (App.18-19, 25, 27) (election official); ¶¶5, 17, 40, 59, 60(c), 60(e) (App.2, 6, 15, 20, 21) (Tribal Court); ¶¶58(b), 58(c), 60(c)-(d), 70, 74-76 (App.21, 25-26) (arbitrations).

The Board's attempt to characterize all of this work of the Tribe as the equivalent of a "personnel handbook" of a commercial enterprise (NLRB Br. 46; *see also id.* at 10 n.6 (citing Board decisions striking down work rules in public sector)) denigrates the Band's considered exercise of sovereign authority and reveals just how far removed this isolated federal agency is from the real world of Indian affairs. The Band's promulgation and implementation of its labor laws through its governmental institutions, including its Tribal Court, constitute the

work of a sophisticated, modern government, with the full support of Congress as expressed in the Indian Reorganization Act ("IRA"), IGRA, and the Band's own Reaffirmation Act, which expressly confirmed the Band's sovereign status and powers. *See* Band Br. 26-27, *see also Iowa Mutual*, 480 U.S. at 14-15 (referencing Congress' encouragement of modern tribal court systems).

This considered exercise of sovereignty is entitled to respect under the teachings of Supreme Court decisions the Board ignores. Time and time again, the Supreme Court has warned against attempts to treat Indian nations as "little more than private voluntary organizations." *Bryan v. Itasca County,* 426 U.S. 373, 388 (1976) (internal quotation marks omitted); *accord Merrion*, 455 U.S. at 140. The Board's attempt to do just that is an unacceptable affront to the Band's dignity as a government—no more acceptable than mischaracterizing a state's application of its carefully considered public-sector labor laws to its lottery operations, *cf.* Mass. Gen. Laws ch. 150E, §§1-3 (2009) (state lottery governed by state's public-sector labor law), or to any other economic activity that it might decide to undertake for the public good, *cf. 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) (state off-track betting facility governed by state's public-sector labor law).

3. The Board also asserts that its order striking down the Band's laws as applied to its IGRA gaming operations involves no "radical constraints" on the

Band's governance of that economic activity, that it does not "affect the Band's gaming operations," and that "nothing in the NLRA interferes with tribal management of IGRA gaming." NLRB Br. 51-52. This ignores the fact that everything just described will be laid to waste by the NLRB's order. The Board would upend the Band's careful public-policy judgments about the best way to regulate labor-management relations for the Band's own on-reservation economic activity, ranging from the prohibition of strikes and the management of conflict resolution to drug-testing policies and the oversight of labor-organization licensing. *See* Band Br. 32-36. The Board's suggestion that this would not destroy the Band's sovereign power to undertake and regulate economic activity betrays its lack of understanding of the sovereign powers that the Band has exercised and that its order, if upheld by this Court, would thwart.

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

As our opening brief explains (at 37-38), the NLRA does not expressly authorize the NLRB to prevent the Band from enacting and implementing public-sector labor laws. The Board does not contend otherwise. Instead it juxtaposes the fact that Congress enacted the IRA in 1934, committing the federal government to a course of encouraging tribal sovereignty that endures today, with a 1935 decision of the Supreme Court, *Superintendent of Five Civilized Tribes v. CIR*, 295 U.S. 418 (1935), holding that Indians are subject to general taxes. The Board

characterizes these as "[c]ontemporaneous events" that, in combination, "undermine any suggestion that Congress' failure to exclude Indian tribes from the NLRA's definition of 'employer' was inadvertent." NLRB Br. 26-27.

It is difficult to fathom how the Board could reach this conclusion, for *Superintendent of Five Civilized Tribes* had nothing to say about the application of federal statutes to *Indian tribal governments*. It addressed the application of federal law to *individual Indians*, and individual Indians obviously do not exercise sovereign power. The case, therefore, could not possibly inform Congress' position on the application of the NLRA to Indian tribes.

Far more germane is the commitment to tribal sovereignty shown by Congress' enactment of the IRA. As *amici* National Congress of American Indians *et al.* ("NCAI") explain in their brief (at 14-16), the path Congress took in 1934 to support and strengthen Indian tribal governments pursuant to the IRA is wholly incompatible with the notion that it intended to subject them to the requirements of the NLRA, which has no application to labor relations in the public sector.

And the Board's attribution of intentionality to Congress is again undermined by its own position in this case. According to the Board, by not specifically mentioning tribes in the NLRA, Congress intended to include them within its coverage in circumstances such as those presented by this case (circumstances which the 1934 Congress almost certainly did not have in mind),

while not including them in others, all without any indication as to how federal agencies (or federal courts) were to draw that line. This is hardly a sensible approach to statutory construction.[4]

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

The Tenth Circuit held in *Pueblo of San Juan* that the NLRA may not be applied to undermine an Indian nation's exercise of inherent sovereign authority absent express authorization by Congress. Rejecting our contention that this Court should reach the same conclusion here (*see* Band Br. 38-42), the NLRA argues that this case is different. The Board notes the Tenth Circuit's statement that "the general applicability of federal labor law [wa]s not at issue" there and implies that it is at issue here. NLRB Br. 29. But the general applicability of the NLRA is no more implicated by this case than it was by *Pueblo of San Juan*.

There is no dispute here about the general application of the NLRA to private-sector employers, including those in Indian country. Nor was there any dispute about that in *Pueblo of San Juan*. In that case, the Tenth Circuit held, over the Board's objection, that the Pueblo could enact and implement its right-to-work law with respect to a private on-reservation employer because (a) doing so was an exemplary exercise of sovereign authority, (b) the NLRB could show no clear

[4] The NLRB's attribution of intentionality to Congress also overlooks entirely the point that the NLRA Congress would have considered tribes to be federal instrumentalities, and hence would have perceived no need to expressly exclude them from the Act's coverage. *See* NCAI Br. 17-18.

intent on the part of Congress to divest the Pueblo of that authority, and (c) there was no reason to close the door on the Pueblo's exercise of that authority just because Congress failed to mention Indian tribes alongside other sovereigns that it permitted to enact and apply similar laws to private-sector employers. *See Pueblo of San Juan*, 276 F.3d 1192-96, 1200. There is nothing different about this case.

Here, as in *Pueblo of San Juan*, Congress left a realm open to other sovereigns. It excluded public-sector employers from the NLRA, and as in *Pueblo of San Juan*, there is no reason to treat Indian nations any differently than other public-sector employers. *See id.* at 1200; *see also Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1284 (10th Cir. 2010) (refusing to treat tribal governments differently than state governments under ERISA "absent an express statement or strong evidence of congressional intent"). If anything, this is an even stronger case for the tribe than *Pueblo of San Juan*, because it involves a sovereign's governance of itself within its territorial jurisdiction, not an attempt to govern a private employer.

Clinging to its erroneous view that the NLRA and other federal laws like it must be presumed to apply to Indian nations, the NLRB posits a "horrible hypothetical": the prospect that an Indian nation could readily "escape" the imposition of federal law merely by enacting a law of its own, as the Band has done here. NLRB Br. 44. The Pueblo of San Juan could be accused of "getting

away with" the same thing, *see* 276 F.3d at 1205 (Murphy, J., dissenting), but that did not deter the Tenth Circuit from faithfully applying federal Indian law and according respect to the integrity of tribal governments. Because the comity owed to Indian tribal governments is on a par with that owed to states, absent some clear indication from Congress, there is no reason that Indian tribes should not enjoy the same breathing room to make sensitive policy judgments that Congress has afforded to states. *See, e.g. Dobbs*, 600 F.3d at 1284; *Pueblo of San Juan*, 276 F.3d at 1200; *Reich* 4 F.3d at 495 (observing that "Indian tribes, like states, are quasi-sovereigns entitled to comity" and applying same comity owed to states "until and unless Congress gives a strong[ ] indication ... that it wants to intrude on the sovereign functions of tribal government"). This is especially true where, as here, the exercise of tribal sovereign authority is endorsed by Congress.

III. THE NLRB'S DECISION IS ERRONEOUS.

As our opening brief explains (at 42-55), the NLRB's framework is wrong and the Band would prevail under it even if the framework were right. The Board's arguments to the contrary are severely flawed and should be rejected.

A. The Board Employed The Wrong Framework.

The NLRB asks this Court to adopt a framework that it claims is (a) "derived from" *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), (b) "modified by" three "exemptions" developed in *Donovan v. Coeur*

d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985), and (c) "augmented by" the Board's own discretionary inquiry. NLRB Br. 11. Employing this ultra-qualified framework, the Board proclaims authority to decide when, and under what circumstances, the NLRA may be applied to Indian nations. By so doing, the NLRB cloaks itself with authority to engage in the business of divesting Indian nations of their sovereignty, a task that, in accordance with basic principles of federal Indian law, must be left to Congress. *See United States v. Wheeler,* 435 U.S. 313, 323 (1978); *Iowa Mutual Ins.*, 480 U.S. at 14. The Band and the Scholars have explained how the NLRB's framework is unmoored from fundamental principles of Indian law. *See* Band Br. 43-48; Scholars Br. 18-27.

In applying its framework, the Board "distinguish[es] commercial from governmental operations." NLRB Br. 34. The Board defends that distinction in this Court by arguing that "neither it nor the courts" have had "difficulty in distinguishing between the two categories." *Id.* at 35 (internal quotation marks omitted). *Amici* Chickasaw Nation *et al.*, however, have shown the practical difficulties of identifying "pure" or "traditional" governmental activity and of drawing a line in this context between the "commercial" and the "governmental." *See* Chickasaw Br. 18-21.

These distinctions are especially meaningless when it comes to the activities at issue here; for Congress has fully endorsed and encouraged the Band's

reservation gaming as an exercise of governmental power to further the Band's economic independence and enable it to build a strong and effective tribal government. Pursuant to Congress' goals under the IRA, IGRA, and the Reaffirmation Act, the Tribe's reservation economic activity—here, gaming—and the Tribe's regulation of that activity—here, its fully operational, carefully considered public-sector labor law—involve the exercise of the Band's authority as a modern Indian tribal government. *See Mescalero Apache Tribe*, 462 U.S. at 336 ("[W]hen a tribe undertakes an enterprise under the authority of federal law, an assertion of [external] ... authority must be viewed against any interference with the successful accomplishment of the federal purpose."). Indeed, as *amici* Chickasaw Nation *et al.* have pointed out, in IGRA Congress committed to Indian nations the regulation of employment relations within their reservation gaming operations. Chickasaw Br. 12-17. The abrogation of the Band's exemplary exercise of governmental authority would therefore obliterate Congress' own goal of encouraging the Band to exercise the very governmental authority at stake here. This would be an intolerable usurpation of congressional power.

In any event, the *Coeur d'Alene* framework has never been used to do what the Board seeks to do here: strike down the laws of an Indian tribe, enacted and implemented pursuant to its sovereign authority. Even the Ninth Circuit, which decided *Coeur d'Alene*, has suggested that it might not apply the framework when

a tribal law manifesting the exercise of tribal sovereignty is in place. *See Solis v. Matheson,* 563 F.3d 425, 433-34 (9th Cir. 2009).

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

1. The Board's framework governs only "a federal statute of general application." NLRB Br. 24. As our opening brief explains (at 48-49), the NLRA is not such a law because it does not apply to employment relations in the public sector. Indeed, the NLRB agrees that Indian tribes themselves can fall within that excluded sector. Thus, the Board itself ultimately recognizes that the NLRA is not a law of general application.

Citing *N.L.R.B. v. Chapa De Indian Health Program, Inc.,* 316 F.3d 995 (9th Cir. 2003), and *Navajo Tribe v. N. L. R. B.,* 288 F.2d 162 (D.C. Cir. 1961), the Board nevertheless claims that "[t]wo circuits agree" that the NLRA "qualifies ... as a general statute entitled to the *Tuscarora* presumption of applicability to Indian tribes." NLRB Br. 25. In both cases, however, the NLRA was applied to private-sector employers. *Chapa De Indian Health Program, Inc.* involved an off-reservation non-profit California corporation that provided health services to nearby Indian communities. *See* 316 F.3d at 1000. And *Navajo Tribe* involved a private company engaged in uranium mining on the Navajo Reservation. *See* 288 F.2d at 163. There is no dispute in this case about the application of the NLRA to private-sector employers, which do not exercise governmental powers.

2. Even if the Board could get out of the starting gate, the Band would satisfy the first exception under the NLRB's framework, because the order striking down the Band's laws interferes with its governance of purely intramural matters. *See* Band Br. 39-52. As the NLRB concedes, "the core of Indian sovereignty is governance of tribal members." NLRB Br. 49. The Band regulates its employment relationships with its own members pursuant to the labor laws the Board seeks to strike down, and its ability to do so depends on being able to apply exactly the same laws to nonmembers who work next to its tribal members. The Band cannot possibly impose two sets of rules—one on its members and another on nonmembers—without destroying its ability to maintain order, let alone governmental legitimacy.

The Board says this changes nothing, because "[a]ny individual resort employee—tribal member or non-member—... has a right [under the NLRA] to act collectively with his coworkers in dealing with the Resort," and therefore "[t]he Resort's labor relations, *even with member employees*, … cannot be described as exclusively intramural." NLRB Br. 49-50 (emphasis in original.) That reasoning suggests that the first exception would not apply as long as even a single employee was not a member of the tribe. The reasoning is thus flatly inconsistent with one of the Board's central justifications for its decision—that "[t]he majority of the [LRCR's] employees . . . are non-Indians" (R.03.18.13, App.14)—as well as with

the Board's emphasis throughout its brief that "most resort employees are not members of any Indian tribe" (NLRB Br. 5, 40, 45, 48-49). This flip-flop underscores the illogic and unworkability of the Board's position.

3. As our opening brief explains (at 52-55), Congress demonstrated its intent and understanding that Tribes are not covered by the NLRA by excluding them from Section 301 of the Act, a centerpiece provision that establishes a private right of action in federal court to enforce collective-bargaining agreements entered into pursuant to the NLRA. The NLRB asserts that this is wrong because "Congress can, and occasionally does, impose legal obligations on Indian tribes without necessarily subjecting them to private causes of action to enforce those obligations," particularly "where other avenues of relief are possible, as they are here in Board proceedings under the NLRA." NLRB Br. 55.

This does not answer the Band's point, which is that Section 301 is so central to the statutory scheme that it would make no sense for Congress to exclude tribes from that provision if it had intended to render them subject to the Act. Furthermore, while the lack of a private action may not matter when the NLRB can obtain an overlapping remedy in an unfair labor practice proceeding, that ordinarily will not be the case. As a general matter, the NLRB has "no authority to decide" liabilities under a collective bargaining agreement. *Metro. Detroit Bricklayers Dist. Council, Int'l Union of Bricklayers & Allied Craftsmen, AFL-*

CIO v. J. E. Hoetger & Co., 672 F.2d 580, 584 (6th Cir. 1982) (citing cases). Indeed, the Board itself has recognized that it "is not the proper forum for parties seeking to remedy an alleged breach of contract or to obtain specific performance of its terms." *United Telephone Company of the West*, 112 N.L.R.B. 779, 782 (1955).

As we explain in Point II.B.2, above, the Band has given authority to its Tribal Court to develop its own body of law to govern collective-bargaining agreements. This is in full accord with Congress' goal of encouraging tribal self-government, and in particular its recognition of the "vital role" of tribal courts. *Iowa Mutual*, 480 U.S. at 14. In exercising this authority, the Tribal Court will have the opportunity to examine and draw upon the case law developed by various state courts in the public-sector labor-relations arena. This is the very exercise of tribal sovereignty envisioned by Congress in the IRA, IGRA, and the Reaffirmation Act. There is no indication that Congress ever envisioned destroying it through operation of the NLRA. Quite the contrary, by not subjecting Indian tribes to suit under Section 301, Congress confirmed that the Act does not extend to them.

CONCLUSION

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

Respectfully submitted this 29th day of August, 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 6,800 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Dated: August 29, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2013, I served this Reply 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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