No. 14-2239

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

LITTLE RIVER BAND OF OTTAWA INDIANS TRIBAL GOVERNMENT

Respondent

RESPONSE TO PETITION FOR REHEARING EN BANC OF THE NATIONAL LABOR RELATIONS BOARD

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Response to Petition for Rehearing En Banc

Pursuant to the Court's Order directing a response to the Little River Band of Ottawa Indians Tribal Government's petition for rehearing en banc, the National Labor Relations Board agrees, for different reasons than the Band asserts, that the Court should accept for en banc rehearing both the panel decision in the instant case and the panel decision in the related case, *Soaring Eagle Casino & Resort v. NLRB*, Case Nos. 14-2405, 14-2558. The Board urges the full Court to reconsider and reaffirm both decisions and to resolve the split between the two panels on the important issue of the applicability of general federal laws like the National Labor Relations Act to certain commercial enterprises on Indian lands.

The panel decision enforced a Board Order, *Little River Band of Ottawa Indians Tribal Government*, 361 NLRB No. 45 (2014), *adopting and incorporating* 359 NLRB No. 84 (2013). In *Little River*, the Board asserted jurisdiction over the Band's casino-resort, a gambling, hospitality, and entertainment complex located on reservation lands. The casino-resort employs 85% non-Indians (771 of 905 employees), serves mostly non-Indian customers, and competes in interstate commerce with similar non-Indian enterprises. In asserting jurisdiction, the Board applied the jurisdictional standard for tribal employers that it had announced in *San Manuel Indian Bingo & Casino*, 341 NLRB No. 138 (2004), *enforced*, 475 F.3d 1306 (D.C. Cir. 2007). That standard incorporates an analytical framework, first

described in *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.3d 1113 (9th Cir. 1985), for assessing the applicability of general federal laws to Indian tribes.

The *Coeur d'Alene* framework is consistent with Supreme Court jurisprudence recognizing and protecting both tribal sovereignty and the superior sovereignty of the federal government. It starts from the presumption, announced by the Supreme Court in *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960), that broadly applicable federal laws apply to Indian tribes in the absence of a clear expression to the contrary. But the framework also includes three exceptions to that presumption, which prevent implicit abrogation of intramural tribal self-government or specific treaty rights, and bar application of a law if Congress has otherwise made clear its intent that the law should not apply. *Coeur d'Alene*, 751 F.3d at 1115-16.

The panel's decision is not, as asserted in the Band's petition (Pet. 1-3, 6-12), contrary to controlling Supreme Court law. The Supreme Court has not addressed or decided whether comprehensive federal laws like the NLRA apply to on-reservation tribal enterprises absent express language specifying application to Indian tribes. Moreover, as recognized by the panel majority, slip op. 8-11, and by other circuit courts, Supreme Court Indian-law jurisprudence is consistent with the interpretation of tribal sovereign authority implemented by the *Coeur d'Alene* framework. *See Coeur d'Alene*, 751 F.2d at 1115, 1117; *Reich v. Mashantucket*

Sand & Gravel, 95 F.3d 174, 178-79 (2d Cir. 1996); *see also San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1312-14 (D.C. Cir. 2007) (concluding, after survey of Supreme Court's Indian-law jurisprudence, that the "Court's concern for tribal sovereignty distinguishes among the different activities tribal governments pursue, focusing on acts of governance as the measure of tribal sovereignty").

Furthermore, many Supreme Court cases indicate that, although sovereign authority focused on the governance of tribal members is generally subject to abrogation only through explicit congressional action, sovereign authority that is peripheral to intramural self-governance may at times be divested without an express congressional statement. *See, e.g.*, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-15 & n.17 (1987); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332-33 (1983); *Montana v. United States*, 450 U.S. 544, 564-65 (1981); *Tuscarora*, 362 U.S. at 120. As the panel noted, slip op. 17, the *Coeur d'Alene* framework adopted by the Board for determining when to assert jurisdiction over tribal enterprises "accommodates principles of federal and tribal sovereignty" and "reflects the teachings" of the Supreme Court.

The Band's contention (Pet. 13-15) that the panel decision "creates an unnecessary intercircuit conflict" is also incorrect, in three respects. First, as the panel described, slip op. 12-14, the *Coeur d'Alene* analytical framework

underlying the Board's *San Manuel* standard has been accepted and applied by several circuits to comparably general federal laws that are silent as to Indian tribes. *See, e.g., Florida Paraplegic, Ass'n v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126 (11th Cir. 1999) (ADA); *Mashantucket*, 95 F.3d 174 (2d Cir. 1996) (OSHA); *Smart v. State Farm Ins.*, 868 F.2d 929 (7th Cir. 1989) (ERISA); *Coeur d'Alene*, 751 F.2d 1113 (9th Cir. 1991) (OSHA); *see also EEOC v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246, 248-49 (8th Cir. 1993) (acknowledging *Tuscarora* presumption of applicability in ADEA case, but finding exception for intramural dispute between tribe and its member). To the extent the decision in this case contributes to a circuit split, therefore, it squarely aligns the Court with the overwhelming majority of its sister circuits by adopting the *Coeur d'Alene* framework, a near-consensus analytical approach to navigating the intersection of tribal sovereignty and general federal law.

Second, even if the issue is more narrowly defined, the decision cited as in conflict with the panel decision, *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002) (en banc), is not, as the Band represents (Pet. 13), the only decision to consider the applicability of the NLRA to employees on tribal lands. As noted, the District of Columbia Circuit enforced the Board's assertion of jurisdiction over a tribal casino in *San Manuel*. 475 F.3d 1306; *see also NLRB v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995, 997-98 (9th Cir. 2003) (holding that the

Board did not "plainly lack[]" jurisdiction over off-reservation tribal healthcare organization because the "NLRA is not materially different from the statutes that we have already found to be generally applicable" within the meaning of *Tuscarora* and *Coeur d'Alene*).

Third, in the Tenth Circuit *San Juan* case, unlike here, "the general applicability of federal labor law [wa]s not at issue" and the tribal ordinance did "not attempt to nullify the NLRA." *See* 276 F.3d at 1191, 1197-98. The holding of the Tenth Circuit in *San Juan* was that an NLRA provision exempting a particular type of state and local regulation from NLRA preemption, see 29 U.S.C. § 164(b), also exempted comparable tribal regulation. *Id.* *San Juan* did not address or resolve the question presented in this case. Specifically, it did not decide whether the NLRA's otherwise preemptive regulation of labor relations nationwide authorizes Board jurisdiction over on-reservation tribal casino resorts employing mostly non-Indians and competing in interstate commerce with other casino resorts.

Nonetheless, given the extensive critique in *Soaring Eagle* of the panel's rationale, the Board agrees that en banc hearing is appropriate, both to readopt the *Little River* decision and to clarify the rationale supporting it in response to the *Soaring Eagle* panel's concerns. Should the Court grant en banc hearing, the

Board agrees that supplemental briefing would materially assist the Court's consideration of the issues presented.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2015, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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Dated at Washington, DC
this 28th day of August, 2015