

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case Nos. 13-1569/13-1629

Saginaw Chippewa Indian Tribe of Michigan,
Petitioner/Cross-Respondent,

v.

National Labor Relations Board,
Respondent/Cross-Petitioner.

BRIEF OF AMICUS CURIAE AMERICAN INDIAN LAW SCHOLARS
IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, Amicus Curiae American Indian Law Scholars have no corporate status and therefore no subsidiaries or subordinate companies, and no affiliate companies that have issued shares to the public.

IDENTITY AND INTERESTS OF AMICUS CURIAE¹

This brief is filed on behalf of a group of legal scholars (“American Indian Law Scholars”) who study and write about American Indian Law, including authors of the leading casebooks, treatises, and articles in the field. Several members of this group are law professors who live and work in the Sixth Circuit. In addition, some members are participants in the American Law Institute’s section on American Indian Law and engaged in the project of drafting a Restatement of American Indian Law. The interest of the American Indian Law Scholars is in ensuring the coherent development of the field, consistent with its foundational principles. Toward that end, the brief is intended to provide specialized expertise and perspectives that may be of assistance to the Court in considering this case.

¹ All parties have consented to the filing of this brief. No person or entity other than the members of the group American Indian Law Scholars made any monetary or other contribution to the drafting or filing of this brief. Law school affiliations are noted only for purposes of identification.

Summary of Argument

This Court must decide whether a federal statute that is silent with respect to tribes nonetheless applies to tribal governmental activities. The National Labor Relations Act (the NLRA) imposes requirements on private employers regarding actions toward labor unions. 29 U.S.C. §158(a)(1). The NLRA explicitly exempts federal and state governments from its definition of employer, but does not mention American Indian tribes one way or the other. 29 U.S.C. § 158(a)(3). In addition, there is a dearth of legislative history on the subject. *See NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1196 (10th Cir. 2002) (“[N]either the legislative history of the NLRA, nor its language, make any mention of Indian tribes.”).

In the decision below, the National Labor Relations Board (the NLRB) determined, despite the absence of direction from Congress, that its jurisdiction extends to tribal governments. *See Soaring Eagle Casino and Resort, an Enterprise of the Saginaw Chippewa Indian Tribe of Michigan and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America*, 359 NLRB No. 92, 2013 WL 1646049 (April 16, 2013). The NLRB’s decision is incorrect. The NLRB erred when it applied an interpretive approach of recent vintage that leads courts and administrative bodies to stray beyond their institutional competence and

expertise, while also usurping congressional prerogatives and eroding tribal sovereignty.

As a general matter, principles of statutory construction require courts to give effect to congressional intent, whether that intent is found in the plain text of the statute or by resort to legislative history. *See Milner v. Dep't of the Navy*, 131 S.Ct. 1259, 1264-66 (2013). When a statute's text provides no clues and the legislative history is arguably equivocal,² courts face the question of the proper starting point. They must choose what set of presumptions to apply to fill the gap left by congressional silence. In other words, given that courts cannot go back and ask the Congress of 1935 what it was thinking about tribes when it passed the NLRA, courts must choose an interpretive stance. The decision this Court must make is whether to apply the interpretive principles that the Supreme Court has employed for two centuries in cases involving statutes, treaties, regulations, and executive orders that affect American Indian tribal sovereignty and treaty rights, or instead to adopt an approach that a small number of lower federal courts has developed recently from language in a single Supreme Court case, which

² There is a strong argument that even under ordinary principles of statutory construction, the Court should conclude that the NLRA does not apply to tribes. Assuming, however, that the Court will nonetheless apply one or another set of interpretive principles due to the NLRA's silence, this Brief addresses the question of which set of principles to apply.

itself was not interpreting congressional silence. *See Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960).

The Indian law rules of interpretation require Congress to be clear when it deprives tribes of sovereignty or treaty rights, and call for doubtful expressions of congressional intent to be resolved in favor of tribes. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-203 (1999); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59-60 (1978); *see generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02[2], at 116-19 (Nell Jessup Newton ed., 2012) [hereinafter, COHEN'S HANDBOOK]. These interpretive principles are grounded in American Indian tribes' pre-constitutional status as sovereigns, the unique trust relationship between the federal government and tribes, and the tension between that relationship and Congress's expansive power to alter, modify, and even abrogate tribal rights, often described as Congress's "plenary power" in Indian affairs. *See Santa Clara Pueblo*, 436 U.S. at 56, 72. Given Congress's plenary power as well as the federal government's trust relationship, the Indian law interpretive principles function to require Congress to be clear when it exercises its broad powers to diminish tribal sovereignty. *See id.* at 72. This stance has the benefit of restraining courts from straying into the unguided territory of

discerning the scope of tribal sovereignty, allowing them instead to defer to Congress in a realm constitutionally committed to that branch's power and expertise.

The NLRB, instead of seeking clear direction from Congress, presumed that silence should be interpreted to allow the NLRA to apply to tribal governments. This opposite presumption derives from the following language in *Tuscarora*, 362 U.S. at 116: "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." That statement was not necessary to the *Tuscarora* holding, and was limited to the circumstances of individual Indian property interests or property held by tribes that was equivalent to non-Indian holdings. *See id.* at 112, 116. In addition, the Supreme Court has never applied the *Tuscarora* language in a subsequent case. To the contrary, the Supreme Court has repeatedly applied the Indian law rules of interpretation to statutes of general application, as well as statutes that apply specifically to tribes. Nonetheless, the "*Tuscarora* rule," as it has become known, has been adopted by one court, *see Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985), and has affected the approach and reasoning of another. *See San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1312 (D.C. Cir. 2007). These cases

misapply core federal Indian law principles and create an unnecessarily convoluted approach to defining the contours of tribal sovereignty.

This Court does not have to follow the *Tuscarora* path. Instead, the Court should adhere to federal Indian law and look to Congress for clear statements of deprivations of tribal rights. *See NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1192, 1197 (10th Cir. 2002) (finding that the NLRA does not clearly preempt tribe's right to pass right-to-work ordinance). This approach is consistent with long-standing principles of judicial restraint, and comports with the relative competencies and structural capacities of each branch of the federal government. Adhering to federal Indian law principles is also consistent with contemporary federal policies of promoting tribal-self government and economic self-sufficiency.

I. Foundational Principles of Federal Indian Law Support a Requirement of Clear Congressional Intent Before Finding Deprivations of Tribal Sovereignty

The Supreme Court has long recognized that Indian tribes are “distinct, independent political communities, retaining their original natural rights” of self-governance. *Worcester v. Georgia*, 31 U.S. 515, 559 (1832); *see also Santa Clara Pueblo*, 436 U.S. at 56 (describing tribes as “separate sovereigns pre-existing the Constitution.”); *Pueblo of San Juan*, 276 F.3d at 1192. The interpretive rules that apply to cases involving tribal sovereignty

and treaty rights flow from that venerable and enduring recognition. As the Supreme Court has stated, “[T]he standard principles of statutory interpretation do not have their usual force in cases involving Indian law.” *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). These principles derive from the relationship between the United States and Indian tribes, which at its core recognizes tribes’ sovereign powers over their members and territory.

The basic Indian law interpretive rules include the following: First, treaties, agreements, statutes, and executive orders are liberally construed in favor of tribes. *See Oneida Indian Nation*, 470 U.S. at 247 (1985); *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 846 (1982); *Worcester*, 31 U.S. at 551-57 (1832). Second, ambiguities or doubtful expressions in statutory text are resolved in the tribes’ favor. *See McClanahan v. State Tax Comm’n of Arizona*, 411 U.S. 164, 174 (1973); *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 634 (1970); *Winters v. United States*, 207 U.S. 564, 576-77 (1908). Third, and most relevant here, tribal sovereignty and property rights are preserved unless Congress’s intent to the contrary is clear. *See Mille Lacs Band*, 526 U.S. at 202 (1999); *United States v. Dion*, 476 U.S. 734, 739-40 (1986); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149, n.14 (1982); *Santa Clara Pueblo*, 436 U.S. at 59-

60. Significantly, as discussed further below, the Supreme Court has applied the “clear Congressional intent” requirement to statutes of general application as well as to laws and treaties that affect tribes specifically. *See, e.g., Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 17-18 (1987); *Dion*, 476 U.S. at 738; *Merrion*, 455 U.S. at 149, 151-52.

A. Origins and Justifications for the Indian Law Principles of Interpretation

The origins of Indian law’s principles of interpretation lie in the unique relationship between American Indian tribes and the federal government. That relationship, characterized as the federal trust obligation, recognizes that tribal sovereignty predates the U.S. Constitution and that tribes have nonetheless been incorporated into the domestic legal framework. *See Oneida Indian Nation*, 470 U.S. at 247 (describing Indian law interpretive rules as “rooted in the unique trust relationship between the United States and Indians.”); *Santa Clara Pueblo*, 436 U.S. at 60 (respect for tribal sovereignty and congressional authority cautions courts “to tread lightly in the absence of clear indications of legislative intent.”). In most circumstances, federal/tribal relations originated with treaty negotiations. *See COHEN’S HANDBOOK* § 1.03[1], at 23-30 (2012 ed.) (describing early treaty-making period). Indian tribes retained control over their members and territory while ceding their powers of foreign relations. *See id.*; *see also*

Worcester, 31 U.S. at 559; *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). Also from early in our legal history, the Supreme Court interpreted Indian treaties as reservations by tribes of any rights not otherwise ceded, rather than as grants of rights from the U.S. See *Worcester*, 31 U.S. at 554; *United States v. Winans*, 198 U.S. 371, 381 (1905); *Winters*, 207 U.S. at 576-77. More than two centuries after the Founding, these principles remain in force; Indian tribes retain critical aspects of internal sovereignty, and the United States explicitly recognizes a continuing government-to-government relationship with tribes.

Tribes' retained inherent sovereignty includes the power to make their own laws, *Williams v. Lee*, 358 U.S. 217, 221-23 (1959); to tax tribal members and nonmembers, *Merrion*, 455 U.S. at 137; *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 201 (1985); to regulate the conduct of members and nonmembers, *Montana v. United States*, 450 U.S. 544, 557 (1981); to impose criminal jurisdiction on their own members and members of other tribes, *United States v. Wheeler*, 435 U.S. 313 (1978); *United States v. Lara*, 541 U.S. 193 (2004); and to operate free of state laws and regulations within tribal territory. See *McClanahan*, 411 U.S. 164, 181 (1973); *Williams*, 358 U.S. at 223.

Tribes' inclusion in the United States has also been accompanied by limited divestments of their pre-contact sovereignty, including the power to engage in foreign affairs, *Cherokee Nation*, 30 U.S. at 17; the power to transfer fee title in aboriginal property to anyone other than the federal government, *Johnson v. M'Intosh*, 21 U.S. 543, 587-88 (1823); and, according to a relatively recent line of Supreme Court cases, the power to subject non-Indians to criminal jurisdiction and to govern non-Indian activity on non-Indian lands within reservation boundaries, subject to certain important exceptions. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 211 (1978) (holding that tribes were implicitly divested of the power to subject non-Indians to criminal jurisdiction); *Montana*, 450 U.S. at 557, 565-66 (holding that while tribes retain considerable authority over non-Indians on trust lands, they are presumed to lack regulatory authority over non-Indians on non-Indian fee land, subject to two key exceptions); *see also Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) (applying *Montana* approach to power to tax); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (applying *Montana* to judicial jurisdiction). Notwithstanding these limited judicial limitations on tribal powers, the Supreme Court has repeatedly recognized tribes' sovereign authority over economic and commercial activity within tribal territorial boundaries, including the power to regulate

the conduct of non-Indians. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 332-33 (2008); *see also Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 813-14, 817-19 (9th Cir. 2011) (upholding tribal authority to regulate conduct of non-Indian who had engaged in lengthy commercial relationship with the tribe on grounds of inherent authority over tribal lands and consensual relationship with tribe).

The Supreme Court has also held that Congress has the authority to alter the boundaries of tribal sovereignty, including the power to diminish tribal governmental powers, or to restore inherent powers that the Court or Congress had previously stripped away. *See Lara*, 541 U.S. at 200 (2004). One potential source of this expansive authority is the Indian Commerce Clause, which vests in Congress the power to regulate commerce with the Indian Tribes. U.S. Const. art. I, § 8, cl. 3; *see McClanahan*, 411 U.S. at 172 n.7. Another is the structure of the Constitution and the United States' own status as a sovereign, with the power to state the terms on which it will treat the political entities within its borders. *See Lara*, 541 U.S. at 200. At one time this power, which the Supreme Court has described as plenary, was deemed to be nearly absolute, in that congressional actions depriving tribes of property and treaty rights were unreviewable by the federal courts. *See*

Lone Wolf v. Hitchcock, 187 U.S. 553, 566-68 (1903). That understanding has been rejected. *See United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968). Today, congressional plenary power is understood to include the ability, exclusive of states, to modify tribal rights and powers, including to restore powers diminished by the Supreme Court. *See Lara*, 541 U.S. at 202-203.

B. The Clear Congressional Intent Requirement

Together, tribes' retained inherent sovereignty, the federal government's trust relationship with tribes, and Congress's plenary power over Indian affairs serve as the bases for the Indian law canons of interpretation. While Congress's power is no longer understood as absolute, it is nonetheless established that Congress can abrogate or modify treaty rights, *see Dion*, 476 U.S. at 739-40, as well as diminish tribal sovereign powers, *see Santa Clara Pueblo*, 436 U.S. at 72; *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 758-59 (1998). Tribes have little recourse in Congress if the majority decides to engage in either of those methods of eroding tribal rights. The courts, therefore, play the institutionally appropriate role of requiring Congress to be clear when it exercises its prerogatives. *See Santa Clara Pueblo*, 436 U.S. at 72. As discussed below,

the clear expression principle protects attributes of tribal sovereignty arising from either treaty rights or from federal common law, as the Supreme Court recognized in *United States v. Dion*, 476 U.S. 734 (1986), which involved the impact of the Eagle Protection Act on treaty rights, and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), which related how the federal diversity jurisdiction statute interacted with inherent tribal sovereignty rights.

This not only protects tribes subject to a majoritarian political process, but also safeguards the structural relationship between tribes and the federal government that has been recognized since the founding of the country and enshrined in the Constitution. *See Lara*, 541 U.S. at 200 (Indian commerce and treaty clauses, as well as structure of the Constitution, provide bases for expansive congressional power). The Indian law canons are therefore a crucial aspect of the architecture of federal Indian law, which strikes a delicate balance between preserving tribes' retained inherent sovereignty and deferring to the political branches both to honor tribal rights consistent with the trust relationship and to regulate tribes consistent with congressional power.

While the Indian law interpretive rules are distinct, they are similar to approaches that courts apply regularly in the federalism and separation of powers contexts. For example, Congress has broad, but not unlimited,

powers to regulate states. Because the line between permissible and impermissible regulation is difficult for courts to police, the Supreme Court requires Congress to be clear when it intends regulations to apply to state governmental functions. *See Gregory v. Ashcroft*, 501 U.S. 452, 469-70 (1991); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985). Similarly, Congress must use clear language when it intends to waive state sovereign immunity from suit, *see Dellmuth v. Muth*, 491 U.S. 223, 228 (1989), and when it intrudes on Executive Branch functions, *see Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). These interpretive approaches operate similarly to the Indian law rules, and protect similar values. They call on judicial expertise about the core values enshrined in our Constitution and governmental structure, and simultaneously employ an appropriately restrained method for protecting those values without intruding on the more democratic branches of government.

II. The *Tuscararora* Language is Inconsistent with Supreme Court Precedent and Harmful to Tribal Self-Governance

The NLRB, rather than looking for clear congressional intent, resorted to the opposite presumption, which is that statutes that are silent with respect to tribes should nonetheless apply to them. *Soaring Eagle Casino and Resort, an Enterprise of the Saginaw Chippewa Indian Tribe of Michigan*

and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, 359 NLRB No. 92, 2013 WL 1646049 (April 16, 2013). The NLRB relied primarily on its own previous decision in *San Manuel Indian Bingo & Casino*, 341 NLRB 1055 (May 28, 2004), which determined that the NLRA applied to a tribe's operation of a casino and resort. *Soaring Eagle*, 2013 WL 1646049 at *9, 11. The NLRB relied on *Tuscarora*'s language indicating that statutes of general application apply to Indians. *Id.* at * 9. To understand how the NLRB got it wrong, it is necessary to excavate the origins of the Supreme Court's statement in *Tuscarora*, and also to unravel the path that a small number of lower courts have taken since then.

A. *Tuscarora* Did Not Interpret Congressional Silence to Erode Tribal Rights

In *Tuscarora*, the Supreme Court held that the Federal Power Act (the FPA) authorized the condemnation of land owned by the Tuscarora Indian Nation for the purpose of constructing a reservoir and hydroelectric facility on the Niagara River. 362 U.S. at 123-24. At issue in the case was whether the Tuscarora's land, owned in fee simple by the Tribe, qualified as a "reservation" under the terms of the FPA. *Id.* at 110. If so, the FPA required a finding that the license (and therefore the condemnation of land to facilitate the license) would not interfere with the purpose of the reservation.

Id. at 110-11. If not, then the Tuscarora’s land could be condemned without any additional process. *Id.*

The *Tuscarora* Court analyzed the FPA’s plain language as well as its legislative history and concluded that Congress’s intent was clear; any lands other than those owned by the United States were not included in the definition of “reservation” in the Act. *Id.* at 111-13. First, the Court stated: “The plain words of this definition seem rather clearly to show that Congress intended the term ‘reservations,’ . . . to embrace only ‘lands and interests in lands owned by the United States.’” *Id.* at 111. Next, the Court reviewed the congressional record and found it replete with evidence supporting the conclusion that “reservations” meant lands owned by the United States. *See id.* at 112-13. The Court, after this extensive contemplation of the FPA’s text and legislative history, concluded that “This analysis of the plain words and legislative history of the Act’s definition of ‘reservation’ and of the plan and provisions of the Act leaves us with *no doubt* that Congress . . . intended to and did confine ‘reservations,’ including ‘tribal lands embraced within Indian reservations’, to those located on lands ‘owned by the United States.’” *Id.* at 114 (emphasis added).

Only after the Court’s conclusion about Congress’s clear intent did it address the question of whether, notwithstanding the FPA’s language and

history, the Court should nonetheless carve out an exception for *Tuscarora*'s fee lands. *See id.* at 115-16. In that context that the Court stated: “[I]t 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.* at 116. In support of this proposition, the Court cited only to decisions upholding federal or state taxes imposed on individual Indians. *See id.* at 116-17. The *Tuscarora* Court’s language—“all *persons* includes Indians and their *property interests*”—as well as the context and supporting authority indicate that the Court was stating nothing other than the unsurprising proposition that when Indians earn income or own property on terms identical to non-Indians, they are subject to the same strong tax law presumptions of applicability as anyone else. *See id.* (emphasis added).

Tuscarora's approach was wholly consistent with the requirement that courts find evidence of clear congressional intent to erode tribal rights. The FPA was not silent with respect to the definition of Indian reservation lands, and therefore *Tuscarora* sheds no light on how the Supreme Court would interpret a statute that had not contemplated its effects on tribes one way or another.

B. The Supreme Court Has Never Applied the *Tuscarora* Language in Subsequent Cases but Has Applied the Clear Congressional Intent Canon

Tuscarora was decided in 1960. The Supreme Court has since issued many decisions addressing tribes' sovereign powers and treaty rights, including cases that have construed statutes of general applicability. The Court has never once applied the so-called *Tuscarora* doctrine to decide whether a statute should be interpreted to interfere with or abrogate tribal rights. In fact, the Court has employed the opposite presumption in determining whether a federal statute abrogates Indian rights.

First, as a general matter, the Supreme Court has cited and applied the "clear congressional intent" rule in many Indian law cases since 1960. In *Oneida Indian Nation*, the Court rejected a statutory argument raised by the parties opposing the Oneida Indian Nation's land claims, stating: "The Court has applied . . . [the] canons of construction *in nontreaty matters*. Most importantly, the Court has held that congressional intent to extinguish Indian title must be 'plain and unambiguous.'" 470 U.S. at 247-48 (emphasis added). Even more recently, in *Mille Lacs Band*, the Court refused to conclude that legislation admitting Minnesota to the Union had the effect of abrogating the Tribe's treaty rights: "In making this argument, the State faces an uphill battle. Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so." 526 U.S. at 202. Other cases citing the Indian law canons since 1960 include: *White Mountain Apache Tribe v.*

Bracker, 448 U.S. 136, 143 (1980); *Santa Clara Pueblo*, 436 U.S. at 59-60; *Menominee Tribe*, 391 U.S. at 412; *see also* COHEN’S HANDBOOK § 2.02[1], at 114 (listing cases citing the clear congressional intent rule).

Of even greater relevance to the question of how to interpret the NLRA, the Supreme Court applied the clear congressional intent rule to two cases involving statutes of general applicability. In *United States v. Dion*, the Court addressed whether the Bald and Golden Eagle Protection Act (the BGEPA) abrogated a tribal member’s right to hunt eagles within the boundaries of his reservation. 476 U.S. 734, 735-36 (1986). The BGEPA prohibits the taking of eagles throughout the country, and the tribal member relied on a reserved treaty right to hunt and fish rather than an explicit treaty term. *Id.* at 736-37. Nonetheless, the Court required “clear evidence that Congress actually considered the conflict between its intended action on the one hand, and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.” *Id.* at 739-40. The Court found sufficient evidence in the BGEPA’s text and legislative history, including a provision allowing tribes to apply for special permits to take eagles for religious purposes, to conclude that Congress did have the requisite clear intent. *See id.* at 740-45.

In *Iowa Mutual Insurance Co. v. LaPlante*, 480 U. S. 9 (1987), the question was whether the federal diversity statute, 28 U.S.C. § 1332, which authorizes federal court jurisdiction over non-federal question cases when the parties are citizens of different states, applied to a matter filed in a tribal court by a tribal member against a non-Indian defendant. 480 U.S. at 11. The diversity statute, like the NLRA, does not mention tribes. Further, *Iowa Mutual* involved the issue of whether a tribal court could hear a case against a non-Indian. The Court did not decide that precise question, opting instead to remand the case to the district court for consideration of whether the parties should exhaust their remedies in tribal court. *See id.* at 19-20. Importantly, however, the Court soundly rejected the argument that the diversity statute applied to oust tribal court jurisdiction automatically, even in a case involving a non-Indian: “The diversity statute makes no reference to Indians and nothing in the legislative history suggests any intent to render inoperative the established federal policy promoting tribal self-government.” *Id.* at 17. The Court concluded that: “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.” *Id.* at 18.

Dion and *Iowa Mutual*, along with many other Indian law cases decided since 1960, have embraced the Indian law rules of interpretation. Not only has the Supreme Court never applied the *Tuscarora* language in a subsequent case, but it has repeatedly made directly contradictory statements when deciding cases affecting tribal rights. This makes clear that the Supreme Court has marginalized its own language in *Tuscarora* concerning statutes of general applicability.

C. Lower Courts Have Misapplied *Tuscarora*

Despite the Supreme Court's repeated application of the clear congressional intent rule, including in cases interpreting statutes of general applicability, two Ninth Circuit decisions have extended the dictum of *Tuscarora*. *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985); *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980). First, in *Farris*, the court held that the Organized Crime Control Act applied to a large-scale gambling business on a reservation. 624 F.2d at 894. In an opinion by Judge Choy, joined by neither of the two other judges on the panel, the court stated that, "federal laws generally applicable throughout the United States apply with equal force to Indians on reservations." *Id.* at 893. Strangely, Judge Choy does not cite to *Tuscarora* nor to any authority for that proposition, but after the following sentence in the opinion, he cites to a list of cases

comprising only authorization for federal criminal jurisdiction over crimes by individual Indians. *See id.* *Farris* itself is therefore arguably consistent with the appropriately limited understanding of *Tuscarora* (despite the fact that it never actually cites *Tuscarora*) because it applied a federal criminal statute of general application to individual Indians, rather than to tribes or to tribal treaty rights or sovereign powers.

The next case, however, took another step along the *Tuscarora* path, holding that the Occupational Safety and Health Act (OSHA) applied to a tribal enterprise, notwithstanding OSHA's silence with respect to tribes. *Coeur d'Alene*, 751 F.2d 1113. In *Coeur d'Alene*, the court began its analysis by recognizing that tribes have the "inherent sovereign right to regulate the health and safety of workers in tribal enterprises." *Id.* at 1115. The court then also acknowledged Congress's expansive authority in Indian affairs, and that the appropriate question was whether "Congress *intended* to exercise its plenary authority over Indian tribes." *See id.* Immediately after those sentences, however, the court abandoned all effort to discern congressional intent, and instead applied the *Tuscarora* dictum as if it were settled law. *See id.* at 1115-16. The *Coeur d'Alene* court flipped the normal Indian law presumptions, stating that, "we have not adopted the proposition that Indian tribes are subject only to those laws of the United States

expressly made applicable to them. Nor do we do so here.” *Id.* 1116.

Notably, *Coeur d’Alene* did not cite or discuss any of the Supreme Court cases decided after *Tuscarora* (and discussed above) that adopt and apply the exact opposite proposition. Having announced its own rule concerning the presumption from congressional silence, the *Coeur d’Alene* court then also embraced its own exceptions to that rule: “A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches ‘exclusive rights of self-governance in purely intramural matters’; (2) the application of the law to the tribe would ‘abrogate rights guaranteed by Indian treaties’; or (3) there is proof ‘by legislative history or some other means that Congress intended the [the law] not to apply to Indians on their reservations’” *Id.* (quoting *Farris*, 624 F.2d at 893-94). The court then held that none of the exceptions to the newly-minted rule applied. *Id.* at 116-18.

The *Coeur d’Alene/Farris* rule contradicts the Indian law rules of interpretation, and also conflicts with a multitude of decisions that address the boundaries of tribal regulatory authority. In analyzing its first exception, *Coeur d’Alene* baldly stated, “The operation of a farm that sells produce on the open market and in interstate commerce is not an aspect of tribal self-government.” 751 F.2d at 1116. The court bolstered its conclusion with the

observation that the tribal enterprise employed non-Indians. *See id.* Yet the Supreme Court has repeatedly held that tribes' retained inherent power to regulate commercial operations located on tribal lands is one of the core aspects of tribal self-governance, and includes authority over non-Indians. *See Plains Commerce Bank*, 554 U.S. at 332-33; *Strate*, 520 U.S. at 446; *Montana*, 450 U.S. at 557; *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152-53 (1980); *Williams*, 358 U.S. at 223 (1959). By ignoring federal Indian law's interpretive principles, the *Coeur d'Alene* court arrogated to itself the power to declare what qualifies as tribal self-government. *See* 751 F.2d at 1116-17. Worse, it did so in a context separate from, and inconsistent with, the Supreme Court's many decisions on these very issues. The court anointed itself the arbiter of two subjects—whether statutes apply to tribes and what counts as a legitimate exercise of tribal sovereignty—in the absence of congressional direction and contrary to Supreme Court precedent.

Finally, in one of only two published cases addressing whether the NLRA applies to tribes, the D.C. Circuit attempted to “reconcile” the clear congressional intent rule with *Tuscarora*. *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1312 (D.C. Cir. 2007). Like *Coeur d'Alene*, the *San Manuel* court began by acknowledging the limited nature of

Tuscarora's language: "*Tuscarora*'s statement is of uncertain significance, and possibly dictum, given the particulars of that case." *Id.* at 1311. Yet the court did not apply the *Dion/Iowa Mutual* approach of looking for clear evidence that Congress considered the conflict between a non-Indian law statute and tribal sovereign powers or treaty rights and chose to resolve it against the tribes. Instead, *San Manuel* overlooked both of these cases, stating that, "We have found no case in which the Supreme Court applied this principle of pro-Indian construction when resolving an ambiguity in a statute of general application." 475 F.3d at 1312.

Having failed to find the two most relevant Supreme Court cases (*Dion* and *Iowa Mutual*), the *San Manuel* court endeavored instead to find a middle ground between the *Coeur d'Alene* approach and the clear congressional intent rule. *San Manuel*'s compromise consisted of "recognizing that, in some cases at least, a statute of general application can constrain the actions of a tribal government without at the same time impairing tribal sovereignty." 475 F.3d at 1312. In other words, if the court determined (as it did) that the NLRA's infringement on tribal sovereignty was "negligible," or "modest," *id.* at 1315, then it could avoid the Indian law rules and go directly to the *Coeur d'Alene* doctrine, which presumes that a general statute applies to tribes.

There are two problems with *San Manuel*'s compromise. The first is logical. There is no distinction between "constraining tribal government" and "impairing tribal sovereignty." To impair the actions of a government is to constrain its sovereign powers. The *San Manuel* court seemed to recognize this, in that later in the opinion it adopted the language of "minimal" or "negligible" intrusions on tribal sovereignty. *See id.* at 1315.

The second problem with the *San Manuel* approach is that it puts courts in the position of assessing the degree of harm to tribal sovereignty, the very position that the Indian law interpretive rules caution against. *See Santa Clara Pueblo*, 436 U.S. at 55-56. The *San Manuel* decision mentioned the many Supreme Court cases that have acknowledged tribal sovereign status, recognized tribal primacy over commercial activity on tribal lands, and ousted the application of non-tribal laws. *See* 475 F.3d at 1312-13 (citing and discussing *Santa Clara Pueblo*, 436 U.S. at 55-56; *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987); and *Williams*, 358 U.S. at 223). And yet, in the very next part of the opinion, the court swept away the implications of these cases and embarked on its own free-wheeling analysis of how much harm to tribal self-governance is enough to constitute an erosion of tribal sovereignty. *Id.* at 1314-15. The court put itself in the unnecessary position of second-guessing

centuries of Supreme Court precedent, as well as congressional prerogatives that have recognized the significance of gaming to tribal economic development. *See id.* at 1317-18 (discussing but then ignoring the Indian Gaming Regulatory Act's application to the case). This approach flatly contradicts the Supreme Court's repeated admonition that courts should not interfere with current federal goals of promoting tribal economic and governmental independence. *See, e.g., New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-35 (1983); *Bryan v. Itasca County*, 426 U.S. 373, 389 n.14 (1976). In short, *San Manuel*, despite an earnest attempt to harmonize the clashing approaches of the Supreme Court and the Ninth Circuit, simply reinserted the *Coeur d'Alene* court's unguided analysis of tribal sovereignty at the front end of its reasoning rather than having it tacked on as an exception at the end.

The Ninth and D.C. Circuit decisions unjustifiably expand the *Tuscarora* dictum. Nonetheless, the harm can be stopped where it is. As discussed above, Supreme Court cases have applied the clear congressional intent approach consistently since *Tuscarora*. And as described below, the Tenth Circuit has charted a better path that is consistent with Supreme Court precedent.

III. Principles of Judicial Restraint Point to Deferring to Congress on Questions of Tribal Sovereignty

With no Supreme Court guidance on the precise question here—whether the NLRA applies to tribes—this Court has a choice to make. It can either hew to what the Supreme Court has said to date about the Indian law rules of interpretation, or it can deviate from that known path, joining the Ninth and D.C. Circuits in fashioning a new approach of assessing degrees of harm to tribal sovereign powers. If this Court opts for the former approach, it will not be alone. The Tenth Circuit has held that the NLRA does not preempt tribal law-making authority, *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1200 (10th Cir. 2002), and other circuits have either explicitly or by implication rejected the *Coeur d’Alene* rule. *See E.E.O.C. v. Fond du Lac Heavy Equip. & Const. Co., Inc.*, 986 F.2d 246, 249 (8th Cir. 1993); *Reich v. Great Lakes Indian Fish & Wildlife Comm’n*, 4 F.3d 490, 494-95 (7th Cir. 1993).

A. *Pueblo of San Juan* Correctly Held That the NLRA Did Not Interfere with Inherent Tribal Authority

In *Pueblo of San Juan*, the San Juan Pueblo enacted a right-to-work ordinance and adopted a lease containing right-to work provisions. 276 F.3d at 1188. The Pueblo’s actions were challenged by the NLRB, which argued that the NLRA’s prohibitions on right-to-work laws applied to the Pueblo.

Id. at 1189-90. The NLRA exempts states and territories from the right-to-work prohibition, but the NLRB interpreted this exception narrowly. *See id.* at 1190-91. The court, in rejecting the NLRB's position, placed the burden on the NLRB to establish clear congressional intent necessary to preempt tribal labor and employment laws, and held that it failed to meet that burden. *Id.* at 1192.

The *Pueblo of San Juan* court's analytic point of departure was to consider whether the Pueblo had the sovereign authority to pass its right-to-work ordinance. *See id.* at 1192-93. If so, then the next step was to discern whether the NLRB could meet its burden of showing clear congressional intent to preempt the Pueblo's law-making authority. *See id.* at 1194-1200. The court began its discussion of the first question with the observation that "Indian tribes are neither states, nor part of the federal government, nor subdivisions of either. Rather they are sovereign political entities possessed of sovereign authority not derived from the United States, which they pre-date." *Id.* at 1192. The court noted in particular that tribes' authority includes the power to "regulate economic activity within their own territory." *Id.* at 1192-93. The court then acknowledged the Supreme Court cases, discussed above, that limit tribal inherent powers in the context of non-Indian activity. *See id.* at 1193. The court concluded that those

precedents did not diminish the Pueblo's authority to regulate labor and employment relations in the context of "consensual commercial dealings" between the Pueblo and the non-Indian companies to whom the labor laws would apply. *See id.* at 1193.

The *Pueblo of San Juan* court's approach has the distinct advantage of incorporating the Supreme Court's well-developed case law regarding tribal inherent powers into its assessment of whether the tribe's labor and employment laws are exercises of sovereignty. This contrasts sharply with the *Coeur d'Alene* and *San Manuel* approaches, which proceed as if that line of cases either did not exist or was irrelevant. *See Coeur d'Alene*, 751 F.2d at 1115; *San Manuel*, 475 F.3d. at 1312-14. Next, the *Pueblo of San Juan* court turned to the rules of interpretation that the Supreme Court has applied to cases involving infringements of tribal sovereign powers. 276 F.3d at 1193-94. The court followed the Supreme Court's many decisions in this context as well, and looked for "clear and unambiguous intent to restrict tribal sovereign authority." *Id.* at 1194-95. Given that the NLRA's text and legislative history are mum with respect to tribes, the court concluded that clear intent was lacking. *See id.* at 1196-98.

The *Pueblo of San Juan* decision adopted an analytic approach that allowed the court to consider all of the relevant precedents in the field, rather

than cherry-pick some cases and marginalize others. This comprehensive method is preferable to those embraced by other courts, which carve up the cases into discrete and inevitably policy-ridden sub-topics that cause confusion for tribal governments and interfere with long-standing principles of tribal-federal relations. In addition, the *Pueblo of San Juan* decision tracks current Supreme Court precedent rather than deviates from it. In all, *Pueblo of San Juan*, which is on all fours with this case, adopts an appropriately restrained role for the federal courts, while leaving unharmed the federal government's firm commitment "to the goal of promoting tribal self-government." *Mescalero Apache Tribe*, 462 U.S. at 334-35.

B. Congress Can Amend Statutes to Apply to Tribes

A legitimate concern underlying the decisions that misapplied the *Tuscarora* language might be that federal laws requiring universal application will be under-enforced. The solution is for Congress to pass or amend statutes so that they apply to tribes specifically. There are many examples of Congress doing so. *See* COHEN'S HANDBOOK § 5.02[3], at 392-94. Not all statutes require uniform application to achieve their goals, however. Given that the NLRA exempts states and the federal government from its definition of employer, there is good reason to conclude that the

NLRA is in that category. Rather than guess otherwise, courts should defer to the legislative branch to make that choice.

Conclusion

For the foregoing reasons, the NRLB's decision should be reversed.

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Respectfully submitted by,

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CERTIFICATION OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 29 AND 32(a)(7)

I certify that pursuant to Federal Rules of Appellate Procedure 29 and 31(a)(7) and 6 Cir. R. 32, the foregoing Brief of Amici Curiae in Support of Appellants is proportionally spaced, has a typeface of 14 point Baskerville, and contains 6,898 words. No counsel for a party has authored the brief in whole or in part. No counsel for a party, or any person other than the amicus, has made a monetary contribution to the preparation or submission of the brief.

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CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2013, I electronically filed the foregoing Brief of Amicus Curiae with the Clerk of Court for the United States Court of Appeals for the Sixth Circuit by using the Court's ECF system. I further certify that all parties are represented by counsel registered with the ECF system, so that service will be accomplished by the ECF system.

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