UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

THE CHICKASAW NATION, further designation under review by the court, Petitioner/Cross-Respondent v. NATIONAL LABOR RELATIONS BOARD, Respondent/Cross-Petitioner	Case No. 13-9578
NATIONAL LABOR RELATIONS BOARD, Petitioner/Cross-Respondent v. THE CHICKASAW NATION, further designation under review by the court, Respondent/Cross-Petitioner.	Case No. 13-9588

BRIEF OF *AMICI CURIAE* NAVAJO NATION, OSAGE NATION, SOUTHERN UTE INDIAN TRIBE, UTE MOUNTAIN UTE TRIBE, LITTLE RIVER BAND OF OTTAWA INDIANS, AND SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN IN SUPPORT OF GRANTING THE CHICKASAW NATION'S PETITION FOR REVIEW AND DENYING THE NATIONAL LABOR RELATIONS BOARD'S CROSS-PETITION FOR ENFORCEMENT

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

Proposed amici, the Navajo Nation, Osage Nation, Southern Ute Indian Tribe, Ute Mountain Ute Tribe, Little River Band of Ottawa Indians, and Saginaw Chippewa Indian Tribe of Michigan are federally-recognized American Indian tribes that regulate and operate tribal gaming on their lands in the exercise of their rights of self-government, and in accordance with the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-21.

Amici Navajo Nation, Osage Nation, Southern Ute Indian Tribe, and Ute Mountain Ute Tribe all reside in the Tenth Circuit.

Amicus Little River Band of Ottawa Indians regulates labor organizations and collective bargaining pursuant to tribal law and relies upon this Court's decision in *NLRB v. Pueblo of San Juan,* 276 F.3d 1186 (10th Cir. 2002) in its petition for review of an order by the National Labor Relations Board ("NLRB" or the "Board") striking down its law. That case is currently pending before the Court of Appeals for the Sixth Circuit and is captioned *Little River Band of Ottawa Indians Tribal Government v. NLRB,* Nos. 13-1464 and 13-1583.

Amicus Saginaw Chippewa Indian Tribe's petition challenging the Board's exercise of jurisdiction against it is pending at Sixth Circuit Case Nos. 13-1569 and 13-1369.

Amici support the position of the Chickasaw Nation in this case, and submit that the Board's Decision and Order, *Chickasaw Nation Operating Winstar World Casino & Int'l Bhd. of Teamsters Local 886, Affiliated with the Int'l Bhd. of Teamsters*, 359 NLRB 163 (July 12, 2013), is contrary to federal law and should be vacated. *Amici* submit this brief to demonstrate the complete infirmity of the governmental-commercial test fashioned by the Board to apply the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. §§ 151-69, to tribal gaming enterprises. *See* Decision and Order at 3; *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1055, 1057-64 (2004). All parties have consented to the filing of this brief.[1]

[1] Troy A. Eid, consulted with counsel for the Board about some, but not all, of the specific *amici* signing on to this brief. The Board's counsel indicated that she did not have an objection to four of six tribes submitting this brief. Two additional tribes have expressed desire to join this brief since that correspondence between counsel took place, but the substance of the brief is as disclosed by Mr. Eid to the Board's counsel.

FEDERAL RULE OF APPELLATE PROCEDURE 29(C)(5) DISCLOSURE

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

SUMMARY OF ARGUMENT

In the instant case and others, the Board asserts it has the power to: (1) divine by measure of degrees some essence of tribal governmental activity based on the Board's discretionary interpretation of whether the activity fits the Board's non-expert understanding of historical tribal governmental activities; (2) then sort governmental activity into two categories – "traditional tribal governmental functions" and "commercial" ones; and (3) further to apply the NLRA to any tribal activities that the Board deems not sufficiently "traditional," and therefore, "commercial." *San Manuel Indian Bingo*, 341 N.L.R.B. at 1057-64.[2] The Board insists tribal gaming enterprises are "typical commercial enterprise[s]." *Id*. at 1064. But that contention is wrong, and the Board's governmental-commercial test is contrary to federal law. Instead, "[i]n this circuit, respect for Indian sovereignty means that federal regulatory schemes do not apply to tribal governments exercising their sovereign authority absent express congressional authorization." *Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1283-84 (10th Cir. 2010). This Court has applied that principle to the National Labor

[2] The NLRB is not entitled to deference on the question of the application on the NLRA to Indian tribes, and its decision carries only (limited) persuasive authority. *San Manuel Indian Bingo & Casino v. N.L.R.B.*, 475 F.3d 1306, 1319 (D.C. Cir. 2007) ("Congress has not delegated questions of federal Indian law to the Board").

Relations Act (NLRA) in the past, holding that the NLRB was incorrect to find that it preempted a tribal right-to-work ordinance because "neither the legislative history of the NLRA, nor its language, make [sic] any mention of Indian tribes," and "[s]ilence is not sufficient to establish congressional intent to strip Indian tribes of their retained inherent authority to govern their own territory." *Pueblo of San Juan*, 276 F.3d at 1196.

Amici submit that there is no more "traditional" function of any government than to generate revenue to fund governmental activities. Indian tribes are reliant upon "commercial" economic development to fund basic government functions. Tribes frequently lack access to more common governmental revenue generating tools utilized by sister sovereigns, such as property, sales and income taxation.[3] To fund services to their citizens, tribal governments rely on their enterprises, including but not limited to gaming enterprises, to raise the funds necessary to run

[3] Tribes lack a property tax base because significant reservation lands are held in trust by the United States and thus not subject to property taxation. And tribes often lack any practical sales tax or income tax base because typical historic unemployment on many reservations exceeds 50 percent. This very high rate of unemployment is regrettably typical in Indian country. *Unemployment on Indian Reservations at 50 Percent: The Urgent Need to Create Jobs in Indian County: Hearing Before the S. Comm. on Indian Affairs*, 11th Cong. (2010), *available at* http://www.indian.senate.gov/public/_files/January2820102.pdf.

their governments. This reality is appreciated and supported by the federal policy of self-determination.

And even if the question of how "governmental" a particular tribal function may appear to the NLRB were the correct test – which it is not – the operation of a gaming facility as a source of governmental revenue would satisfy that test. Indian tribes conduct gaming in order to raise revenues to operate their governments and provide essential public services to their communities. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). In enacting IGRA, Congress reaffirmed this fact and recognized that Indian tribes have exclusive authority over their gaming activities, including employment-related matters. The Board is bound by these determinations of federal law, and has no authority to reach a contrary result by imposing its governmental-commercial test. Indeed, the Supreme Court has expressly rejected that same test as a basis for limiting tribal sovereignty, *Kiowa Tribe v. Mfg. Tech., Inc*., 523 U.S. 751 (1998), and wholly rejected in an analogous context the "traditional" standard now advanced by the Board. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985).

The Board pronounces that applying the NLRA to tribal gaming enterprises would "do[] little harm to the Indian tribes' special attributes of sovereignty." *Id*. 341 N.L.R.B. at 1063. Nothing could be further from the truth. Subjecting Indian

tribes to the Board's asserted power to segregate their governmental activities into "governmental" and "commercial" components based on the Board's assessment of how "traditional" an Indian tribe's activity is, and the coordinate subjugation of tribes' sovereignty to the requirements of the NLRA, as enforced by the Board, would do tremendous violence to tribes' rights of self-determination. It is a matter of federal law that tribes' inherent rights remain to: govern themselves by choosing their own governmental structures, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62-64 (1978); be governed by their own laws, *Williams v. Lee*, 358 U.S. 217, 220 (1959); develop their economies through revenue-generation and tribal regulation of revenue-generating activities, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983); and establish and operate tribal gaming enterprises to fund the provision of public services to their citizens, *Cabazon*, 480 U.S. at 216-19. Labor regulation is no less a part of the bundle of tribal sovereign rights than the fundamental tribal governmental powers routinely recognized by the Supreme Court. *Pueblo of San Juan*, 276 F.3d at 1199. The Board has no authority to decide otherwise because Congress in the NLRA never authorized such a result. *Id.* at 1195-96.

ARGUMENT

I. GENERAL REGULATORY STATUTES DO NOT APPLY TO INDIAN TRIBES IN THE ABSENCE OF A CLEAR STATEMENT FROM CONGRESS.

The NLRA is silent as to Indian tribes. Yet the Board still claims the power to select, at its sole discretion, which tribal activities the NLRA can preempt and when. Federal statutory law, and specifically the NLRA, does not leave tribal sovereignty to the NLRB's whims. Rather, tribes presumptively retain their inherent powers of self-government unless Congress has decided otherwise. As the Supreme Court has said, "we tread lightly in the absence of clear indications of legislative intent." *Santa Clara Pueblo*, 436 U.S. at 60. Divesture of tribal sovereign powers "will only be found where Congress has manifested its clear and unambiguous intent to restrict tribal sovereign authority." *Pueblo of San Juan*, 276 F.3d at 1194. "In this circuit, respect for Indian sovereignty means that federal regulatory schemes do not apply to tribal governments exercising their sovereign authority absent express congressional authorization." *Dobbs*, 600 F.3d at 1283-84. "Applying certain federal regulatory schemes to Indian tribes would impinge upon their sovereignty by preventing tribal governments from freely exercising their powers, including the sovereign authority to regulate economic activity within their own territory." *Id*. at 1284 (quotation omitted).

As a matter of statutory construction, moreover, federal statutes "are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). "[T]raditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important backdrop against which vague or ambiguous federal enactments must always be measured." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143, (1980) (citation omitted). Silence as to Indian tribes is a form of ambiguity that must be construed in their favor. *E.E.O.C. v. Cherokee Nation*, 871 F.2d 937, 939 (10th Cir. 1989) ("We believe that unequivocal Supreme Court precedent dictates that in cases where ambiguity exists (such as that posed by the ADEA's silence with respect to Indians), and there is no clear indication of congressional intent to abrogate Indian sovereignty rights (as manifested, e.g., by the legislative history, or the existence of a comprehensive statutory plan), the court is to apply the special canons of construction to the benefit of Indian interests.") "Silence as to tribes can constitute a latent or intrinsic ambiguity that only becomes apparent when other facts are considered." *Pueblo of San Juan*, 276 F.3d at 1196.

This Circuit has applied these principles directly to the NLRA. In *Pueblo of San Juan*, the Court, sitting en banc, found that the NLRA did not preempt a tribal

right to work ordinance. Although the Pueblo made the strategic choice not to contest the jurisdiction of the Board beyond the alleged preemption of its right-to-work law and the Court was careful not to reach beyond the issues presented by the parties, 276 F.3d at 1190, the principles laid out by the Court in that case and its predecessors strongly suggest that the Board has no authority over Indian tribes.[4] In interpreting the NLRA, the Court observed that "neither the legislative history of the NLRA, nor its language, make any mention of Indian tribes," and that it was therefore necessary to decide "what is the proper inference to draw from this silence." *Id*. at 1196. The Court found that "[s]ilence is not sufficient to establish congressional intent to strip Indian tribes of their retained inherent authority to govern their own territory." *Id*. Likewise, it found "no showing here that satisfies the burden of the Board and the Union to demonstrate congressional intent to preempt the Pueblo's authority to enact the ordinance and enter into the lease agreement," and that "[t]ribes retain those attributes of inherent sovereignty not

[4] The NLRA includes a provision allowing closed shops unless states or territories pass a contrary law, but does not discuss tribal labor law. 29 U.S.C. § 158(a)(3). The Board decision at issue here deals with tribal public employment, rather than tribal labor law, but it involves the application of the same canons of statutory interpretation to the same statute, to answer the same question of whether a tribe is more closely analogous to a state government or to a private organization.

withdrawn either expressly or necessarily as a result of their status." *Id*. at 1190-92.

II. THE BOARD'S UNPRINCIPLED AND UNWORKABLE GOVERNMENTAL-COMMERCIAL TEST VIOLATES FEDERAL LAW AND WOULD PRODUCE WHOLLY ARBITRARY RESULTS.

The basic justification the Board presents for its decision to exert its self-declared authority over tribal governments is that a gaming facility is not really part of the tribal government and thus is not protected by longstanding precedent protecting tribal sovereignty: "[T]here is no merit in the Nation's argument that gaming is an exercise of its sovereign authority under Tenth Circuit law." *Chickasaw Nation* at *7. The Board misinterpreted IGRA, federal Indian law, and the fundamental role that tribal enterprise plays in tribal government, but also extended its inquiry far beyond its area of expertise and authority, taking upon itself the role of determining the scope of tribal sovereign authority rather than leaving such decisions, as Congress did in enacting the NLRA, with governments themselves.

A. Tribal Gaming Is An Exercise Of Tribes' Right of Self-Government.

Indian tribes utilize gaming as a revenue-generating tool in the exercise of their rights of self-government. Tribal governments raise revenue to operate their governments and provide services to their citizens.

1. *The Supreme Court and this Circuit agree that Indian gaming is an exercise of the right of self-government.*

The Supreme Court squarely held in *Cabazon*, 480 U.S. 202, that Indian gaming furthers "the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development," *id*. at 216 (quoting *New Mexico*, 462 U.S. at 334-35), by providing "revenues for the operation of the tribal governments and the provision of tribal services." *Id*. at 218-19. This is essential to tribal self-government because "[s]elf-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members." *Id*.

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

19 WEEKLY COMP. PRES. DOC. 98, 99 (Jan. 24, 1983)). There is no difference in purpose between tribal taxation and tribal revenue generation from Indian gaming. Rather, their purposes are identical. *Compare Cabazon*, 480 U.S. at 218-19 and *Merrion*, 455 U.S. at 137.

In many respects, with these cases, the Supreme Court is simply recognizing what is equally obvious to Congress: "the lack of employment and entrepreneurial opportunities" in Indian country "has resulted in a multigenerational dependence on Federal assistance that is— (A) insufficient to address the magnitude of needs; and (B) unreliable in availability," thus giving rise to repeated Congressional efforts to overcome these historical structural disparities by supporting tribal self-sufficiency in the form of gaming and other economic development. *See e.g.,* Native American Business Development Act of 2000, 25 U.S.C. § 4301(a)(11). Nowhere in their litany of unambiguous support for and recognition of the development of tribal economies has Congress or the Supreme Court recognized any power vested in the Board or any other federal body to evaluate what degree of "tradition" attaches to tribal self-sufficiency efforts.

Relying on the Supreme Court's clear roadmap and these same obvious facts, this Circuit has held that operating a gaming facility is a governmental function, and part of the inherent sovereign authority of a tribe. In *Indian Country,*

U.S.A., Inc. v. Oklahoma ex rel. Oklahoma Tax Commission, 829 F.2d 967 (10th Cir. 1987), the Court held that the Creek Nation's operation of a bingo hall was protected by its right of self-government. *Id*. at 974-76.

The Board posits that tribal gaming is not a sovereign activity, but rather a "proprietary" one, because the tribal casino attracts non-Indian patrons and employs some non-Indians. Decision and Order at 6 (quoting *San Manuel*, 341 N.L.R.B. at 1061). But the Board's race-based focus of who enjoys the casino or whom the casino employs ignores *Cabazon*, wherein the Court acknowledged that tribal casinos aim to attract non-Indian patrons, 480 U.S. at 210-11, 216, and held that by "provid[ing] comfortable, clean, and attractive facilities and well-run games in order to increase attendance at the games," tribal governments "are generating value on the reservations through activities in which they have a substantial interest." *Id*. at 219-20. In turn, that value "generates funds for essential tribal services and provides employment for tribal members." *Id*. at 220 (emphasis added). Thus, contrary to the Board's view, by attracting customers and utilizing employees, Indian gaming supports tribal sovereignty and self-governance, irrespective of the identity of the customers or the employees.

The simple reality that tribal gaming supports tribal governmental programs has been repeatedly recognized by this and other Circuits: "[o]ne of the ways that

Congress has promoted tribal sovereignty through economic development is . . . the authorization of Indian gaming." *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1183 (10th Cir. 2010). *See also Grand Traverse Band of Ottawa & Chippewa Indians v. Office of the U.S. Attorney for the W. Dist. of Mich*., 369 F.3d 960, 962 (6th Cir. 2004); *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 736, 741 (9th Cir. 2003); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006); *United States v. Garrett*, 122 F. App'x 628, 633 (4th Cir. 2005). These cases reflect reality; tribes are reliant upon commercial ventures to fund basic government functions. In context of tribes' reservation economic enterprises, there simply is no distinction between "commercial" versus "governmental" activity.

2. *Federal policy supports tribal economic development as and part-and-parcel of tribal self-determination.*

For nearly half a century, the federal government has been committed to strengthening tribal self-government through tribal economic development. President Nixon stated in his historic Self-Determination Message that "it is critically important that the Federal government support and encourage efforts which help Indians develop their own economic infrastructure." Message from the President of the United States Transmitting Recommendations for Indian Policy,

H.R. DOC. NO. 91-363, at 7 (1970). In the years since, Congress has steadfastly maintained that commitment. *See e.g.*, Indian Tribal Energy Development and Self-Determination Act of 2005, 25 U.S.C. §§ 3501-3506; Native American Business Development, Trade Promotion and Tourism Act of 2000, 25 U.S.C. §§ 4301-07. The Executive Branch has done so as well. Earlier this year, the President reaffirmed the federal government's commitment to "honor treaties and recognize tribes' inherent sovereignty and right to self-government under U.S. law . . . by . . . promoting sustainable economic development . . . ." Exec. Order No. 13,647, 78 Fed. Reg. 39,539 (June 26, 2013).

The Supreme Court has expressly held that tribal self-sufficiency and economic development are core goals of the United States' self-determination policy, and that Indian tribes must have the power to engage in economic activity in order to further those goals. *New Mexico*, 462 U.S. at 334-36. The Board's contrary contention – that "[r]unning a commercial business is not an expression of sovereignty," *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1055, 1062 (2004) – fundamentally misstates federal Indian policy. The United States' tribal self-determination policy fully embraces tribal economic development. Moreover, such generalized pronouncements are not for the Board to make. They would

require Congressional authorization in the form of statutory language limiting tribal powers of self-government.

3. *In enacting IGRA, Congress confirmed that Indian gaming is a governmental activity.*

IGRA reaffirms these conclusions in clear terms. Congress enacted IGRA to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self sufficiency, and strong tribal governments," 25 U.S.C. § 2702(1) (emphasis added), and specifically recognized that Indian tribes engage in gaming "as a means of generating tribal governmental revenue." *Id*. § 2701(1). Congress also established the National Indian Gaming Commission ("NIGC") in order "to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue," *id*. at § 2702(3) (emphasis added), and expressly required that tribal gaming revenues be used only to fund tribal government operations and programs, provide for the general welfare of the tribe, promote tribal economic development, and for charitable and local purposes. *Id*. at § 2710(b)(2)(B); *see also* S. REP. NO. 100-466, at 13 (1988) (noting tribal governmental interests in gaming include "raising revenues to provide governmental services for the benefit of the tribal

community"). The Board has no authority to ignore Congress' considered judgment in this regard.

4. *Under IGRA, only Indian tribes have authority to regulate the employment of gaming personnel.*

Congress determined in IGRA that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands …" 25 U.S.C. § 2701(5). Under IGRA, an Indian tribe must enact a regulatory ordinance, subject to approval by the Chairman of the NIGC. *Id*. at § 2710(b)(1)(B), (d)(1)(A). The ordinance must include provisions for: background investigations of primary management officials and key employees of the gaming enterprise, as well as ongoing oversight of such officials, § 2710(b)(2)(F)(i); licensing of primary management officials and key employees, § 2710(b)(2)(F)(ii)(I); and a standard for determining ineligibility for employment based on a person's activities, prior criminal record, or associations, § 2710(b)(2)(F)(ii)(II). These provisions are bolstered by IGRA's requirements for a tribal-state compact further fleshing out governmental regulation of gaming. 25 U.S.C. §§ 2710(d)(1)(C); § 2710(d)(3)(A). IGRA unequivocally commits the regulation of Indian gaming to Indian tribes.

Congress emphasized that IGRA was not intended to interfere with tribal inherent sovereign authority, and that Indian tribes retain such power unless it has been expressly divested by Congress itself. The Senate Report reaffirms this:

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

S. REP. NO. 100-466, at 5; *see also* 134 CONG. REC. 24,016, 24,027-28 (1988).

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

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

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

> The most important difference in the three bills is in the role of tribes in the regulation and management of games. H.R. 1920 as passed by the House and as amended and reported out by the Select Committee on Indian Affairs recognizes a far stronger role to be played by the governments of the Indian tribes than would the legislation proposed by the Administration.
>
> *The Administration proposal, by contrast, would preempt nearly every authority currently exercised by the tribes, including . . . employment of personnel. . . .*
>
> *. . . the Committee does not believe that such a heavy Federal hand is appropriate at this time and has opted for continued tribal control*, but subject to a strong Federal presence to assure the integrity of the

> games, and assurance that the tribes themselves derive the benefits from the operation of the games.

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

B. The Board Has No Authority To Impose Its Governmental-Commercial Test.

As a practical matter, the distinction between governmental and commercial activities – on which the NLRB relied in adopting the *San Manuel* test – is "unsound in principle and unworkable in practice," as the Supreme Court observed in an analogous context by rejecting the same test as a limiting standard of Congress' commerce powers vis-à-vis state governments. *Garcia*, 469 U.S. at 546.

In *Garcia*, the Court found judicial efforts to apply the commercial-governmental distinction had led to a string of confusing and contradictory rulings by federal courts on what constitutes a "traditional," and (it was urged) therefore "governmental," function of government. *Id*. at 538. The Court rejected assessment of the degree of adherence to historical practice – or in other words, the degree to which an activity might be deemed "traditional," for doing so, the Court found, would preclude accommodation of "changes in the historical functions of

States, changes that have resulted in a number of once-private functions like education being assumed by the States and their subdivisions." *Id*. at 543-44. The Court found to the contrary: "Reliance on history as an organizing principle results in line-drawing of the most arbitrary sort. . . ." *Id*. at 544.

The governmental-commercial test has also been consistently rejected in the Court's federal Indian law jurisprudence. In *Kiowa Tribe*, 523 U.S. at 760, the Court expressly rejected a commercial activity exception to tribal sovereign immunity, holding Congress alone could impose such a limitation on tribal authority. "Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests" limitations on tribal sovereignty present. *Id*. at 759. The Court's deference to Congress is well-founded and consistent with federal policy supporting tribal economic development.

In fact, where a petitioner has specifically asked the Court to "abandon or at least narrow" the doctrine of tribal sovereignty because "tribal businesses had become far removed from tribal self-governance and internal affairs," the Court flatly declined to do so. *Id*. at 757. As stated by the Court: "We retained the doctrine, however, on the theory that Congress had failed to abrogate it in order to promote economic development and tribal self-sufficiency." *Id*.

Only arbitrary results would flow from the Board's desired power to judge whether tribal revenue-generating activities are sufficiently "traditional" such that they need not be deemed the opposite – innovative, modern – or "commercial," as the Board denominates here, to justify treating such functions differently than other activities of the tribal government. No justification for such an unchecked discretionary power for the Board exists in the NLRA.

C. There Is No Express Congressional Authorization For The Abrogation Of Tribal Rights Of Self-Government That Would Be Rendered By The Board's Governmental-Commercial Test And Thus, The Board's Test Violates Federal Law.

The Board concludes that its implementation of its governmental-commercial test will "do[] little harm to the Indian tribes' special attributes of sovereignty or the statutory schemes designed to protect them," *San Manuel*, 341 N.L.R.B. at 1063, and that the effects of the Act would not extend "beyond the tribe's business enterprises and regulate intramural matters." *Id*. at 1063-64; *see also* Decision and Order at 6. The Board declares that "there is no merit in the [Chickasaw] Nation's argument that gaming is an exercise of its sovereign authority." Decision and Order at 7. The Board's conclusions lack merit. There is no authority, other than sovereign authority, pursuant to which tribes conduct Indian gaming.

The fact that the exercise of tribal sovereignty through gaming touches some non-Indians does not strip the gaming activity of its sovereign character. "[T]ribes have the power to manage the use of [their] territory and resources by both members and nonmembers," and "to undertake and regulate economic activity within the reservation" without external interference. *New Mexico*, 462 U.S. at 335 (citations and footnote omitted). Thus, tribes plainly have sovereign authority to govern labor and employment relations within their reservation enterprises. *See, e.g.*, *Pueblo of San Juan,* 276 F.3d at 1189, 1192-93; *E.E.O.C. v. Fond du Lac Heavy Equip. and Constr. Co., Inc.*, 986 F.2d 246, 249 (8th Cir. 1993) (tribe exercises its "implicit right of self-government" in governing discrimination dispute within tribe's construction company); *Penobscot Nation v. Fellencer*, 164 F.3d 706, 712 (1st Cir. 1999) (tribe has sovereign authority over discrimination dispute within tribe's health clinic). *See also Plains Commerce Bank v. Long Family Land & Cattle Co.,* 554 U.S. 316, 334-35 (2008) ("a business enterprise employing tribal members . . . may be regulated [by the tribe]"). *See generally* KAIGHN SMITH, JR., LABOR AND EMPLOYMENT LAW IN INDIAN COUNTRY, 22-39 (2011).

Reservation economic activities undertaken by Indian tribes are those *of governments*, *see Mescalero Apache Tribe,* 462 U.S. at 341; *Cabazon,* 480 U.S. at

219-20 (citing *Mescalero Apache Tribe*), and tribes, no less than states or the federal government, should be free to regulate labor relations within their public sectors; it makes no more sense to impose the NLRA, a law clearly designed to govern the labor relations in the private sector, upon the public sector labor relations of tribes than it does to impose that law upon the public sectors states or the federal government.

1. *The NLRA's right to strike would grant labor organizations the power to restrict tribal governments' ability to act.*

Granting an Indian tribe's so-called "commercial" employees the right to strike under the Act, 29 U.S.C. § 157, would enable labor organizations to shut down tribal gaming enterprises, and halt the flow of revenue needed to support core governmental functions – the delivery of health care, elementary education, police and fire protection – as Congress envisioned in IGRA. *See* 25 U.S.C. § 2710(b)(2)(B). Communities' health, welfare, and safety would hinge on whether or not tribal government capitulated to union demands.

Such a scenario of veritable hostage-taking of the government by a union is untenable and was anticipated and addressed, as the history of the NLRA reveals. Following the passage of the NLRA, President Roosevelt wrote with obvious concern to federal employees: "a strike of public employees manifests nothing less

than an intent on their part to prevent or obstruct the operations of Government until their demands are satisfied," labeling a strike by public sector employees "unthinkable and intolerable." Letter from President Roosevelt to the President of the National Federation of Federal Employees (Aug. 16, 1937), available at http://www.presidency.ucsb.edu/ws/index.php?pid=15445. This is why the federal government forbids its employees to strike, 5 U.S.C. § 7311, and many states also restrict disruptive public employee strikes. *See Local Union No. 370, Int'l Union of Operating Eng'rs v. Detrick,* 592 F.2d 1045, 1046 (9th Cir. 1979) ("strikes impede government economy and performance of services"); *Board of Educ., Tp. of Middletown v. Middletown Tp. Educ. Ass'n*, 800 A.2d 286, 288 - 289 (N.J. Super. 2001) (surveying laws and history of public policy against strikes in the public sector); *see generally* James Duff, Jr., Annotation, *Labor Law: Right of Public Employees to Strike or Engage in Work Stoppage*, 37 A.L.R.3d 1147 (1971 & Supp. 2007) (same). As one commentator observes: "Given the strong policy in most states against strikes by government employees, it is not surprising that the statutory penalties for strikes are numerous, varied, and often quite severe." Benjamin Aaron, *Unfair Labor Practices and the Right to Strike in the Public Sector*, 38 STAN. L. REV. 1097, 1116 (1986). Indeed, it is a crime to strike against the federal government, 5 U.S.C. § 7116(b)(7)(A), strikes are prohibited by statute

in most states (or highly limited, if they are allowed), *see, e.g.,* Mich. Comp. Laws § 423.202; N.Y. Civ. Serv. Law § 210(1); Wash. Rev. Code § 41.56.120; Wis. Stat. § 111.70(4)(L), and otherwise deemed prohibited by common law. A central rationale for the prohibition against strikes in the public sector is that the economic conditions of public employment are subject to the ultimate authority of legislative bodies, which cannot be made captive to the weapon of strikes in their oversight of the public fisc. *See* Duff, 37 A.L.R.3d at 1151-52 & n.14 (citing cases); Doherty, *Review: The Politics of Public Sector Unionism*, 81 YALE L.J. 758, 767 (1972) ("[S]trikes have the potential of altering our system of public benefit conferral."). Thus, the prohibition against strikes in the public sector is no less relevant to states' activities to generate governmental revenue through gaming than any other undertaking, and arguments to the contrary have met with a "total lack of success." Duff, 37 A.L.R.3d at 1152. *See New York City Off-Track Betting Corporation v. Local 2021 of Dist. Council 37*, 416 N.Y.S.2d 974 (1979) (state's labor law prohibiting strikes applies to state-owned off-track betting facility); Mass. Gen. Laws ch. 150E, §§ 1-3 (2009) (state law governing collective bargaining applies to employees of state lotteries).

Indian tribes, which retain their inherent attributes of sovereignty unless those powers have been expressly divested by Congress, likewise have the

authority to make the decision whether to turn over this power to a union in keeping with their own unique policy choices. Indeed, exercising their inherent sovereign authority, a number of Indian tribes regulate their public sector labor relations and prohibit strikes in the same manner as states and the federal government. *See, e.g.*, Navajo Nation Code, 15 N.N.C. § 606(A) (prohibiting public sector employee strikes); Mashantucket Pequot Labor Relations Law, 32 M.P.T.L. ch. 1, available at http://www.mptnlaw.com/laws/Titles%2024%20-%20End.pdf; Title V Nottawaseppi Huron Band of the Potawatomi Tribal Code ch. 3, available at http://nhbpi.com/wp-content/uploads/2013/03/Title-V-03-Labor-Relations-Code.pdf; Title 3 Jamestown S'Klallam Tribal Code ch. 3.03, at http://www.jamestowntribe.org/govdocs/Tribal_Code/Title_03_Labor_Code_2_5_13.pdf); Little River Band of Ottawa Indians Tribal Code, Chapter 600, Title 3, Arts. XVI-XVII, at https://www.lrboi-nsn.gov/images/docs/council/docs/ordinances/Title%20600-03.pdf). The Board would thwart this exercise of tribal authority as if there were some basis for treating employment within tribes differently than employment within states or the federal government when there is none.

The policy reasons for leaving governments free to regulate labor organizations and collective bargaining in a manner that is separate and distinct

from the private sector under the NLRA are self-evident. The most glaring one is the impact of strikes upon governments. The NLRA guarantees the right to strike against private sector employers, but as discussed above, strikes against governments are anathema to governmental stability. *See e.g.*, *Detrick,* 592 F.2d at 1046; *Middletown Tp. Educ. Ass'n*, 800 A.2d at 288 - 289. Yet as a consequence of its presumed authority to apply the NLRA to Indian tribes, the Board would impose strikes upon tribes when they engage in activities that, in Board's view may be deemed "commercial," rather than "governmental," but would never do so for states. There is no principled basis, in law or logic, for the distinction. Tribes engage in economic activities within their reservations to generate governmental revenues for all of the same good reasons that states do. Their governance of labor relations within their reservation economic enterprises and their presumed freedom from the burdens of strikes should be no less respected than that of states. *See Dobbs,* 600 F.3d at 1284 (comity principles that leave states free to govern subject matter of ERISA for state employees apply to tribes).

Further, like many states that decide to permit public sector labor organizing, while prohibiting strikes, a number of tribes have designed mandatory dispute resolution processes to deal with collective bargaining impasses as an alternative to strikes. *Compare* N.Y. Civ. Serv. Law § 209(3)(b) (fact-finding); Iowa Code §§

20.19-20.22 (mediation, fact-finding and binding arbitration) *with* Title 3 Jamestown S'Klallam Tribal Code ch. 3.03, § 3.03.11 (same); Little River Band of Ottawa Indians Tribal Code, Chapter 600, Title 3, § 16.17 (same).

The design of such procedures is a sensitive public policy matter, for they can implicate the delegation of legislative power over public resources to non-governmental bodies, like arbitration panels, which may be granted authority to resolve bargaining impasses about government employees' wages, which directly affect governments' budgets. *See generally* Arvid Anderson & Loren A. Krause, *Interest Arbitration: The Alternative to the Strike*, 56 FORDHAM L. REV. 153, 169-172 (discussing cases). The Board would jettison these sensitive bargaining impasse procedures when Indian tribes implement them in substitution for strikes, but not when states do so. And, again, it would presume authority to do this with respect to tribes, but not to states, when, in the Board's view, the activity in question can be viewed as "commercial" rather than "governmental." *See Little River Band of Ottawa Indians Tribal Gov't & Local 406, Int'l Bhd. of Teamsters,* 359 NLRB 84 (2013) (striking down labor relations laws of tribe, including prohibition against strikes and alternative impasse procedure), *petition for review pending*. As in the case of imposing NLRA-sanctioned strikes against Indian tribes, but not against states, there is no principled basis for such a distinction.

Tribes, no less than states, need to regulate all aspects of their public sector labor relations in a manner that fits with their own public policy priorities. *See Dobbs,* 600 F.3d at 1284.

2. *Application of the NLRA to tribal casinos would subject tribal governments to a Board command-and-control regime no longer supported by federal law or policy.*

If the Board had the jurisdiction it claims, it would possess the discretionary power to judge the character of tribal enterprises as either "commercial," or "traditional tribal government functions." *San Manuel*, 341 N.L.R.B. at 1062-63. Any enterprise the Board deemed to depart from the Board's understanding of "traditional" tribal activity would be subject to the NLRA. The Board's decision would be made without regard to the organizational choices and employee classifications made by a tribe as a governmental employer. Furthermore, such decisions would be made by Board officials who, in all likelihood, have little knowledge or first-hand experience of the societies they are trying to organize or their economic and cultural realities. A tribe's own sovereign determinations – laws, policies, institutions – would be meaningless – everything would be up to the Board in Washington, D.C., not unlike the Bureau of Indian Affairs and its predecessors of a century ago.

Because each would severely impact tribal sovereignty or treaty rights, this Circuit has held that ERISA does not apply to tribal government employees, *Dobbs*, 600 F.3d 1275; that the Equal Employment Opportunity Commission does not have jurisdiction over Americans with Disabilities Act claims of tribal employees, *Cherokee Nation*, 871 F.2d 937; and that OSHA has no jurisdiction on Indian land, *Donovan v. Navajo Forest Products Indus*., 692 F.2d 709 (10th Cir.1982). The application of these federal statutes to Indian tribes, while serious, would arguably have a less-severe effect on the day-to-day authority and operation of tribal governments than what the Board is proposing here, given the power of labor unions to engage in strikes and other workplace activities that could literally bring tribal governments to their knees.

CONCLUSION

The Board has no jurisdiction over Indian tribes and tribal enterprises, and therefore the petition of the Chickasaw Nation should be granted.

Respectfully submitted this 16th day of December 2013.

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-volume limitation provided in Federal Rule of Appellate Procedure 32(a)(7)(B). The foregoing brief uses Times New Roman (14-point) proportional type, and contains 6,962 words, exclusive of exempted portions.

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CERTIFICATE OF SERVICE

I certify that on December 16, 2013, I electronically filed the foregoing Brief for the Little River Band of Ottawa Indians, Navajo Nation, Osage Nation, Saginaw Chippewa Indian Tribe of Michigan, Southern Ute Indian Tribe, and Ute Mountain Ute Tribe as *Amici Curiae* in Support of Petitioner and Granting the Petition with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the Court's CM/ECF System. Counsel for all parties are registered CM/ECF users and will be served with the foregoing document by the Court's CM/ECF system, as well as by email by me on today's date.

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