Case Nos . 14-2405 and 14-2558

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SOARING EAGLE CASINO AND RESORT,
an Enterprise of the Saginaw Chippewa Indian Tribe of Michigan,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner.

ON PETITION FOR REVIEW
AND CROSS-APPLICATION FOR ENFORCEMENT OF
AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF OF *AMICUS CURIAE* THE UTE MOUNTAIN UTE TRIBE IN SUPPORT OF GRANTING THE SAGINAW CHIPPEWA INDIAN TRIBE'S PETITION FOR REVIEW AND DENYING THE NATIONAL LABOR RELATIONS BOARD'S CROSS-PETITION FOR ENFORCEMENT

Jennifer H. Weddle
Troy A. Eid
Maranda S. Compton
GREENBERG TRAURIG, LLP
1200 17th Street, Suite 2400
Denver, Colorado 80202
Tele: (303) 572-6565
Fax: (303) 572.6540
weddlej@gtlaw.com
eidt@gtlaw.com
comptonm@gtlaw.com

Counsel for *Amicus Curiae*
Ute Mountain Ute Tribe

Case Nos . 14-2405 and 14-2558

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SOARING EAGLE CASINO AND RESORT,
an Enterprise of the Saginaw Chippewa Indian Tribe of Michigan,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner.

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Sixth Circuit Rule 26.1, the Ute Mountain Ute tribe makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? No.

s/ Jennifer H. Weddle

Jennifer H. Weddle
Troy A. Eid
Maranda S. Compton
GREENBERG TRAURIG, LLP
Tele: (303) 572-6565
Fax: (303) 572.6540
weddlej@gtlaw.com
eidt@gtlaw.com
comptonm@gtlaw.com

Counsel for *Amicus Curiae*
Ute Mountain Ute Tribe

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

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

Proposed *amicus curiae*, the Ute Mountain Ute Tribe, is a federally-recognized American Indian tribe that regulates and operates tribal gaming on its lands in the exercise of its rights of self-government, and in accordance with the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-21. The Ute Mountain Ute Tribe supports the position of the Saginaw Chippewa Indian Tribe in this case, and submits that the National Labor Relations Board's Decision and Order, *Soaring Eagle Casino and Resort, an Enterprise of the Saginaw Chippewa Indian Tribe of Michigan and Int'l Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)*, 359 NLRB 92 (April 16, 2013) ("Decision and Order"), is contrary to federal law and should be vacated. The Ute Mountain Ute Tribe submits this brief to demonstrate that the governmental-commercial test upon which the Board relies to apply the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. §§ 151-69 (2006), to Indian tribes, *see* Decision and Order at 3; *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1055, 1057-64 (2004), is a false dichotomy entirely

contrary to established federal law. All parties have consented to the filing of this brief.[1]

SUMMARY OF ARGUMENT

The Board claims authority to divide tribal governmental activity into two categories, "traditional tribal governmental functions" and "commercial business[es]," and to apply the NLRA to any tribal activities that it deems are the latter. *San Manuel Indian Bingo*, 341 N.L.R.B. at 1057-64.[2] The Board views tribal gaming enterprises as "typical commercial enterprise[s]" to which the Act applies. *Id*. at 1064. But that contention is wrong, and the governmental-

[1] Sections of this brief were incorporated from an *amicus* brief previously filed by the Ute Mountain Ute Tribe and other federally-recognized American Indian tribes in a separate case pending before this Circuit, *Little River Band of Ottawa Indians Tribal Government v. NLRB,* Nos. 13-1464 and 13-1583, which involves legal issues similar to those in the case at bar, portions of which were drafted on a collaborative basis between other counsel who appeared as counsel for the tribal *amici* in *Little River*, and the Ute Mountain Ute Tribe's undersigned counsel in both cases. However, no party other than *amicus* contributed money to fund the participation in or preparation and submission of this brief.

[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").

commercial test on which the Board relies is logically flawed and contrary to federal law.

Indian tribes are reliant upon commercial economic development to fund basic government functions. Tribes frequently lack access to more traditional governmental revenue generating tools, such as property, sales and income taxation. To fund services to their citizens, tribal governments rely on commercial businesses, including but not limited to gaming enterprises, to raise the funds necessary to run their governments. This reality is appreciated and supported by the federal policy of self-determination.

In applying a governmental-commercial distinction, the Board would restrict tribal self-sufficiency – a federal policy continually encouraged by Congress and the Executive Branch. Indeed, in the only piece of federal legislation that squarely addresses Indian gaming, the Indian Gaming Regulatory Act ("IGRA"), Congress recognized that "the operation of Indian gaming as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). Because of the importance of gaming to tribal governments, Congress, in IGRA, also placed exclusive regulatory authority in tribal governments themselves, including authority over the employment of personnel. 25 U.S.C. § 2702(2). As the Supreme Court held in *California v. Cabazon Band of*

Mission Indians, 480 U.S. 202 (1987), Indian tribes conduct gaming as a governmental activity, in order to raise revenues to operate their governments and provide essential governmental services to their communities. The Board is bound by these determinations of federal law, and has no authority to reach a different result by imposing the governmental-commercial test.

Finally, the Board's governmental-commercial test should be overruled by this Court because the Supreme Court expressly rejected such a test as a basis for limiting tribal authority. *Kiowa Tribe v. Mfg. Tech., Inc*., 523 U.S. 751 (1998). The Supreme Court has also determined, in an analogous context, that the governmental-commercial distinction is unsound, unworkable and produces arbitrary results. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985).

Nonetheless, the Board insists that applying the NLRA to tribal gaming enterprises would "do[] little harm to the Indian tribes' special attributes of sovereignty." *San Manuel Indian Bingo,* 341 N.L.R.B. at 1063. That contention is also simply wrong. Subjecting Indian tribes to the Board's power to divide their governments into "governmental" and "commercial" pieces, and subordinating their sovereignty to the requirements of the NLRA, as enforced by the Board, would destroy Indian tribes' rights of self-government, which include the right to

determine their own form of government, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62-64 (1978), to make their own laws and be ruled by them, *Williams v. Lee*, 358 U.S. 217, 220 (1959), to engage in and regulate economic activity, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983), and to conduct gaming to raise revenue to operate their governments and provide tribal services. *Cabazon*, 480 U.S. at 216-19. Labor regulation is an exercise of a tribe's "authority as sovereign." *Pueblo of San Juan*, 276 F.3d at 1199.

For the same reasons, applying the NLRA would limit tribes' right to conduct gaming under IGRA in order to raise revenue for essential tribal governmental functions. Congress in the NLRA never authorized this result. The Act is silent with respect to Indian tribes, and under settled law, silence is an insufficient basis on which to apply a statute that would abrogate tribal rights of self-government. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17-18 (1987); *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1195-96 (10th Cir. 2002).

ARGUMENT

I. THE GOVERNMENTAL-COMMERCIAL DISTINCTION IS A FALSE DICHOTOMY BECAUSE REVENUE GENERATION THROUGH GAMING IS A GOVERNMENTAL ACTIVITY.

A. As a practical reality, tribal governments must rely on commercial economic development to fund basic governmental services.

Tribes are reliant upon commercial ventures to fund basic government functions. In the tribal economic context, there simply is no distinction between "commercial" versus "governmental" activity. This is especially the case with the Soaring Eagle Casino. Lacking a tax base or the means to otherwise develop and invest in their tribal lands and citizenry, the Saginaw Chippewa are dependent upon commercial development for their governmental revenue. As noted by the Board, the casino serves as the Tribe's primary source of revenue, generating approximately 90 percent of Tribal income, meaning that the Tribe's 37 Governmental departments and 159 programs – including the police department, tribal courts system, and fire department – are 90 percent funded by casino revenue. Decision and Order at *4. Also noted by the Board, the Tribal Council is heavily involved in casino operations due to the important governmental role it serves. *See id.* To then classify the casino as "merely" a commercial entity willfully ignores its impact.

Thus, the Board's contention that "[r]unning a commercial business is not an expression of sovereignty in the same way that running a tribal court system is," *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1055, 1062 (2004), is divorced from reality and fundamentally misstates federal Indian policy. The United States' self-determination policy embraces *both* tribal economic development and tribal

courts, *and* relies on the former to raise the revenues needed to operate the latter. They are inseparable.

B. Federal Indian policy has long recognized tribal "governmental" and "commercial" activity as synonymous, supportable, and indeed, essential.

The inseparability of tribal commercial development and governmental activity is also understood by the federal policy of self-determination. For nearly half a century, the federal government has been committed to strengthening tribal self-government through tribal economic development. Both the Executive and Legislative branches support tribal economic development as part-and-parcel of tribal self-governance. President Nixon initiated the commitment in 1970, stating in his historic Self-Determination Message that "it is critically important that the Federal government support and encourage efforts which help Indians develop their own economic infrastructure." Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. DOC. NO. 91-363, at 7 (1970). And six months ago, President Obama expressly reaffirmed the United States' 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). Over the last five decades, the Legislative Branch has also continuously

supported tribal government efforts to generate economic development through various pieces of legislation. Examples include: the Indian Self-Determination and Educational Assistance Act, 25 U.S.C. §§ 450-458bbb, in which Congress committed to "supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and *developing the economies of their respective communities*," 25 U.S.C. § 450a(b) (emphasis added); the Indian Tribal Energy Development and Self-Determination Act of 2005, 25 U.S.C. §§ 3501-3506; and the Native American Business Development, Trade Promotion and Tourism Act of 2000, 25 U.S.C. §§ 4301-4307.

In addition, the Supreme Court has expressly held that tribal self-sufficiency and economic development are core goals of the nation's self-determination policy, and that Indian tribes have the power to engage in economic activity to further those goals:

> [B]oth the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes. We have stressed that *Congress' objective of furthering tribal self-government encompasses far more than encouraging tribal management of disputes between members, but includes Congress' overriding goal of encouraging "tribal self-sufficiency and economic development*." In part as a necessary implication of this broad federal commitment, *we have held that tribes have*

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

Mescalero Apache Tribe, 462 U.S. at 334-36 (emphasis added) (footnotes and citations omitted).

C. Congress and federal courts recognize gaming as a self-determination governmental function.

IGRA and Circuit Courts of Appeals have also recognized that revenue generation through tribal gaming is a governmental activity. IGRA expressly identifies gaming "as a means of generating tribal governmental revenue." 25 U.S.C 2701(1). In fact, IGRA expressly requires that tribal gaming revenues be used only to fund tribal government operation and programs, provide for the welfare of the tribe, promote tribal economic development, and for charitable and local purposes. *Id.* § 2710(b)(2)(B). In order to protect this governmental activity, IGRA also establishes the National Indian Gaming Commission ("NIGC"), an independent federal regulatory agency, to oversee the governmental revenue-raising opportunity that gaming provides.

Moreover, Circuit Courts of Appeals have readily agreed that Indian tribes engage in gaming under IGRA as a *governmental* activity to raise revenues. This Circuit, in upholding the right of the Grand Traverse Band to conduct gaming

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

> the furtherance of "an economic community" on Indian lands [i]s a goal related to Congress' special trust obligations. IGRA and the Tribal–State Compacts further that goal by authorizing gaming. Congress recognized that the revenue generated from pre-IGRA tribal gaming operations "often means the difference between an adequate governmental program and a skeletal program that is totally dependent on Federal funding." S. REP. NO. 100–446, at 3 [(1988), *reprinted in* 1988 U.S.C.C.A.N. 3071,] 3072.

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

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

2702(1).

Allen v. Gold Country Casino, 464 F.3d 1044, 1046 (9th Cir. 2006). *See also United States v. Garrett*, 122 F. App'x 628, 633 (4th Cir. 2005) (recognizing IGRA's promotion of tribal economic development to be an "important federal interest"). In sum, these Circuits all agree that "[o]ne of the ways that Congress has promoted tribal sovereignty through economic development is . . . the authorization of Indian gaming." *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1183 (10th Cir. 2010).

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

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

In enacting IGRA, Congress further determined that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701(5). In order to conduct class III gaming under IGRA,

essentially all gaming other than traditional Indian gaming, bingo and bingo-related games, *see id*. § 2703(8) (defining class III gaming), an Indian tribe must enact an ordinance regulating that activity, which must be approved by the Chairman of the NIGC. *Id*. § 2710(b)(1)(B), (d)(1)(A). The ordinance must provide, *inter alia*, for an adequate system that requires background investigations of primary management officials and key employees of the gaming enterprise, as well as ongoing oversight of such officials, *id*. § 2710(b)(2)(F)(i); licensing of primary management officials and key employees, *id*. § 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, in instances that pose a threat to the public interest or effective regulation, *id*. § 2710(b)(2)(F)(ii)(II).[3] IGRA also requires a Tribal-State gaming compact for class III gaming, *id*. § 2710(d)(1)(C), which is to provide for the governmental regulation of the activity, *id*. §

[3] These detailed requirements plainly recognize that tribal regulatory authority over gaming includes the power to regulate employment at gaming enterprises. Their importance is made clear by IGRA's second stated purpose, which is: "to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences." 25 U.S.C. § 2702(2).

2710(d)(3)(A) (compacts "govern[] the conduct of [class III] gaming activity").[4] These provisions make clear that the regulation of Indian gaming is committed to Indian tribes under IGRA, and that the terms on which this is to be done are to be spelled out in tribal law and a tribal-state compact.

Congress also made clear that IGRA was not intended to interfere with tribal inherent sovereign authority, and that Indian tribes retain such authority unless it has been expressly relinquished or abrogated by Congress – neither of which has occurred in the instant case. As the Senate Report accompanying S. 555 states:

> 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-

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

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

S. REP. NO. 100-66, 13 (emphasis added).

> 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 (1988) (emphasis added). This commitment was underscored by a colloquy engaged in by Senators Evans and Inouye, both of whom were co-sponsors of S. 555. 134 CONG. REC. S12,643, S12,653-55 (1988). Senator Evans stated:

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

Id. at S12,655. Senator Inouye agreed with these remarks. "As a statement of one of the legislation's sponsors, this explanation deserves to be accorded substantial weight in interpreting the statute." *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976).

In enacting IGRA, Congress also expressly recognized tribal sovereign authority over the employment of gaming personnel, and determined that it would *not* interfere with the tribes' ongoing exercise of that authority. Congress considered and explicitly rejected a scheme that would have removed this authority by providing for federal control of gaming employees, analogous to the authority that the NLRB now claims. The Senate bill proposed a Commission that would have had authority to enact "rules setting out the requirements for employment in a bingo establishment and for any bingo license required for employment in or other connection with a bingo establishment," S. 2557, § 305(2), and "rules concerning the amount of compensation that may be paid to employees of bingo establishments," *id.,* § 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." *Id.* § 308.

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

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

S. REP. NO. 99-493, at 1-2 (1986) (emphasis added). The amended version of H.R. 1920 formed the basis for S. 555, which was introduced and passed in the next

Congress. S. REP. NO. 100-446, at 3-4 (1988). As enacted, Congress maintained the limits on federal control provided in the House bill.

In sum, IGRA confirms exclusive tribal inherent sovereign authority over the regulation and employment of personnel at tribal gaming enterprises, and establishes that Congress intended that authority to be free from federal interference. Furthermore, in enacting IGRA, Congress "intended to expressly preempt the field in the governance of gaming activities on Indian lands." S. REP. NO. 100-466, at 6 (1988). This Circuit should not allow the NLRB to replace tribal governmental regulation of gaming employment with federal control that Congress unambiguously rejected when it enacted IGRA.

II. THE BOARD LACKS AUTHORITY TO IMPOSE THE GOVERNMENTAL-COMMERCIAL TEST, WHICH IS UNPRINCIPLED, UNWORKABLE, AND PRODUCES ARBITRARY RESULTS.

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

Congress's commerce powers over state governments, *Garcia*, 469 U.S. at 546, and must be rejected for that reason too.

A. The *San Manual* decision incorrectly relies on extrapolated Supreme Court dicta, inapplicable to the essential governmental activity of tribal gaming.

The Board's governmental-commercial test is a distorted extrapolation of inapplicable case law. In its Decision and Order, the Board recognizes this mutation. Decision and Order at *6. The Board recognizes that, in 2004, it abandoned its previously limited regulatory scope in favor of the "*Tuscarora*-Donovan" Rule, adopted in *San Manuel*. *Id.* (citing *San Manual*, 341 NLRB at 1059 and *Donovan v. Coeur d'Alene Tribal Farm,* 751 F.2d 1113 (9th Cir. 1985)). From that test, developed by the Ninth Circuit, the governmental-commercial distinction was born. *Id.*

Notably, however, this distinction is not supported by Supreme Court precedent. *Federal Power Commission v, Tuscarora Indian Nation*, the only Supreme Court authority relied on by the Board, is a termination era case that provides for, in *dicta*, the application of statutes of general applicability to the off-reservation property rights of individual Indians. 362 U.S. 99 (1960). It does not stand for the application of statutes of general applicability to tribal interests and it does not create a distinction in application between governmental and commercial

activities. Yet, more than forty years after *Tuscarora* was decided, the Board extrapolated its holding to find that the commercial activities of tribes and tribal entities were within the regulatory scope of the NLRA, which it concluded was a statute of general applicability. *Id. (*citing *San Manual*, 341 NLRB at 1055).

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

Where the Supreme Court has considered limiting tribal sovereign authority based on a commercial distinction, it has expressly rejected it unless, and until Congress explicitly does so. The Supreme Court has made clear that if tribal activity is to be divided into commercial and governmental categories for purposes of limiting Indian rights, only Congress can do so. *Kiowa Tribe*, 523 U.S. 751. In *Kiowa Tribe*, the Court expressly rejected a commercial activity exception to tribal sovereign immunity, holding that it was up to Congress alone to decide whether to impose any such limitation on sovereign immunity. "Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests" that proposals to limit tribal immunity present. *Id*. at 759. Similarly in *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), the Court *rejected* both the argument that "tribal business activities . . . are now so detached from traditional tribal interests that the tribal-sovereignty doctrine no longer makes sense," and the contention that tribal

sovereign immunity should be limited to the tribal courts and internal affairs of tribal government. *Id*. at 510. The same principle applies here: only Congress can determine whether to apply the NLRA to the so-called commercial activities of Indian tribes. Indisputably, Congress has not done so.

C. The commercial-governmental test on which the *San Manuel* decision relies has been rejected by the Supreme Court.

In *Garcia*, the Court found judicial efforts to apply the commercial-governmental distinction to have led to a string of confusing and contradictory rulings by federal courts on what constitutes a "traditional," and (it was urged) therefore "governmental," function of government. *Id*. at 538. Some federal courts had determined that the regulation of traffic on public roads was not a traditional government function, *see Friends of the Earth v. Carey*, 552 F.2d 25, 38 (2d Cir. 1977), while others had found that operating a highway authority was, *see Molinsa-Estrada v. P.R. Highway Auth.*, 680 F.2d 841, 845-46 (1st Cir. 1982). Similarly, some courts had determined that the regulation of air transportation was not a traditional governmental function, *see Hughes Air Corp. v. Pub. Utils. Comm'n of Cal.*, 644 F.2d 1334, 1340-41 (9th Cir. 1981), while others had ruled that operating a municipal airport was such a function. *See Amersbach v. City of Cleveland*, 598 F.2d 1033, 1037-38 (6th Cir. 1979). And the regulation of ambulance services was held to be a traditional governmental function in *Gold*

Cross Ambulance v. City of Kansas City, 538 F. Supp. 956, 967-69 (W.D. Mo. 1982) *aff'd on other grounds*, 705 F.2d 1005 (8th Cir. 1983), yet the operation of a mental health facility was held not to be in *Williams v. Eastside Mental Health Ctr., Inc.*, 669 F.2d 671, 680-81 (11th Cir. 1982). The Supreme Court concluded that "[w]e find it difficult, if not impossible, to identify an organizing principle that places each of the cases in the first group on one side of a line and each of the cases in the second group on the other side." 469 U.S. at 539.

Having rejected the traditional/non-traditional distinction as unworkable, the Court then dismissed the alternatives. *Id*. at 543. The Court rejected reliance on historical precedent to identify traditional functions because such an approach "prevents a court from accommodating changes in the historical functions of States, changes that have resulted in a number of once-private functions like education being assumed by the States and their subdivisions." *Id*. at 543-44. Instead, "[r]eliance on history as an organizing principle results in line-drawing of the most arbitrary sort. . . ." *Id*. at 544. A standard that only protected "uniquely" governmental functions was likewise unmanageable and had been rejected elsewhere. *Id*. at 545 (citing *Indian Towing Co. v. United States*, 350 U.S. 61, 64-68 (1955) (rejecting such a standard for purposes of governmental tort liability)). A standard that protected so-called "necessary" governmental functions – services

that would be provided inadequately or not at all without the government – was also probably useless, because "[t]he set of services that fits into this category . . . may well be negligible" and courts are not well equipped to determine what they are. *Id*. Finally, a standard that distinguished between traditional state functions and other functions on the basis of whether the federal government had historically been involved with that function would be faulty because federal involvement in many areas is of relatively recent vintage, yet the recency of that involvement does not diminish asserted federal or state interests in those functions. *Id*. at 544 n.10.

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

III. APPLICATION OF THE BOARD'S GOVERNMENTAL-COMMERICAL TEST TO INDIAN GAMING IS BARRED BY FEDERAL LAW BECAUSE IT WOULD ABROGATE TRIBAL RIGHTS OF SELF-GOVERNMENT IN THE ABSENCE OF CONGRESSIONAL AUTHORIZATION.

The Board insists that exercising jurisdiction over tribal enterprises under 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 4, J.A. 15. This contention is specious. Applying the NLRA to Indian tribes' regulation and operation of gaming would abrogate core elements of tribal rights of self-government, and create a legal and administrative quagmire that would effectively deny Indian tribes their rights under IGRA.

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

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

President Roosevelt warned that "a strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of Government until their demands are satisfied," calling such action "unthinkable and intolerable." Letter from President Roosevelt to the President of the National Federation of Federal Employees (Aug. 16, 1937) *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=15445 [hereinafter "President Roosevelt's Letter"]. His words apply equally here. A more complete divestiture of the right of self-government is difficult to conceive. To borrow from *Merrion*'s context, "[r]equiring the consent of the [union] deposits in the hands of the [union] the source of the tribe's power, when the power instead derives from sovereignty itself. Only the Federal Government may limit a tribe's exercise of its sovereign authority." *Merrion*, 455 U.S. at 147 (citing *United States v. Wheeler*, 435 U.S. 313, 322 (1978)). Congress could not possibly have intended such a complete divestiture of the Nation's right of self-governance in a statute which does not even mention Indian tribes. *San Juan*, 276 F.3d at 1196.

B. The Board's sense of the breadth of its own jurisdiction is a simple power-grab whereby the Board declares itself vested with the power to restructure and reorganize tribal governments.

If the Board had the jurisdiction it claims, it would then possess the power to split a tribal government into two parts – one part comprised of whatever the

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

Furthermore, it would be impossible for a tribe to know into which category an activity fell unless the Board had adjudicated the issue. This uncertainty would never end, since under the NLRA an unfair labor practice charge can be made at any time and is resolvable only by the Board. 29 U.S.C. § 160(a). And any change in the structure of the tribal government, or even in the composition of a tribe's work force or its patrons, could be said to raise anew even a previously decided question. A tribe could not avoid the chilling effect of this uncertainty, or the time and cost of Board adjudications (many of which take years to complete, as this case illustrates).

Furthermore, the Board's determination that an activity was "commercial" in nature would only begin the process of applying the NLRA to a tribe. Within each "commercial enterprise" the Board would have authority under the Act to determine what "bargaining units" to recognize. 29 U.S.C. § 159(b). The Board might recognize multiple bargaining units within each so-called "commercial enterprise," or it might choose to recognize just one – consisting of all "commercial enterprise[s]." This decision would be made without regard to the organizational choices and employee classifications made by a tribe as a governmental employer. A tribe's constitution, laws, and court rulings would be meaningless here – everything would be up to the Board.

Subjecting the tribal government to the Board's plenary power to restructure the tribe's government in this manner would virtually extinguish a tribe's rights to determine its own form of government, *Santa Clara Pueblo*, 436 U.S. at 62-64, to engage in economic activity through its government, *New Mexico*, 462 U.S. at 335, and to make its own laws and be ruled by them, *Williams*, 358 U.S. at 220.

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

Were Indian tribes required to engage in collective bargaining under the Act over "wages, hours, and other terms and conditions of employment" as defined in

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

Ultimately, the tribe would be required to bargain over *all* tribal laws and policies that the Board found to be "terms and conditions" of employment, even those requiring drug and alcohol testing. In such a process, the tribe's representatives would be negotiating to obtain the consent of tribal employees to the application of tribal law. As President Roosevelt explained, that process does not work when applied to a sovereign:

> All Government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service. . . . The

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

> very nature and purposes of Government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with Government employee organizations. The employer is the whole people, who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employees alike are governed and guided, and in many instances restricted, by laws which establish policies, procedures, or rules in personnel matters.

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

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

For all of these reasons, requiring tribal governments to bargain collectively would abrogate their right of self-government, which includes the power to make

their own laws, *Williams*, 358 U.S. at 220, and to exercise judicial authority over the interpretation of those laws. *Id.* at 223; *Santa Clara Pueblo*, 436 U.S. at 65.

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

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

Congress in the NLRA never authorized the Board to exercise such plenary power over tribal governments. The Act and its legislative history are utterly silent with respect to Indian tribes, *San Juan,* 276 F.3d at 1196; *San Manuel,* 341 N.L.R.B. at 1058, and that silence is an insufficient basis on which to apply a

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

This is confirmed by the Tenth Circuit's ruling in *San Juan* that the NLRA does not preempt tribal sovereign authority to enact a right-to-work ordinance. The Court rejected the Board's argument that under the Act, 29 U.S.C. § 164(b), only states or territories could prohibit union security agreements otherwise authorized by the NLRA. 29 U.S.C. § 158(a)(3). The Court held that the Pueblo's right-to-work ordinance was an exercise of its "retained sovereign authority," 276 F.3d at 1195, and that the Act would be construed to work a divestiture of that

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

sovereignty only if "Congress ha[d] made its intent clear that we do so." *Id*. Finding that the NLRA is silent as to Indian tribes, the Circuit held that "[s]ilence is not sufficient to . . . strip Indian tribes of their retained sovereignty to govern their own territory." *Id*. at 1196. Accordingly, as the Tenth Circuit reaffirmed in *Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275 (10th Cir. 2010)), "Congressional silence exempted Indian tribes from the National Labor Relations Act." *Id*. at 1284 (citing *San Juan*, 276 F.2d at 1200).

CONCLUSION

Amicus curiae respectfully submits that the Saginaw Chippewa Indian Tribe's petition for review should be granted, the Board's cross-petition for enforcement should be denied, and the Board's decision should be vacated.

Respectfully submitted this 27th day of January 2015.

GREENBERG TRAURIG, LLP

By: *s/ Jennifer H. Weddle*
Jennifer H. Weddle
Troy A. Eid
Maranda S. Compton
GREENBERG TRAURIG LLP
1200 Seventeenth Street, Suite 2400
Denver, CO 80202
Telephone: (303) 572-6500
Facsimile: (303) 572-6540
Email: eidt@gtlaw.com
weddlej@gtlaw.com
comptonm@gtlaw.com

Counsel for Amicus Curiae
Ute Mountain Ute Tribe

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of FED. R. APP. P. 29(d) and 32(a)(7)(B). The brief contains 6,794 words, excluding the parts of the brief exempted by FED. R. APP. P. 29(d) and 32(a)(7)(B)(iii).

Dated: January 27, 2015

/s/ Jennifer H. Weddle
Jennifer H. Weddle

Counsel for *Amicus Curiae*

CERTIFICATE OF SERVICE

I certify that on January 27, 2015, I electronically filed the within document with the Clerk of the Court for the Sixth Circuit Court of Appeals in the above-captioned case.

Participants in the case who are registered participants will be served by email.

Ms. Linda Dreeben
Ms. Kira D. Vol
National Labor Relations Board
Appellate Court Branch
1099 14th Street, N.W. Suite 8100
Washington, DC 20570
(202) 273-2960
Linda.dreeben@Board.gov
Kira.vol@Board.gov
appellatecourt@Board.gov

Blair Katherine Simmons
Associate General Counsel
International Union, UAW
Firm: 313-926-5216
8000 E. Jefferson Avenue
Detroit, MI 48214
313-926-5216

Sean Reed
General Counsel
Saginaw Chippewa Indian Tribe
7070 East Broadway
Mt. Pleasant, Michigan 48858
(989) 775-4032
sreed@sagchip.org

Ms. Blair Katherine Simmons
Associate General Counsel
International Union, UAW
8000 E. Jefferson Avenue
Detroit, MI 48214

Ms. Jessica S. Intermill
Ms. Jessica Jean Stomski Seim
Mr. William A. Szotkowski
Hogen Adams
1935 W. County Road B-2
Suite 460
St. Paul, MN 55113

Lloyd B. Miller
Sonosky Chambers
900 W. Fifth Avenue
Suite 700
Anchorage, AK 99501
907-258-6377

Dated: January 27, 2015

s/ Gina Spruitenburg
Secretary of Troy A. Eid

Jennifer H. Weddle
Troy A. Eid
Maranda S. Compton
GREENBERG TRAURIG, LLP
1200 17th Street, Suite 2400
Denver, Colorado 80202
Tele: (303) 572-6565
Fax: (303) 572.6540
weddlej@gtlaw.com
eidt@gtlaw.com
comptonm@gtlaw.com

Counsel for *Amicus Curiae*
Ute Mountain Ute Tribe