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CASINO PAUMA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

WASHINGTON, D.C.

CASINO PAUMA, vs. **UNITE HERE INTERNATIONAL UNION**	Case No.: 21-CA-103026 & 21-CA-114433 **BRIEF OF RESPONDENT CASINO PAUMA IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Administrative Law Judge's (ALJ) decision in this case suffers from a misunderstanding of Respondent's arguments and a misapplication of the law to the Respondent, Casino Pauma. There are two primary issues: application of the Act to the operations of the Respondent and Respondent's rule limiting what employees can wear on their uniform.

With respect to the issue of jurisdiction, the ALJ decision incorrectly applies the law by ignoring past precedent; incorrectly relying on statements made by the Respondent as to the existence of jurisdiction; fails to take judicial notice of documents that were properly noticed; incorrectly assumes that a tribally operated commercial enterprise automatically confer jurisdiction of the Act; and he incorrectly applies the recent U.S. Supreme Court decision in *Michigan v. Bay Mills Indian Community* 572 U.S. ___, 134 S. Ct. 2024 (2014).

Second, the ALJ impermissibly finds that the employer's rule regarding items worn on uniforms is overly broad; that the rule was not uniformly enforced; and, the ALJ "second guesses" the employer's rationale for the rule substituting his own opinion for that of the employer.

Finally, the ALJ simply "second guesses" the employer's rationale for the rule substituting his own opinion as to the validity of employees wearing union buttons.

For such reasons the decision of the ALJ should be overturned.

II. STATEMENT OF FACTS

The following facts were developed at the hearing.[1]

The parties entered into a stipulation (Joint Stipulation 1) regarding certain operations of the Casino. It is not in dispute that the Casino is owned and operated by the Pauma Band of Mission Indians and is located on reservation property in Northern San Diego, California. The

[1] Testimony of witnesses will be referred to as "TR" (Reporter Transcript) with the appropriate line designated.

Casino operates so-called "Las Vegas" style gambling, i.e., see Joint Exhibit 1, subparagraph 5.

Respondent markets the Casino throughout Southern California (see Joint Exhibit 1, subparagraphs 9 and 10). The Casino is located approximately 59 miles north of San Diego and 103 miles from Los Angeles, California (see Joint Exhibit 1, subparagraph 23). Consequently, Respondent provides shuttle bus service to its customers (see Joint Exhibit 1, subparagraph 24).

The General Manager of the Respondent, Harry Taylor, testified (TR, 264, line 1, through 269, line 10) that the Casino has approximately 460 employees and that the Casino is in somewhat of a rural area in northern San Diego County and is surrounded by competing casinos such as Pechanga, Pala, Valley View and Rincon.

Mr. Taylor testified that it is a highly competitive market with the larger casinos soliciting smaller players of the type that normally play at Casino Pauma (TR, page 269, line 11 through 271, line 12).

The primary focus of the General Counsel's case related to restrictions on employees wearing items on their uniforms other than Gaming Commission issued badges. The Team Member Handbook contains the policy (see Respondent's Exhibit 2) which is stated in the section "Personal Appearance Guidelines" (see page 14). The section states as follows:

- All Team Members must wear proper uniforms when provided
- The Pauma Gaming Commission ID badge is part of your uniform and must be visible at all times at work. Except for this badge, Team Members may not wear any badges, emblems, buttons or pine on their uniforms (unless designated by the Casino).

Mr. Taylor testified (TR page 301, line 13 through page 302, line 14) that he was concerned about offending customers should employees be allowed to wear badges advocating a particular cause. (See further discussion below.)

Annelle Lerner, Director of Human Resources, (TR page 330, lines 2-3) testified that the badges themselves are issued by the Tribal Gaming Commission which is a separate entity from the Tribe (TR page 344, line 23 through page 345, lines 1-25). (See further discussion below.)

A. **Testimony Regarding Wearing of Union Buttons**

1. Testimony of James Bayton

James Bayton testified (TR page 57, lines 7-25) that he is employed as a Slot Technician and works the day shift on Wednesday through Sunday. Mr. Bayton testified that his shirt was supplied by Casino Pauma (TR page 59, lines 6-25). Mr. Bayton testified that he wore a button provided by Charging Party (TR page 61, lines 14-25) and that the button was worn both in May 2012 and again in April of 2013 (TR page 66, lines 12-25). General Counsel introduced General Counsel Exhibit 5, an email from April 4, 2013 from supervisor Richard Galvin referencing the policy about wearing items other than company issued badges. In both May of 2012 and April of 2013, Mr. Bayton was told to remove the button. By his own testimony, Mr. Bayton admitted that only 40% of his time is spent in the "tech shop" that is off the Casino floor (TR page 58, lines 22-25).

2. Testimony of Veronica Gazon

Ms. Gazon testified that she was employed in the "pizzeria and deli" (RT page 80, lines 1-7). She further testified that she worked preparing pizzas and sandwiches as well as acting as a cashier (TR page 80, line 7). She testified that in 2012 she wore General Counsel Exhibit 2, i.e., the Union button (TR page 86, lines 10-12) in 2012 (TR page 87, lines 1-2) and that she was told to remove it. She wore the button again in April of 2013 (TR page 90, lines 11-14) and she was told to remove it (TR page 92, lines 1-10). She also testified that she wore decorative items on her badge which were introduced as General Counsel Exhibits 8 and 9 (TR page 83, lines 1-25).

3. Testimony of Victor Huerta

Victor Huerta testified (TR page 110, line 20) that he is the "lead engineer" (TR page 110, lines 15-25). Mr. Huerta testified that he worked at different locations in the Casino (TR page 111, lines 20-25, TR page 112, lines 17-18, TR page 116, lines 7-8) including those that would encounter customers and the uniform worn by Mr. Huerta is provided by Casino Pauma (TR page 113, lines 1-18). Mr. Huerta testified that he wore the Union button provided by Charging Party (General Counsel Exhibit 2) in 2012 (TR page 114, lines 10-17) as well as in April 2013 (TR page 115, lines 1-50). In 2013 he was informed that he had to remove the button

(TR page 116, lines 1-25). He stated that in 2013 the Casino enforced a policy across the board against employees wearing items other than the Casino issued badge (TR page 120, lines 1-20).

On cross examination, Mr. Huerta confirmed again he performed work on the main floor of the Casino (TR page 136, lines 1-25) as well as performing job duties in the Casino parking lot primarily to deal with broken glass (TR page 137, lines 1-25).

4. Testimony of Alicia Andaluz

Ms. Andaluz testified that her job title is cook and she works in the pizzeria in the middle of the Casino (TR page 153, lines 10-25). She testified that the Casino provided her with a shirt for her uniform (TR page 155, lines 1-4) and that in 2012 she wore a Union button (TR page 155, lines 16-25) and that during 2012 she was told to remove the button (TR page 158, lines 1-18). She also wore the button in 2013 (TR page 162, lines 1-17) and was once again told to remove it. She further testified that she wore a decorative item attached to her badge regularly (TR page 165, lines 1-8) (see General Counsel Exhibit 11).

Ms. Andaluz further testified on cross examination that she regularly interacted with customers as part of her job (TR page 170, lines 16-25 and TR page 171, lines 1-19).

5. Testimony of Maria Taverez

Ms. Taverez testified (TR page 179, lines 12-14) that she was a pantry attendant in the pizzeria and that she prepared salads and sandwiches. She testified that she wore a Union button in 2012 (TR page 181, lines 10-25) and that she was told to remove the button (TR page 182, lines 1-25). She again wore the button in 2013 (TR page 186, lines 8-25) and was told to remove it.

6. Testimony of Maria Garcia

Maria Garcia testified that she was employed at the Casino in housekeeping (TR page 198, lines 20-25): She testified as to a number of decorative items (not a Union button) that she had worn during her time at work that were attached to her uniform (TR page 200, lines 7-25) (see General Counsel Exhibit 7); however, she did not wear the items for a portion of 2013 (TR page 202, lines 8-25). Ms. Garcia testified that she worked on the Casino floor where she would interact with patrons (TR page 226, lines 20-25).

7. Testimony of Catalina Gutierrez

Ms. Gutierrez testified (TR page 232, line 15) that she was employed as a housekeeper and that she wore a Union button during April of 2013 (TR page 232, lines 10-25) and that she was told to remove the button (TR page 234, lines 16-25). Additionally she testified she wore decorative pins on her uniform and attached to her badge holder (TR page 235, lines 14-25) (see General Counsel Exhibit 4 and 12).

8. Testimony of Maria Guadalupe Taverez

Ms. Taverez testified that she was a server in the buffet serving beverages to clients (TR page 244, lines 7-9) (see also TR page 249, lines 1-12) and that in 2012 she wore a Union button (TR page 245, lines 20-25). Additionally she wore the button in 2013 (TR page 246, lines 1-14). She was told to remove the button (TR page 247, lines 1-25).

9. Testimony of Harry Taylor

In addition to the testimony noted earlier, Mr. Taylor testified (TR page 283, lines 4-25 and TR page 284, lines 1-9) that there was no clearly designated employee only parking and that patron and employee parking could and did overlap.

Regarding activities of employees where they perform their duties, Mr. Taylor testified that slot techs (TR page 286, lines 14-25 and TR page 287, lines 1-21) primarily performed their duties on the Casino floor.

Mr. Taylor testified that housekeepers also spend the majority of their time on the Casino floor (TR page 288, lines 1-12).

Mr. Taylor testified that the pizzeria/deli is an open area and that employees working there could be viewed by the public (TR page 288, lines 14-25 and TR page 289, lines 1-3).

Finally, regarding enforcement of the rule and making it consistent (TR page 303, lines 4-25 and TR page 304, lines 1-4), he believed the rule was uniformly enforced to the extent that employees wearing items not allowed by the policy were detected.

10. Testimony of Annelle Lerner

Annelle Lerner offered additional testimony that the policy was consistently enforced and to the extent employees violated it they were asked to remove items on their uniform that were in

violation of the policy (TR page 334, lines 1-21).

She also offered testimony that offending items had to be detected before they could be removed (TR page 335, lines 11-13). And she gave an explanation per the Casino policy as to the General Counsel's exhibits as to what type of items on the uniform would violate the rules (TR page 338, lines 9-25 through TR page 342, line 1).

III. SPECIFICATION OF QUESTIONS PRESENTED

Respondent's exceptions to the ALJ's decision in recommended order present the following questions to be considered by the Board.

A. Whether the ALJ erred in relying on opinions that have now been vacated.

   This question is presented in Exception Nos. 1, 2, 11.

B. Whether the ALJ erred in relying on statements by Respondent to establish jurisdiction.

   This question is presented in Exception No. 4.

C. Whether the ALJ erred in not taking judicial notice of documents referenced by the Respondent.

   This question is presented in Exception Nos. 5,6, 7, 9.

D. Whether the ALJ erred in relying on commercial operations of the Respondent to establish jurisdiction.

   This question is presented in Exception Nos. 7,8.

E. Whether the ALJ erred in rejecting Respondent's arguments as to *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. __, 134 S. Ct. 2024 (2014).

   This question is presented in Exception No. 12.

F. Whether the ALJ erred in finding Respondent's rule as to items worn on employee uniforms to be violative of the Act.

   This question is presented in Exception Nos. 15-26

IV. ARGUMENT

A. THE ALJ'S JURISDICTIONAL ANALYSIS IMPERMISSIBLY STARTS FROM THE PREMISE THAT JURISDICTION EXISTS AND THEN CHERRY PICKS CONFORMING EVIDENCE TO SUPPORT THE FLAWED PROPOSITION

The standard process for gauging jurisdiction looks nothing like that contained within the June 25, 2014 opinion from the ALJ. In the normal scenario, the decision-maker starts from the premise that jurisdiction does not exist and stands by that belief until the party claiming otherwise carries its burden of proof. *See, e.g., Rex v. Chase Home Fin., LLC,* 905 F. Supp. 2d 1111, 1122-23 (C.D. Cal. 2012) (citing *Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375, 377 (1994)). In fact, the law considers this perceived skepticism about jurisdiction so basic to the adversary system that it imparts a "continuing, independent obligation [on the part of the decision-maker] to determine whether subject matter jurisdiction exists" in order to account for the myriad of situations in which the burdened party may not affirmatively carry its duty or the governing law or material facts change beneath its feet. *See Mashiri v. Dep't of Educ.,* 724 F.3d 1028, 1031 (9th Cir. 2012).

Yet, the opinion presently under review flips this process on its head by beginning at the finish line and then painting the evidence in a manner than reeks of confirmation bias in order to fend off any question about the expediency with which it reached the end result. Treating an issue of this magnitude in such a cursory and stilted manner imparts serious prejudice on the party claiming jurisdiction is lacking, a reality that becomes all the more clear once the NLRB reviews each of the egregious missteps that the ALJ committed in order to reach the outcome it desired – all of which are recounted in subsection A though F below. Thus, this jurisdictional argument will do the exact opposite of that within the June 25th opinion by dealing with each and every material contention raised by the document at issue so the NLRB can clearly see that the only appropriate outcomes at this juncture are either dismissing the case for lack of jurisdiction

or vacating the June 25th order and remanding the case to the regional office for consideration of the jurisdictional issue anew after a full evidentiary hearing on the topic.

B. Sweeping Statement Supported by Three Vacated Opinions and another Decision that Contravenes Seventy Years of Practice and Precedent is Insufficient to Prove Jurisdiction

The very first sentence of the jurisdictional analysis in the June 25th opinion proclaims in a matter of fact way that "[t]he Board has repeatedly asserted jurisdiction over casinos notwithstanding that they are owned and operated by tribal governments and located on reservation lands." ALJ Decision (ALJD 2-3). The legal authorities sup-porting this bold pronouncement are the following four cases, which the ALJ believed had cover-ed the field on the jurisdictional topic and left no room for Casino Pauma to make out a meaning-ful defense:

- *San Manuel Indian Bingo & Casino,* 341 NLRB 1055 (2004);
- *Little River Band of Ottawa Indians Tribal Gov't,* 359 NLRB No. 84 (2013), *pet. for rev. filed* No. 13-1464 (6th Cir. Apr. 15, 2013) ("*Little River Band*");
- *Soaring Eagle Casino & Resort,* 359 NLRB No. 92 (2013), *pet. for rev. filed* No. 13-1569 (6th Cir. May 3, 2013); and
- *Chickasaw Nation Casino,* 359 NLRB No. 163 (2013), *pet. for rev. filed* No. 13-9578 (10th Cir. July 23, 2013) ("*Chickasaw Nation*")

Id. Yet, this list of authority falls like a house of cards on closer examination. The final three cases that were pending before the federal appellate courts at the time the ALJ issued its opinion are now just empty vessels, titles without any substance and certainly without substance when the jurisdictional issue in this case was decided in the first instance by the ALJ. To explain, the NLRB rendered its final decisions in the *Little River Band, Soaring Eagle Casino & Resort,* and *Chickasaw Nation* cases from March to July of 2013, a time period when the Board was acting with only three members, two of whom (i.e., Sharon Block and Richard Griffin) were appointed by the President of the United States on January 4, 2012 through an invocation of the Recess Appointments Clause of the United States Constitution. *See* National Labor Relations Board, *Members of the NLRB since 1935,* http://www.nlrb.gov/who-we-are/board/members-nlrb-1935

(last visited July 28, 2014). The one problem with this particular application of the Recess Appointments Clause is that it was of no practical force since the Senate was then engaging in *pro forma* sessions every three to four days, making the intra-sessions breaks insufficient to confer the President with the power to bypass the Senate and make appointments unilaterally through his fallback recess powers. *See NLRB v. Noel Canning,* 572 U.S. __, 134 S. Ct. 2250, 2556-78 (2014). As a result, the Supreme Court of the United States concluded its majority opinion in the *NLRB v. Noel Canning* case by explaining the President lacked "the constitutional authority to make the ap-pointments here at issue" (*see id.* at 2578), a holding that served as a stepping-stone for the real outcome of the case that is described at the outset of the opinion – that the NLRB could not have acted in the absence of a lawfully appointed quorum. *See id.* at 2557 (citing, *e.g.*, 29 U.S.C. §§ 153(a), 153(b); *New Process Steel, L.P. v. NLRB,* 560 U.S. 674, 687-88 (2010)).

The immediate fallout of the *NLRB v.Noel Canning* decision involved the United States Court of Appeals for the Seventh Circuit vacating orders from the Board in two cases after reiterating the Supreme Court's language that "in the absence of a lawfully appointed quorum, the Board cannot exercise its powers." *Big Ridge, Inc. v. NLRB,* 2014 U.S. App. LEXIS 12471, *4 (7th Cir. 2014) (citing *NLRB v. Noel Canning,* 134 S. Ct. at 2557). The outright vacatur of these decisions led the NLRB to file motions to vacate *and* "[r]emand for consideration by a properly constituted tri-bunal" in all three of the *Little River Band, Soaring Eagle Resort & Casino,* and *Chickasaw Na-tion* appeals. [*See* Mot. of Board to Vacate and Remand and for Expedited Issuance of Mandate in Light of *NLRB v. Noel Canning* ("Mot. to Vacate"), *Chickasaw Nation v. NLRB,* No. 13-9578, Doc. No. 01019274707 (10th Cir. July 7, 2014); Mot. to Vacate, *Saginaw Chippewa Indian Tribe of Mich. v. NLRB,* No. 13-1569, Doc. No. 86 (6th Cir. July 7, 2014); Mot. to Vacate, *Little River Band of Ottawa Indians v. NLRB,* No. 13-1464, Doc. No. 118 (6th Cir. July 7, 2014)] As of the date of this filing, the United States Court of Appeals for the Tenth

Circuit vacated the NLRB's order in *Chickasaw Nation* and remanded the matter to the Board for further proceedings [*see* Vacatur Order, *Chickasaw Nation v. NLRB,* No. 13-9578, Doc. No. 01019283197 (10th Cir. July 22, 2014)], while the United States Court of Appeals for the Sixth Circuit has not acted on the motions filed in either the *Little River Band* or *Soaring Eagle Resort & Casino* appeals – the former of which was heard by the merits panel some nine months ago. [Notice of Hearing, *Little River Band of Ottawa Indians v. NLRB,* No. 13-1464, No. 96 (6th Cir. Oct. 8, 2013)] Thus, the current tally for these three appeals is one order vacating the NLRB's decision and remanding the matter for consideration in the first instance[2] and two pending applications from the Board requesting the same and acknowledging the underlying opinions have been subject to vacatur – an act that has "the effect, in a concrete and practical way, of removing the [opinions] from the reservoir of legal thought upon which the bench and the bar can subsequently draw." *ATSI Comm'ns, Inc. v. Shaar Fund, Ltd.,* 547 F.3d 109, 112 n.5 (2d Cir. 2008). In other words, the Supreme Court's opinion in *NLRB v. Noel Canning* has transformed three of the four decisions upon which the ALJ based its decision to exercise jurisdiction into outright nullities.

The singular remaining source of authority for asserting jurisdiction over Casino Pauma is *San Manuel Indian Bingo & Casino,* a case that departed from seventy years of practice and precedent to exert jurisdiction over a tribal casino simply because it purportedly made a signifi-

[2] In a recently filed reply brief, the Board conceded that it needs to consider "anew" any cases remanded in light of *NLRB v. Noel Canning*. [Board's Opp'n to Saginaw Chippewa Indian Tribe's Mot. to Hold the Case in Abeyance and Reply to Tribe's Opp'n to Board's Mot. to Remand, *Saginaw Chippewa Indian Tribe of Mich. v. NLRB*, No. 13-1569, Doc. No. 89, § 1 at p. 4 n.2 (6th Cir. July 30, 2014) ("[T]he Court should approve the procedure that the agency deems most appropriate to cure the constitutional defect - here, an unrestricted remand to the Board so it can consider the case anew.")] The Sixth Circuit has yet to rule on the Board's motion for remand in *Saginaw Chippewa*, and the outcome is not certain considering this a problem of the Board's own making since it was aware at the time of its decision that it could not act in the absence of a lawfully constituted quorum. *See New Process Steel,* 560 U.S. at 687-88 (Supreme Court determination from 2010 holding that the Board cannot exercise its powers in the absence of a lawfully appointed quorum).

cant amount of money for the tribe. *See San Manuel Indian Bingo & Casino,* 341 N.L.R.B. at 1056 ("For almost 30 years… the Indian tribes and their commercial enterprises have played an increasingly important role in the Nation's economy. As tribal businesses have grown and prospered, they have become significant employers of non-Indians and serious competitors with non-Indian owned businesses.") Ignoring the fact that "commerce" is but one of three elements in the grant of jurisdiction under Section 10(a) of the NLRA, the Board jettisoned its old standard that "implicitly exempt[ed tribes] as employers within the meaning of [Section 2(2) of] the Act" (*see Fort Apache Timber Co.,* 226 N.L.R.B. 503, 506 (1976)) – a standard the Board characterized as somehow being "overinclusive" and thus unfair to tribes – in favor or employing a policy-driven test that seemingly sweeps virtually every activity within its ambit by only exempting that which "fulfills traditionally tribal or governmental functions that are unique to their status as Indian tribes." *San Manuel Indian Bingo & Casino,* 341 N.L.R.B. at 1063.

The perception that this test covers the spectrum of possible tribal enterprises highlights its first fundamental problem, which is that the NLRB created this standard and singlehandedly determined what is "traditionally" or "uniquely" tribal on appeal without first having an ALJ conduct an evidentiary hearing on the matter. As the remainder of this brief will show, the decision to decide these factual issues on appeal was both improper for a reviewing court to make and erroneous in light of the activities traditionally undertaken by tribes in order to sustain their people, which are discussed more fully in Section I(f), *infra*. However, on a more fundamental level, employing a test that relies on such ephemeral and subjective criteria as "tradition" and "uniqueness" is downright unconstitutional according to Supreme Court precedent and therefore ill-suited for application in the present case. *See* Section I(f), *infra* (discussing *Garcia v. San Antonio Metro. Transit. Auth.,* 469 U.S. 528 (1984)).

With that, the assertion of jurisdiction in the present case arose from three vacated opinions applying a test from a fourth that is both unconstitutional and based on policy rather than legal reasons. Thus, the primary question now becomes what should the Board do in this situation (should it choose to not dismiss the case for lack of jurisdiction), where intervening legal developments and prior missteps on the part of the Board have gutted the jurisdictional analysis in the June 25th opinion of its legal underpinnings? Though case law pertaining to this situation is sparse, the NLRB can seek guidance from the United State Court of Appeals for Veterans Claims and its handling of an administrative decision whose reasoning was lost from the vacatur of the supporting opinion. In *Skobbeko v. Mansfield*, 2007 U.S. App. Vet. Claims LEXIS 1748, *17-18 (Vet. App. 2007), the opinion by the Board of Veterans Affairs then under review denied the appellant's claims regarding his back condition on the basis of *Gahman v. West,* 12 Vet. App. 406 (1999), an opinion that established the appropriate burden of proof the Board must carry for proving an injury preexisted military service and overcoming the "presumption of soundness." *Skobbeko,* 2007 U.S. App. Vet. Claims LEXIS 1748 at *17. However, the "opinion in *Gahman* was withdrawn" following the release of the Board's decision, causing it to ask the Court to remand the matter so it could hear the case anew and "apply the correct legal standard for rebutting the presumption of soundness." *Id.* at *18. In response to this request, the Court explained "that the Board's reliance on *Gahman* renders the Board's statements of reasons or bases for its conclusion inadequate" and consequently vacated and remanded the decision for it "to reevaluate the evidence under the proper legal standard" as part of a "critical [re]examination of the justification for the decision." *Id.* at *18-20. The Court made sure to emphasize that "[o]n remand, the appellant is free to submit additional evidence and argument on the remanded matters, and the Board is required to consider any such relevant evidence and argument." *Id.* at *20. The same remedy should apply in this case, particularly in light of the fact that during the first go around

the ALJ misapplied "evidence" to justify its decision to assert jurisdiction and then ignored all of Casino Pauma's opposing submissions through a methodical process that both misconstrued the law and misrepresented the arguments. *See* Sections I(B)-I(F), *infra.*

C. Jurisdiction is a Disjunctive Consideration and cannot be Proven or Disproven by a Purported Statement from One of the Parties

The swift recitation of the reasons supporting jurisdiction in the July 25th order ended with the comment that "the Casino repeatedly assured its employees, in writing, both before and during the relevant events here, that they were 'protected' by federal law and the NLRA. The Casino even gave employees the address and telephone number of the Board's regional office in San Diego to learn about their 'rights.' " (ALJD 3). The ev-idence the ALJ is referring to is a memorandum from Casino Pauma management to "All Team Members" explaining that "[c]ertain eligible Team Members have a right to support Unite-Here" and "[t]his right is protected by a federal law and the National Labor Relations Act (NLRA) as well as under the Tribal State Compact." [CP Exs. 6-9 (Feb. 10, 2014)] In explaining the rele-vance of this evidence, the ALJ determined that the "Casino's prior statements admitting juris-diction… may properly be considered in evaluating the Casino's contrary arguments here." (ALJD 3: n.7.)

This perception about the methods for proving jurisdiction runs counter to the basic principles of the subject according to federal court authorities, which provide that "subject matter jurisdiction, however, is not something that can be 'conceded' – either by the parties or by the actions of the Court." *Mohammadi v. Islamic Republic of Iran,* 947 F. Supp. 2d 48, 81 n.2 (D.D. C. 2013); *see York Group, Inc. v. Wuxi Taihu Tractor Co.,* 632 F.3d 399, 403 (7th Cir. 2011) (same); *United States v. Ceja-Prado,* 333 F.3d 1046, 1048-49 (9th Cir. 2003) (same in scenario where party concedes jurisdiction before district court and then challenges it on appeal). Even if there was a contrary rule, the federal courts are nevertheless "reluctant to treat opinions and legal conclusions" such as whether a person's rights are protected under the NLRA "as judicial admis-

sions." *See Z.J. Gifts D-4, L.L.C. v. City of Littleton,* 311 F.3d 1220, 1233 (10th Cir. 2002) (citing *MacDonald v. GM,* 110 F.3d 337, 341 (6th Cir. 1997); *Glick v. White Moro Co.,* 458 F.2d 1287, 1291 (3d Cir. 1972); *New Amsterdam Cas. Co. v. Waller,* 323 F.2d 20, 24 (4th Cir. 1963)). However, the NLRB need not even reach the question of whether or not the statements in Casino Pauma's memorandum are sufficient to establish an admission because the basic principle that jurisdiction is static and unaffected by the musings of the parties is so unyielding that the federal courts will apply it in even the most extreme of cases.

For example, in the *Ceja-Prado* case cited in the preceding paragraph, the defendant was a Mexican national charged with conspiring to distribute methamphetamine who admitted he was a twenty-one year old named Alejandro Ceja-Prado before pleading guilty to the crime. *Ceja-Prado,* 333 F.3d at 1047-48. This admission as to his age enabled the federal courts to proceed with the case and accept his guilty plea, something that would not have been possible if he were under eighteen given the protections afforded by the terms of The Federal Juvenile Delinquency Act ("FJDA"), 18 U.S.C. § 5031 *et seq. See Ceja-Prado,* 333 F.3d at 1048 (explaining that under the FJDA juveniles "shall not be proceeded against in any court of the United States" until the Attorney General follows the certification procedures set forth in the statute). However, on appeal, the defendant submitted a slew of new evidence such as a certified birth certificate and declarations from family members for purposes of showing that he was not a twenty-one year old named Alejandro Ceja-Prado, but a sixteen year old named Javier Ceja-Prado who just happened to be the former's younger brother. *Id.* at 1048.

When this new evidence came before the United States Court of Appeal for the Ninth Circuit, the principal question on appeal turned into "[w]hether a criminal defendant may present evidence on appeal that, if true, would establish that the district court lacked jurisdiction over his case – even though in the district court he represented the facts to be the contrary." *Id.* at 1049.

While explaining they do not sanction the course of conduct undertaken by the defendant turned appellant, the Ninth Circuit nevertheless remanded the case for an evidentiary hearing to determine Ceja-Prado's true age. *Id.* In its own words, the reason the Ninth Circuit resolved the appeal in that manner was because "our obligation to investigate and ensure our own jurisdiction overrides the equitable or jurisprudential considerations that might otherwise prevent Ceja-Prado from raising new and contradictory evidence at this point." *Id.* Put differently, questions about jurisdiction should rightly turn on the evidence that proves or disproves the statutory prerequisites and not upon one party's statements in or out of the courtroom as to whether jurisdiction actually exists.

Lest the NLRB think that *Ceja-Prado* is an extreme outlier that does not conform to the representative case, fact patterns that detail decades of litigation and innumerable admissions of jurisdiction still produce the same outcome when the defendant ultimately questions whether a tribunal has the authority to act. Perhaps the most illustrative case for this point is *Richardson v. United States,* 943 F.2d 1107 (9th Cir. 1991), in which the federal defendants partook in "fourteen years [of]... litigation... numerous status and pre-trial conferences, motions, three liability trials, one damage trial, and two prior appeals to the Ninth Circuit Court of Appeals" during which time they never pursued their jurisdictional "discretionary function" defense and even admitted to the district court that it had jurisdiction "pursuant to the Federal Tort Claim Act." *Id.* at 1112. Though the equities of this case could not have been any clearer, the actions of the federal defendants more "troubling," or the end result of the protracted litigation more "harsh," the Ninth Circuit found itself "bound by [the legions of] precedent" espousing principles such as "[s]ubject matter jurisdiction cannot be conferred upon the courts by the actions of the parties and principles of estoppel and waiver do not apply," and consequently held that dismissal for lack of jurisdiction was appropriate. *Id.* at 1112-13.

Putting the subject matter jurisdiction rules aside for a moment, turning a purported admission into a distinct basis for hearing a case does not even pass muster under the more flexible standards for determining whether a party has waived an affirmative defense like sovereignty immunity.[3] The counterpart to the instant scenario arises in *Nanomantube v. Kickapoo Tribe,* 631 F.3d 1150 (10th Cir. 2011), a case that centered on the relevance of a statement in a casino's employee handbook that "The Golden Eagle Casino will comply with the provisions of Title VII of the Civil Rights Act of 1964 and 1991." *Id.* at 1152. The plaintiff took this language at face value, assuming the tribe willingly consented to suit in light of the jurisdictional and enforcement provisions contained within the terms of the statute. Yet, the Tenth Circuit disagreed, explaining the statement may " 'convey a promise not to discriminate,' but it 'in no way constitutes an express and unequivocal waiver of sovereign immunity and consent to be sued in federal court.' " *Id.* at 1153 (quoting *Sanderlin v. Seminole Tribe of Fla.,* 243 F.3d 1282, 1289 (11th Cir. 2001)); *accord Gilbertson v. Quinault Indian Nation,* 495 F. App'x 779, 779-80 (9th Cir. 2012) (explaining statement in employee handbook that workers were protected under Title VII did not waive tribal sovereign immunity); *see Allen v. Gold Country Casino,* 464 F.3d 1044, 1047 (9th Cir. 2006) (same for statement in an employee handbook that the casino would "practice equal opportunity employment and promotion"); *Mastro v. Seminole Tribe of Fla.,* 2013 U.S. Dist. LEXIS 92892, *17-18 (M.D. Fla. 2013) (same for statement in a gaming compact that the tribe

[3] While the ALJ concedes that the statement at issue does not estop Casino Pauma from challenging the Board's jurisdiction, he nonetheless considers the evidence based on *Russell v. UPS,* 666 F.2d 1188 (8th Cir. 1981). But *Russell* merely explains that a lay opinion otherwise satisfying the elements for admission under FRE 701 (i.e., the lay testimony is (a) rationally based on the perception of the witness and (b) helpful to clearly understand his testimony or to determine a fact in issue) need not meet the firsthand knowledge aspect of the test if it is also a party admission. The ALJ thus appears to confuse the admissibility of the statement under the Federal Rules of Evidence with the more germane issue of whether the statement can properly be used to establish jurisdiction, which it cannot. Even within the confines of FRE 701, the ALJ fails to explain how the issue of whether the Board has jurisdiction over Casino Pauma is a "*fact* in issue" or how such a standalone legal issue could possibly be determined or aided by the legal conclusion of a lay witness regarding the "rights" of Casino employees.

will "comply with all federal and state labor laws"). For that to happen, the statement before the court would at least need to more closely resemble the waiver of sovereign immunity in *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 419 (2001), that detailed such particulars as the proper forum, the governing law, and the available remedies. The absence of these specifics in the memorandum from Casino Pauma to its employees means the ALJ should not have even considered this evidence when adjudging a waivable affirmative defense like sovereign immunity (if that were an issue) let alone the non-waivable jurisdictional question.

D. Judicial Notice does not Employ a Discretionary, Time-Limited, Elastic Standard that Ultimately turns on Considerations of Expediency

The eagerness with which the ALJ considered the internal Casino Pauma memorandum in its jurisdictional analysis contracts starkly with its reluctance to recognize any of the counter-vailing evidence offered by Casino Pauma. At the hearing in this matter, the counsel for the General Counsel approached the jurisdictional issue in much the same way as the ALJ, contending that jurisdiction exists solely because the enterprise at issue is a casino:

> On the jurisdictional issue, we have *San Manuel* and the facts of this case. There's nothing new or novel here. Respondent is a significant commercial employer. The NLRB is a significant commercial employer. The NLRB has jurisdiction over its operations, and that jurisdiction is exclusive jurisdiction, so regardless of any compact that the tribe may have with the State of California, the NLRB has exclusive jurisdiction to resolve the unfair labor practice charges in this case.

(RT 46:3-10) This proposed shortcut for creating jurisdiction blindsided Casino Pauma, necessitating that it address the accuracy of the aforementioned statement in its post-hearing brief.[4] Although the vast majority of the evidence discussed within and attached to Casino

[4] Casino Pauma was similarly blindsided by the ALJ's finding that judicial notice of the documents was inappropriate to the extent they address "how the Casino's revenues are distributed" since the Casino's attorney represented that he would not be presenting evidence on the issue. (ALJD 3-4: n.9) What specially-appearing counsel for the Tribe actually explained at the hearing was that the purposes for which the Casino's revenue could be used by the Tribe is dictated by the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2710 *et seq.*, and thus not

Pauma's post-hearing brief were public records from governmental websites, the ALJ nevertheless painted the evidence as consisting of such uncouth things as "newspaper articles, an American Gaming Association report,… and a Wikipedia page" before artfully manipulating the rules of evidence and administrative law to bar its consideration entirely.

First, the ALJ characterized the evidence submitted in connection with Casino Pauma's post-hearing brief as being "nonrecord documents," as if implying that it did not have any obligation to consider the material when rendering its opinion. However, Ninth Circuit precedent clearly provides that the "administrative record… consists of all documents and materials directly or indirectly considered by the agency decision-makers" (*see Ariz. Rehabilitation Hosp. v. Shalala,* 185 F.R.D. 263, 266 (D. Ariz. 1998) (citing *Thompson v. U.S. Dep't of Labor,* 885 F.2d 551, 555 (9th Cir. 1989))), which is generally everything "that was before the administrator when the decision was made." *Velikanov v. Union Sec. Ins. Co.,* 626 F. Supp. 2d 1039, 1050 (C.D. Cal. 2009) (citing *Tremain v. Bell Indus.,* 196 F.3d 970, 976-77 (9th Cir. 1999)). Interpreting the term "record" to include all the materials filed on the case docket prior to entry of judgment makes logical sense given the NLRB's own procedures that permit the filing of post-hearing briefs to address matters raised at the hearing or even to counter the ALJ taking eleventh-hour judicial notice of material facts in its opinion in the matter. *See* National Labor Relations Board, Statements of Procedure §§ 101.10(a) & (b)(3), *available at* http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1717/Manual-Part 101 .pdf (last visited July 29, 2014).

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an appropriate subject for factual discovery. In response, both the General Counsel and the Union represented that they would not be litigating the Casino's compliance with the statute, and the ALJ indicated that he would consider reopening the hearing should the Casino later put on evidence on the point. [Hr'g Tr., 26:2-28-7 (Feb. 10, 2014)] And yet, the ALJ appears to estop Casino Pauma from arguing this point, whether by citing the statute or referencing judicially noticeable documents from public sources available to all parties. Although the specially appearing counsel for the Tribe asked to brief the issue should it arise again [Hr'g Tr., 29:1-5 (Feb. 10, 2014)], the ALJ failed to provide any notice to the Tribe or the parties of his apparent ruling that the Casino could not address the issue by any means. This resulted in substantial prejudice to Casino Pauma, and provides yet another basis for remanding this case for further proceedings.

The comment brandishing Casino Pauma's evidence as "nonrecord" then morphed into a discussion about the rules for judicial notice under Federal Rule of Evidence 201 ("Rule 201"), at least as understood by the ALJ. The basic purpose of judicial notice, according to the ALJ, is to take judicial notice of adjudicative facts, a term that it contends does not include such things as "legislative or 'background' facts." (ALJD 3: n.8) While the focus of the inquiry may be correct, the understanding of its constituent parts is not. The term adjudicative has a broad scope that includes all the facts in a particular case that ordinarily would go to a jury, such as the "who did what, where, when, how, and with what motive or intent." *See* 1 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 201.02[1] (2d ed. 2014). Falling within the ambit of this term are all the "background" facts necessary for the res-olution of the case. *See United States v. Costello,* 222 F.2d 656, 661 (2d Cir. 1955) (explaining judicial notice of background facts is appropriate); *accord Twombly v. Bell Atl. Corp.,* 313 F. Supp. 2d 174, 182 (S.D.N.Y. 2003), *vacated on other grounds by* 2005 U.S. App. LEXIS 21390 (2d Cir. 2005); *Parker v. State,* 2012 U.S. Dist. LEXIS 104684, *1 (D. Utah 2012); *Orso v. Bayer Corp.,* 2009 U.S. Dist. LEXIS 7438, *1 n.1 (N.D. Ill. 2009). What is excluded from this term are "basic" facts that everyone can conceptualize without the assistance of evidence, such as a car or, in this particular case, an Indian or a slot machine. *See* 1 *Weinstein's Federal Evidence* § 201.04. Requiring proof of these factual rudiments would overwhelm the judiciary by requiring it to "construct every case from scratch," thus making the submission of evidence to corroborate these facts either directly or through judicial notice inappropriate. When looking at the footnote in the June 25th opinion discussing the contours of Rule 201, the error arises not from the ALJ's use of arguably incorrect terminology but from its failure to appreciate the difference between "basic" facts that are not proper subjects for judicial notice (*i.e.*, a casino) and "background" facts that are (*i.e.*, the history of casino gaming in the United States).

This initial error then led to a cavalcade of others as the ALJ reinterpreted each of the pertinent subsections of Rule 201 to turn the stationary judicial notice requirements into moving targets that Casino Pauma could never hit. Under Rule 201(b), the test for judicial notice that inquires whether a fact is not subject to reasonable dispute in that it is either "generally known within the trial court's territorial jurisdiction" or capable of "accurate[ ] and read[ ]y determination from sources whose accuracy cannot reasonably be questioned" suddenly gained an extra corroboration requirement – one that is not mentioned in the text of the rule, seems superfluous in light of the initial source being of unquestionable accuracy, and fails to specify the quality of evidence needed to substantiate a document that is already beyond reproach.[5] Nevertheless, the ALJ used this implied corroboration requirement to categorically deflect consideration of a batch of evidence that largely consisted of public records from governmental websites and a handful of complimentary materials like newspaper articles. *See e.g., United States ex rel. Dingle v. BioPort Corp.*, 270 F. Supp. 2d 968, 972 (W.D. Mich. 2003) (stating public records are "generally considered not subject to reasonable dispute"); 1 *Weinstein's Federal Evidence* § 201.11[2] ("Facts reported in a newspaper are often accepted as generally known" (citing *Ritter v. Hughes Aircraft Co.,* 58 F.3d 454, 459 (9th Cir. 1995); *Associated Gen. Contractors of Am. v. City of Columbus,* 936 F. Supp. 1363, 1425 (S.D. Ohio 1996) (collecting cases))).

Turning to subsection (c), the ALJ then painted judicial notice as a discretionary exercise by contending that it "*might*" take notice of the evidence should the materials satisfy the heightened amorphous standard set forth by the court. Yet, this stance runs counter to the express text of subjection (c) that mandates a court to take judicial notice of an adjudicate fact when "a party

[5] ALJD 3-4. ("[J]udicial notice is clearly not appropriate with respect to the uncorroborated hearsay statements contained in the cited [documents] absent a showing or basis to conclude that the statements properly fall within an exception to the hearsay rule and/or are free from reasonable dispute"). The ALJ's determination entirely misses the point of the judicial notice function, which is that evidentiary proof is not required for a document that itself meets the criteria of Rule 201.

requests it and [as here] the court is supplied with the necessary information." Fed. R. Evid. 201(c). *See O'Toole v. Northrop Grumman Corp.,* 499 F.3d 1218, 1225 (10th Cir. 2007) (explaining a court had to take judicial notice of retirement fund earnings when the requesting party presented the court with a link to the company's website address containing the information); *Zimora v. Alamo Rent-A-Car, Inc.,* 111 F.3d 1495, 1523 (10th Cir. 1997) (explaining a court was required to take judicial notice of a local ordinance when requesting party presented the court with a copy of the ordinance). Compounding this error was the ALJ's previously mentioned statement that the record in the case had closed and presumably barred the submission of any judicially noticeable evidence. (ALJD 3-4 describing Casino Pauma's evidence as "nonrecord"). However, subsection (d) provides that "a court may take judicial notice at any stage of the proceeding" (*see* Fed. R. Evid. 201(d)), a standard the federal courts have construed as permitting judicial notice for the first time after the actual close of the record before the district court or even on appeal. *See, e.g., Group One, Ltd. v. Hallmark Cards, Inc.,* 407 F.3d 1297, 1306 (Fed. Cir. 2005) (allowing for judicial notice after jury reached verdict but before entry of judgment).

When the ALJ was done transforming basic into background, indisputable into debatable, mandatory into discretionary, and "at any point" into "at any point before the record subjectively closes," it concluded the discussion about judicial notice by stating that it need not consider the question at hand because "the prior Board decisions would be factually indistinguishable" even if such notice were taken. (ALJD 3-4) For starters, this choice to refrain from considering the offered evidence has put others involved in this suit into unfortunate positions, with Casino Pauma having to recreate its arguments from scratch and the NLRB now having to wear the duel hats of being both the reviewing court and the trial court in the first in-stance. After all, when it comes to standard procedure for the NLRB and other appellate bodies:

> [n]ormally, in an appeal, we receive the case after the [trial court] has resolved every claim presented, after the parties have had the opportunity to raise every argument they choose, and after the facts have been fully developed.

Calderon v. United States Dist. Court, 163 F.3d 520, 533 (9th Cir. 1998). The June 25th opinion does an admirable job of resolving the claims pursuant to the evidence submitted by the complaining parties, but completely abdicates its responsibility with respect to hearing the "facts [Casino Pauma tried to]… fully develop[ ]" and addressing the "arguments [it] cho[ ]se" to advance. What is worse, the ALJ based its decision to not perform these functions on three vacated opinions and the much-maligned *San Manuel Indian Bingo & Casino* decision, claiming their mere existence rendered meaningless any possible argument about the "Pauma Band's history of severe poverty and total dependence on the Casino's revenues to fund the tribe's governmental operations." (ALJD 3-4) Putting aside the fact that three-fourths of those authorities no longer exist, this statement is just a *tad* bit misrepresentative seeing the brunt of the evidence advanced by Casino Pauma addressed the completely unrelated point that commerce alone is insufficient to establish jurisdiction when governmental entities are in play – just as the ensuing subsection explains.

E. Non-Tribal Governments Routinely Engage in Gambling and other Commercial Enterprises as part of their Governmental Functions and yet still Evade Scrutiny under the NLRA

The counsel for the General Counsel's comment at the hearing that commerce in and of itself is sufficient to establish NLRB jurisdiction compelled a response from Casino Pauma detailing a myriad of longstanding commercial enterprises conducted by other governments in this Nation that would erroneously run afoul of the "traditional" governmental function test in *San Manuel Indian Bingo & Casino* and yet still evade scrutiny under the NLRA. [Post Hr'g Br. of Casino Pauma, § 5 (Apr. 25, 2014)] In other words, the *San Manuel Indian Bingo & Casino* test works off of the flawed assumption that the concepts of "governmental" and "commercial" are

mutually exclusive and then unfairly singles out Indian tribes for disparate treatment from the myriad of other governments engaging in exactly the same sort of hybrid conduct. The decision by the ALJ to adopt the counsel for the General Counsel's argument wholesale and ignore Casino Pauma's evidence to the contrary means that this brief will have to regurgitate the argument in full so the Board can determine (or question if it should determine) in the first instance whether the assertion of jurisdiction is proper in light of *all* of the evidence submitted in this case.

While "[t]he Board [may have] repeatedly asserted jurisdiction over casinos" and other gambling enterprises (ALJD 2-3), that does not mean the NLRB can or should do that when a government is the operator. In this United States, there is a history of governments engaging in gambling in order to generate money for their residents. [Post Hr'g Br. of Casino Pauma, § 5 at 33:11-20 (Apr. 25, 2014)] This practice dates back to the origin of the Nation, beginning with the colonies in the 1600s. [Post Hr'g Br. of Casino Pauma, § 5 at 33:13-15 (Apr. 25, 2014)] During this time, the incidence of state-sponsored gambling was not isolated to one or two anomalous locales; rather "each of the 13 original colonies established a lottery system to raise revenue, and playing the lottery became a civic responsibility." [Post Hr'g Br. of Casino Pauma, § 5 at 33:15-17 (Apr. 25, 2014)] These auspicious origins produced a culture dependent on lotteries for generating "governmental" revenue, as lotteries now exist in forty-four states plus the District of Columbia, Puerto Rico, and the United States Virgin Islands. [Post Hr'g Br. of Casino Pauma, § 5 at 33:17-20 (Apr. 25, 2014)]

Yet, the uses for which these revenues are put would seemingly cast doubt on whether or not the lotteries are actually "traditional" governmental functions under the *San Manuel Indian Bingo & Casino* test. The general perception that lotteries correlate with increased school funding loses merit upon closer examination of the actual evidence. Some states like the States of Connecticut and Delaware direct the entire amount of net income produced by the sale of lottery

tickets into their respective General Funds [Post Hr'g Br. of Casino Pauma, § 5 at 34:22-24 (Apr. 25, 2014)], accounts "consist[ing] of money received into the treasury and not required by law to be credited to any other fund." *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger,* 602 F.3d 1019, 1029 (9th Cir. 2010). On the other hand, certain other states like the State of Iowa have created more elaborate programs that funnel the preponderance of the lottery proceeds into the General Fund while sending a much smaller segment into funds like the "Vision Iowa program, which was implemented [in part] to create tourist destinations and community attractions." [Post Hr'g Br. of Casino Pauma, § 5 at 34:22-24 (Apr. 25, 2014)] The common feature running through all of these programs is that the majority of generated funds has absolutely no earmarks attached to it and can be used indiscriminately – whether that is paying for employee conferences in exotic locales or doling out cash benefits to individual persons. The funds that are not simply sitting in an account exposed to the whims of an unchecked legislature instead go to pay for economic development projects of the sort that the counsel for the Union decried might be taking place on the Pauma reservation as a result of the revenues produced by its own gaming facility. [TR, 22:1-13 (Feb. 10, 2014)] Regardless of use, this shift of pro-ceeds from a traditionally governmental program to potentially "non-traditional" proprietary undertakings is occurring on a massive scale considering that even a small, less-populated state like Connecticut is generating upwards of $312 million per year in lottery proceeds. [Post Hr'g Br. of Casino Pauma, § 5 at 34:22-24 (Apr. 25, 2014)] Thus, this is just one example of a "traditional" governmental function that can and does use its proceeds for "non-governmental" purposes – a dichotomy that would run afoul of the *San Manuel Indian Bingo & Casino* test, at least when undertaken by certain targeted governments.

The reality that states and other governments in this Nation are commercial actors means this lottery example has a multitude of counterparts, such as the operation of casinos like the one

at issue in this case. [Post Hr'g Br. of Casino Pauma, § 5 at 35:8-11 (Apr. 25, 2014)] The domineering positions inherently held by states provide them with the luxury of not having to get their hands dirty by actually running the gaming facilities themselves. Instead, the states have historically outsourced the operation of casinos to private parties and then taxed them at such exorbitant rates that they become the primary beneficiaries of the operations for all intents and purposes. *See Rincon,* 602 F.3d at 1035-36 (explaining the revenue sharing demanded by the state for the right to operate a casino would have made it the "primary beneficiary" of the facility). A cross-section of these revenue (not income) tax rates in the thirty-seven states that license private casinos proves this point, as they range from 26% in the State of New Mexico to 33% in the State of Ohio to 35% in the State of Florida to 43.77% in the State of Delaware to 55% in the State of Pennsylvania. [Post Hr'g Br. of Casino Pauma, § 5 at 35:14-17 (Apr. 25, 2014); Resp. Casino Pauma's Opp'n to Mots. to Strike, § II at pp. 14-15 (May 7, 2014)] Again, this is a well-established, traditional governmental function for states and yet the majority of the money still goes into unfettered General Funds. [Post Hr'g Br. of Casino Pauma, § 5 at 35:17-19 (Apr. 25, 2014)]

This practice of states extorting copious amounts of revenues from casino operators has also occurred in the government-to-government scenario following the advent of the tribal/state compacting requirement under IGRA. The fifteen-year history of compacting in California depicts rather clearly how the compact has gone from a mechanism to support communities on the brink to one that fills the coffers of the State government. [Post Hr'g Br. of Casino Pauma, § 5 at 35:20-37:7 (Apr. 25, 2014)] According to the text of IGRA, the central precondition to engaging in tribal gaming is the execution of a compact with the resident state that spells out the regulatory parameters for the activity. *See* 25 U.S.C. § 2710. The negotiations for these compact can touch on a number of topics directly related to the conduct of gambling like compensation to cover the

regulatory costs a state may incur under the future compact, but they may not venture into *quid pro quo* monetary discussions about the tribe paying "any tax, fee, charge, or other assessment" to the state for the right to obtain a compact. *See* 25 U.S.C. §§ 2710(d)(3)(C) & (d)(4). The early years of compacting in California saw the state superficially following the letter and spirit of the law by providing upwards of fifty-seven tribes with a standard form compact in exchange for their promise to make modest annual payments into two "revenue sharing" funds. [Post Hr'g Br. of Casino Pauma, § 5 at 36:3:6 (Apr. 25, 2014)] The first of these is the "Revenue Sharing Trust Fund" ("RSTF"), an account created to provide each non-gaming tribe in the State of California with $1.1 million in financial support to carry out its governmental operations. [Post Hr'g Br. of Casino Pauma, § 5 at 36:6-9 (Apr. 25, 2014)] The second is called the "Special Distribution Fund" ("SDF") and was set up to direct monies to local communities and the state regulatory agencies. [Post Hr'g Br. of Casino Pauma, § 5 at 36:6-9 (Apr. 25, 2014)] The prospect of tribes making money has always caused consternation for the outside world, however, and soon the State of California began selling tribes "new" compacts in exchange for massive payments into the General Fund. As explained in the post-hearing brief, whereas a tribe like the Pechanga Band of Luiseno Indians made modest payments into the RSTF and SDF under its original compact, it soon found itself paying the State $44,500,000 on a yearly basis for largely the same rights, with all but $2,000,000 of that total going into the General Fund. [Post Hr'g Br. of Casino Pauma, § 5 at 36:15-19 (Apr. 25, 2014)] What started as negotiations between an avaricious executive and a lone desperate tribe needing a new deal soon turned into thirteen compacts throughout the State that impose large-scale General Fund Revenue Sharing and a bevy of others that funnel equally exorbitant assessments into other accounts. [Post Hr'g Br. of Casino Pauma, § 5 at 36:19-37:1 (Apr. 25, 2014)] Thus, chalk this up as a second example of a "traditional" governmental activity that states nevertheless use for largely unconventional purposes. What is more, the substantial

involvement by states in overseeing and profiting from tribal casinos means that these facilities should not only come under the governmental exemption in Section 2(2) of the Act for the litany of precedential and fairness reasons mentioned herein (*see* Sections I(A), *supra*; I(E)-(F), *infra*), but also because of the states' roles as significant if not majority shareholders in the enterprises.

The list of commercial enterprises that states have traditionally run as part of their government operations stretches far beyond gambling ventures and into such things as liquor stores.[6] [Resp. Casino Pauma's Opp'n to Mots. to Strike, § II at pp. 16-17 (May 7, 2014)] For eighteen states, the standard regulatory role in this area has given way to the outright control and sale of the alcoholic beverages. [Resp. Casino Pauma's Opp'n to Mots. to Strike, § II at pp. 16-17 (May 7, 2014)] Being the sole provider in a monopolist market is a financial boon for the states involved, as the State of Utah's experience demonstrates. Within this jurisdiction, the machinery needed to service three million residents consists of forty-four liquor and wine stores staffed by state employees, a group of commercial outlets that together generated $175,887,096 in revenue and $81,350,425 in net profit during fiscal year 2013 alone. [Resp. Casino Pauma's Opp'n to Mots. to Strike, § II at pp. 16-17 (May 7, 2014)] The income distribution for these enterprises reads like that for lottery in the State of Iowa with a small segment going to a dedicated purpose – in this case 11% to school lunches and public safety – and the remainder being deposited right into the General Fund. [Resp. Casino Pauma's Opp'n to Mots. to Strike, § II at pp. 16-17 (May 7, 2014)]

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[6] As proof that the operation of these traditionally untraditional stores would incorrectly run afoul of the test in *San Manuel Indian Bingo & Casino,* the NLRB only needs to look to Supreme Court authority stating that "the business of buying and selling commodities [like the liquor involved in that case]... is not the performance of a government function," and that "[when] a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto*, and takes on the character of a trader, so far, at least, as the taxing power of the federal government is concerned." *Ohio v. Helvering,* 292 U.S. 360, 369 (1934). Of course, the Supreme Court then abandoned its practice of trying to catalogue government enterprises as either governmental or commercial in nature, branding the task as unmanageable, unworkable, untenable, unsound, and disrespectful of both democracy and federalism. *Garcia,* 469 U.S. at 542, 545-46; *see* Section I(F), *infra.*

This discussion of "commercial as governmental enterprises" could go on *ad infinitum*, as the state-run Bank of North Dakota and its $94,215,000 in annual profits helps illustrates. [Resp. Casino Pauma's Opp'n to Mots. to Strike, § II at pp. 15-16 (May 7, 2014)] This section only needs to raise two final examples, though, in order to hammer home important points the NLRB should consider in connection with the jurisdictional analysis. The first is that many state revenue sharing schemes shed the governmental cloak altogether by reserving or distributing money for the benefit of the residents of the state rather than the performance of official functions. This practice is rather commonplace in the mineral extraction field, where well-positioned states will borrow the model used in the gambling context and sell licenses in exchange for hefty tax payments into the General Fund or some similar account that has no strings attached. [Post Hr'g Br. of Casino Pauma, § 5 at 37:8-39:3 (Apr. 25, 2014)] For instance, the State of North Dakota permits companies to engage in fracking so long as they pay taxes on both the production and extraction of oil. [Post Hr'g Br. of Casino Pauma, § 5 at 38:7-17 (Apr. 25, 2014)] A considerable percentage of these tax payments then go into the Legacy Fund, an account with a present day balance of over two billion dollars that can go towards any purpose under the sun. [Post Hr'g Br. of Casino Pauma, § 5 at 38:7-17 (Apr. 25, 2014)] The notion that the State of North Dakota could conceivably distribute this money out as dividends to its residents may have seemed farfetched in the 1970s, but not after the State of Alaska created its Permanent Fund. [Post Hr'g Br. of Casino Pauma, § 5 at 37:14-38:6 (Apr. 25, 2014)] This analogous account created by the proceeds from an analogous industry in an analogous state has spawned a system whereby each resident of the state receives an annual dividend check in the amount of his or her *pro rata* share of the interest earned on the principal balance of the account. [Post Hr'g Br. of Casino Pauma, § 5 at 37:7-17 (Apr. 25, 2014)] According to the Division of Oil and Gas for the Alaska Department of Natural Resources, the results of this system during the last fiscal year alone were that

the 731,450 residents of the State of Alaska split the $564,520,085 in interest that accrued during that timeframe, consequently netting each of them around $800. [Post Hr'g Br. of Casino Pauma, § 5 at 37:21-38:2 (Apr. 25, 2014)] The reason this information is important is because the hearing transcript in this case and the appellate affirmation in *San Manuel* are rife with insinuations that tribal casinos are not really governmental in nature because their proceeds occasionally support the tribal members through forms of social welfare. [TR 22:1-13, 26:14-22 (Feb. 10, 2014)]; *see San Manuel Indian Bingo & Casino v. NLRB,* 475 F.3d 1306, 1309 (D.C. Cir. 2007) (discussing the "per capita" payments made by the plaintiff tribe). However, the indisputable reality is that the State of Alaska is doling out social welfare as well, and doing so on a much bigger scale.

The second and final point is that state-run commercial enterprises have evolved with the times, veering away from such pedestrian endeavors as lotteries, casinos, banks, and liquor stores and into such novel undertakings as commercial spaceports designed to launch private persons into the cosmos to engage in capitalistic chicanery or to advance their own personal edification. [Resp. Casino Pauma's Opp'n to Mots. to Strike, § II at pp. 17-18 (May 7, 2014)] The State of New Mexico became the first to construct one of these facilities, taking $25,000,000 in General Fund money and $175,000,000 in bond proceeds to construct a state-of-the-art facility entitled Spaceport America in the middle of the desert outside the town of Truth or Consequences. [Resp. Casino Pauma's Opp'n to Mots. to Strike, § II at pp. 17-18 (May 7, 2014)] This facility is unlike anything else out there, serves no express governmental function, and was designed solely as a money making venture – even though the dearth of tenants and successful space flights suggest otherwise. [Resp. Casino Pauma's Opp'n to Mots. to Strike, § II at pp. 17-18 (May 7, 2014)] And yet, Spaceport America would somehow pass muster under the standard the NLRB created in *San Manuel Indian Bingo & Casino* if applied to any government aside from a tribe. The point

of this argument is that perhaps the NLRB – a *labor* board with minimal experience dealing with governments given its constrained jurisdiction – is neither qualified nor legally empowered to adjudge such elastic concepts as "traditional" or "uniquely" when applied in the governmental context, as the following two subsections explain in greater detail.

F. The *Bay Mills* Argument in Casino Pauma's Notice of New Authority and Related Briefing did not Address Tribal Sovereign Immunity *Per Se* but the Reasons the Doctrine Covers both Governmental and Commercial Enterprises

The jurisdictional analysis in the June 25th opinion concludes by nonchalantly dismissing in a few sentences the Supreme Court's opinion in *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. __, 134 S. Ct. 2024 (2014) that arose following the hearing in this matter, claiming that all the court did was reaffirm earlier precedents addressing tribal sovereign immunity from lawsuits by states that the NLRB previously distinguished within a single footnote in the *San Manuel Indian Bingo & Casino* opinion. ALJD 4-5. However, as Casino Pauma conversely explained to the ALJ in multiple briefs, the import of the *Bay Mills* case has less to do with tribal sovereign immunity than it does with sovereignty more generally and the reasons courts and other tribunals cannot simply depart from precedent to unilaterally single out Indian tribes for invidious treatment different from that afforded to their state counterparts. [Resp't Casino Pauma's Notice of new Authority (June 2, 2014); Resp't Casino Pauma's Opp'n to Counsel for the General Counsel's Mot. to Strike Resp'ts Notice of New Authority, Ex. A at §§ I & II (June 13, 2014)]

The central facts of the *Bay Mill* case involve a gaming tribe with a valid compact under IGRA that opened a casino in the lower peninsula of Michigan, roughly 125 miles from its reservation in the state's upper peninsula. *Bay Mills,* 134 S. Ct. at 2029. Believing this action violated the terms of the compact, the State of Michigan brought suit in federal court against the tribe to stop the operation of this "off-reservation" casino under Section 2710(d)(7)(A)(ii) of IGRA, which permits suits to "enjoin a class III gaming activity located on Indian lands and conducted

in violation of any Tribal-State compact… that is in effect." *Id.* (citing 25 U.S.C. § 2710 (d)(7)(A)(ii)). While this argument carried the day before the district court, both the Sixth Circuit and the Supreme Court disagreed that the State of Michigan had the authority to pursue the action, relying on the express statutory text of Section 2710(d)(7)(A)(ii) to show that Congress only waived the tribe's sovereign immunity for actions occurring on "Indian lands," which the State of Michigan conceded the tribe's piece of property in the lower peninsula was not. *Id.*

Being stymied by tribal sovereign immunity simply led the rebuffed State of Michigan to then request that the Supreme Court overturn the entire doctrine as it relates to off-reservation commercial activities. *Id.* at 2036. The line of reasoning advanced by the State of Michigan "that tribes increasingly participate in off-reservation gaming and other commercial activities, and operate in that capacity less as governments than as private business" harkens back to the prefatory justification for overturning seventy years of practice and precedent in *San Manuel Indian Bingo & Casino* – an introduction that states "Indian tribes and their commercial enterprises have played an increasingly important role in the Nation's economy" over the last thirty years and as they "have grown and prospered they have become significant employers of non-Indians and serious competitors with non-Indian owned businesses." *San Manuel Indian Bingo & Casino,* 341 N.L.R.B. at 1056. Despite this, the request to reconsider the validity of the legal doctrine in *Bay Mills* came before a panel that was once again unwilling to capitulate to the demand. As if a tacit message to all tribunals – such as the district court that heard the action over the defendant tribe's claims of sovereign immunity – who are willing to compromise basic legal rules in order to promote favored policies, the majority explained that *stare decisis* is not just the "preferred course [in the case] because it promotes the even handed, predictable, and consistent development of legal principles… and contributes to the actual and perceived integrity of the judicial

process," but because it is the "foundation stone of the rule of law." *Bay Mills,* 134 S. Ct. at 2036.

The Supreme Court's basis for applying *stare decisis* ultimately traces back to the fundamental rule that "[t]he special brand of sovereignty that tribes retain – both its nature and its extent – rests in the hands of Congress." *Bay Mills,* 134 S. Ct. at 2037. And yet, something about this rule is forgotten when tribal issues come before federal administrative agencies and certain appellate courts that review their decisions. The ALJ in the present case made quick work of this principle by explaining the aforementioned footnote in *San Manuel Indian Bingo & Casino* dealt with the "tribal sovereign immunity" issue. ALJD 4-5. Yet, this statement only addresses the "extent" portion of sovereignty, and not the separate "nature" component. After all, Congress is not only empowered to waive tribal sovereign immunity, but also to address the predicate question of whether tribal sovereignty is even implicated to begin with. The traditional rules of federalism pay homage to this legislature's plenary role in defining the Nation's relationship with the tribes by requiring the courts to refrain from asserting juris-diction over them absent a clear message from Congress. *See Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 149 (1982) ("A proper respect both for tribal sovereignty itself and the plenary authority of Congress in th[e] area [of Indian Affairs] cautions that [courts] tread lightly in the absence of clear indications of legislative intent."). Nevertheless, all it took was two fell swoops from the other branches of the government to flip this rule on its head by burdening a tribe with the task of proving an "intent to exclude" when all along its adversary should be the one showing an "intent to include." This first happened when the Ninth Circuit released *Donovan v. Coeur d'Alene Tribal Farm,* 751 F.2d 1113, 1115 (9th Cir. 1985), an opinion that created a legal pre-sumption that so called statutes of general applicability automatically cover Indian tribes unless one of three exceptions applies, with the primary one being that "the law touches on 'exclusive rights of self-governance in

purely intramural matters.' " Then, the NLRB muddied the waters even more by conveniently classifying the NLRA a statute of general applicability and creating a secondary policy-driven test that assumes jurisdiction over all tribal activities save the limited sphere of undertakings that, in the Board's estimation, fulfill "traditionally tribal or governmental functions that are unique to their status as Indian tribes." *San Manuel Indian Bingo & Casino,* 341 N.L.R.B at 1063. While the desires of the branch of the federal government possessing plenary authority over Indian Affairs seem to have taken a temporary backseat to the dictates of the other two, the present reality seems headed towards a disruptive end in light of the Supreme Court's pronouncement in *Bay Mills* that "Congress [has the] primary role in defining the con-tours of tribal sovereignty," even if its "considered judgment" is contrary with that of the courts.[7] *Bay Mills,* 134 S. Ct. at 2039.

One other aspect of the *Bay Mills* case warrants discussion, and that is the concurrence by Justice Sotomayor detailing the reasons tribal sovereignty immunity exists in its present form. *See Bay Mills,* 134 S. Ct. at 2040-45. The first reason relates to the idea of comity and the realization that "state sovereign immunity [under the Eleventh Amendment] is not any less robust when the case involves conduct that is undertaken for profit, that is traditionally performed by private citizens and corporations, and that otherwise resembles the behavior of market participants." *Id.* at 2041 (quoting *College Savs. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.,* 527 U.S. 666, 684 (1999)). According to Justice Sotomayor, comity would be ill-served and the judiciary would "fail to respect the dignity of Indian Tribes" if the commercial machinery of states were protected from suit while that belonging to tribes was left exposed. *Id.* at 2042. Lest the NLRB think this evenhanded concept is limited to sovereign immunity rather than applying

[7] Suffice it to say, the one thing worthy of inversion in the present situation given Congress' plenary authority over Indian affairs is *not* the principles in *Merrion* but the maxim the NLRB seems to be following in its tribal jurisprudence, that "it's better to beg forgiveness [from the courts] than to ask for permission [from Congress]."

to sovereignty more generally, these principles of comity influenced Judge Posner to interpret the grant of jurisdiction within the Fair Labor Standards Act ("FLSA") (*see* 29 U.S.C. § 201 *et. seq.*) in a manner that treated tribes and the states equivalently. *See Reich v. Great Lakes Indian Fish & Wildlife Comm'n,* 4 F.3d 490 (7th Cir. 1993). To explain, the FLSA has a narrow exemption from coverage that provides that "[n]o public agency shall be deemed to have violated… this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities." *Id.* at 496 (citing 29 U.S.C. § 207(k)). The definition of the term "public agency" contained within this exemption mirrors the one for "employer" in Section 2(2) of the NLRA, which covers "the government of the United States, the government or a state or political subdivision thereof; any agency of the United States (including the U.S. Postal Service and Postal Rate Commission); a state, or political subdivision or a state; or any interstate governmental activity." *Id.* (citing 29 U.S.C. § 203(x)). Although tribes are not explicitly mentioned within this list of governmental entities, Judge Posner explained that "comity is a proper consideration of statutory interpretation" and concluded in much the same way as the NLRB some fifteen years earlier in *Fort Apache Timber Co.* that tribes should be treated the same as states and thus inherently fall within the scope of the exemption. *Id.* at 497.

While this first reason articulated by Justice Sotomayor for construing tribal sovereignty to cover commercial activities argues that tribes and states should receive equal treatment, the second reason suggests that tribes possess an even greater need for this protection since they "face a number of barriers to raising revenue in traditional ways." *Bay Mills,* 134 S. Ct. 2041. Whereas a state can fund the majority of its governmental operations by levying taxes on income (both corporate and personal), property, sales (including fuel), and estates, a tribe has to find alternate means for raising revenue due to factors largely outside of their control. For instance, the ability to impose these types of taxes on those who venture on to the reservation to live or work

dissipates in light of the realization that states already do this and any tribal tax would simply amount to "double taxation [that] would discourage economic growth." *Bay Mills,* 134 S. Ct. at 2044 (citing Mathew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue,* 80 N.D. L. Rev. 759, 771 (2004)). The other segment of the taxable population (i.e., the tribal members) is also noncontributory since "there is very little income, property, or sales the[ ] [tribe] could tax" given the pervasive levels of poverty resulting from the federally-imposed reservation system. *Id.* at 2044-45 (*Fletcher, supra,* at 774). According to Justice Sotomayor, these external constraints are the reason that "tribal gaming cannot be understood as mere profit-making ventures that are wholly separate from the Tribes' core governmental functions." *Id.* at 2043. On the contrary, "[i]f Tribes are ever to become more self-sufficient, and fund a more substantial portion of their own governmental functions, commercial enterprises will likely be a central means of achieving that goal." *Id.* at 2041. These final statements from Justice Sotomayor emphasize a point made earlier in the jurisdictional argument that the ensuing subsection will discuss in more detail: in the end, who's to say whether a commercial enterprise is governmental in nature or not?

G. *Bay Mills* Serves as a Reminder that the Supreme Court Prohibits Tests that Try to Distinguish between Governmental and Commercial Activities since They are Unmanageable, Unworkable, Untenable, Unsound, and Undemocractic

The concurrence by Justice Sotomayor in *Bay Mills* ultimately sets forth the principle that intrusions into one's sovereignty cannot be gauged by looking at whether it would affect a governmental or commercial function. As Casino Pauma explained to the ALJ [Resp't Casino Pauma's Opp'n to Counsel for the General Counsel's Mot. to Strike Resp'ts Notice of New Authority, Ex. A at § II, pp. 12-16 (June 13, 2014)], this principle is one the Supreme Court has addressed repeatedly through the years in the panoply of intergovernmental cases, from those pertaining to the federal government trying to tax state property, to states trying to do the same to

the federal government, to the federal government trying to regulate the states under the Commerce Clause, to one state invoking the Full Faith and Credit Clause in order to defend against a suit brought by another. *See United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.,* 550 U.S. 330, 369 (2007) (Alito, J., dissenting) (discussing the application of this rule in the context of intergovernmental tax immunity and state regulatory immunity under the Commerce Clause); *Franchise Tax Board v. Hyatt,* 538 U.S. 488, 498 (2003) (same for state immunity under the Full Faith and Credit Clause).

The preeminent case on this subject is *Garcia v. San Antonio Metropolitan Transit Authority*, in which the Supreme Court confronted the question of whether mass transit is a traditionally governmental or commercial function for purposes of determining the applicability of the FLSA. Yet, the question did not bog down the Supreme Court for long, as it found it "difficult, if not impossible" to differentiate between activities previous federal decisions had classified as governmental in nature (like operating a highway authority, running a municipal airport, and regulating ambulance service) and those that were conversely labeled as commercial (such as regulating traffic on public roads, regulating air transportation, and providing domestic services for the aged and handicapped).[8] *Garcia*, 469 U.S. at 538-39. The Supreme Court then detailed its

[8] "[C]ourts have held that regulating ambulance service, *Gold Cross Ambulance v. City of Kansas City,* 538 F. Supp. 956, 967-969 (WD Mo. 1982)... licensing automobile drivers, *United States v. Best,* 573 F.2d 1095, 1102-1103 (CA9 1978); operating a municipal airport, *Amersbach v. City of Cleveland,* 598 F.2d 1033, 1037-1038 (CA6 1979); performing solid waste disposal, *Hybud Equipment Corp. v. City of Akron,* 654 F.2d 1187, 1196 (CA6 1981); and operating a highway authority, *Molina-Estrada v. Puerto Rico Highway Authority,* 680 F.2d 841, 845-846 (CA1 1982), are functions *protected* under *National League of Cities.* At the same time, courts have held that issuance of industrial development bonds, *Woods v. Homes and Structures of Pittsburg, Kansas, Inc.,* 489 F. Supp. 1270, 1296-1297 (Kan. 1980); regulation of interstate natural gas sales, *Oklahoma ex rel. Derryberry v. FERC,* 494 F. Supp. 636, 657 (WD Okla. 1980)... regulation of traffic on public roads, *Friends of the Earth v. Carey,* 552 F.2d 25, 38 (CA2)... regulation of air transportation, *Hughes Air Corp. v. Public Utilities Comm'n of Cal.,* 644 F.2d 1334, 1340-1341 (CA9 1981); operation of a telephone system, *Puerto Rico Tel. Co. v. FCC,* 533 F.2d 694, 700-701 (CA1 1977); leasing and sale of natural gas, *Public Service Co. of N.C. v. FERC,* 587 F.2d 716, 721 (CA5)...operation of a mental health facility, *Williams v. Eastside Mental Health Center, Inc.,* 669 F.2d 671, 680-681 (CA11)... and provision of in-house domestic services for the aged and handicapped, *Bonnette v. California Health and Welfare*

own difficulties in dealing with this murky distinction in intergovernmental tax immunity cases, explaining that in 1911 it found that the provision of a municipal water supply "[was] not part of the essential governmental functions of a State" before coming to the opposite conclusion twenty-six years later despite no intervening change in the applicable legal standards. *Id.* at 542 (citing *Flint v. Stone Tracy Co.,* 220 U.S. 107, 172 (1911); *Brush v. Comm'r,* 300 U.S. 352, 370-73 (1937)). This unprovoked about-face convinced the Supreme Court that tests that attempt to distinguish between governmental and commercial functions are "untenable and must be abandoned." *Id.* (citing *New York v. United States,* 326 U.S. 572, 583 (1946)).

The same decision arose in the context of state regulatory immunity under the Commerce Clause, where the Supreme Court noted that a historical standard such as one that looks at whether or not an activity is "traditionally" governmental ill-serves the judiciary because it does not accommodate "changes in the historical function of States, changes that have resulted in a number of once-private functions like education being assumed by States and their subdivisions." *Id.* at 543-44. According to the Supreme Court, "the 'traditional' nature of a particular governmental function can be a matter of historical nearsightedness; today's self-evidently 'traditional' function is often yesterday's suspect innovation." *Id.* at 544 n.9. In response to the advocates of such tests, the Supreme Court further noted that the "only apparent virtue of a rigorous historical standard, namely, its promise of a reasonably objective measure for state immuneity, is illusory. Reliance on history as an organizing principle results in line-drawing of the most arbitrary sort; the genesis of state governmental functions stretches over a historical continuum from before the Revolution to the present, and courts would have to decide by fiat precisely how

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Agency, 704 F.2d 1465, 1472 (CA9 1983), are *not* entitled to immunity. We 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. The constitutional distinction between licensing drivers and regulating traffic, for example, or between operating a highway authority and operating a mental health facility, is elusive at best." *Garcia,* 469 U.S. at 538-39.

longstanding a pattern of state involvement had to be for federal regulatory authority to be defeated." *Id.* at 544.

A standard looking at the "uniqueness" of an activity fared no better than the "traditional" test in the opinion of the Supreme Court, which had rejected it once before in the context of governmental tort liability for being "unmanageable." *Id.* at 545 (citing *Towing Co. v. United States,* 350 U.S. 61, 64-68 (1955)). The labels of unmanageable, unworkable, untenable, and unsound, however, simply highlighted the superficial flaws with tests that ultimately are rotten to the core by disserving federalism and further closing the doors to sovereign laboratories perfecting democracy through social and economic experimentation by allowing unelected judges to make value judgments as to what concoctions it favors and which it does not. *Id.* at 546. In the words of Justice Blackmun, governments "cannot serve as laboratories for social and economic experiment… if they must pay an added price when they meet the changing needs of their citizenry by taking up functions that an earlier day and a different society left in private hands." *Id.* The picking and choosing of favorites by unelected federal judges was not only repugnant to the *Garcia* court in 1985, but also to Justice Black some fifty years earlier, who stated that:

> There is now, and there cannot be any unchanging line of demarcation between essential and non-essential governmental functions. Many governmental functions of today have at some point in the past been nongovernmental. The genius of our government provides that, within the sphere of constitutional action, the people – acting not through the courts but through their elected legislative representatives – have the power to determine as conditions demand, what services and functions the public welfare requires.

Id. (citing *Helvering v. Gerhardt,* 304 U.S. 405, 427 (1938)). Fast forward thirty years and the *Garcia* opinion is still as vibrant as ever, preventing courts from judging one sovereign's use of force against another on the basis of whether it impacts a governmental or commercial function. Nevertheless, the test has somehow risen from the dead in the present context where the NLRB is trying to enforce a federal statute against an Indian tribe without any indication from Congress

that it should apply. *See Merrion,* 455 U.S. at 149. What is worse, the test the NLRB concocted in *San Manuel Indian Bingo & Casino* combines all the component parts the Supreme Court decried in *Garcia,* from the "difficult, if not impossible" to decipher "government" element, to the "arbitrary" and "unworkable" "tradition" adjective that proceeds it, to the "unmanageable" "uniquely" adjective that follows it. Not only has the NLRB crafted a standard that exceeds the competence of the Supreme Court by its own admission, but it has also decided to place its own conceptions of tribal propriety above those of Congress – the branch responsible for defining the contours of the federal/tribal relationship. *See Bay Mills,* 134 S. Ct. at 2039. On the one hand, Congress enacted IGRA to codify the tribes' right to operate Class III gaming facilities, thereby "promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). Then, on the other hand, the NLRB swoops in and imposes added costs on the operation of these facilities, thereby discouraging tribes from constructing these enterprises while simultaneously promoting an Indian affairs agenda that prefers bead sales and public sun dances to the running of casinos, and bare subsistence to self-determination.

It is worth emphasizing that the lack of the requisite expertise to determine whether an activity is traditionally or uniquely governmental permeates the judiciary and invariably affects federal administrative courts that have little to no experience dealing with governmental issues in the first place. To illustrate this, most people would naturally assume that a task like garbage collection falls clearly on the governmental side of the bilateral test. However, the majority of the waste in this country is not only retrieved by private companies but deposited into private sector landfills. *See United Haulers,* 550 U.S. at 369 (citing an Environmental Research and Education Foundation study to show that 69.2% of the solid waste produced in this country in 1999 was managed by privately owned businesses). Thus, this is just one additional example where either a

federal court or the NLRB would be "mistaken in concluding that waste disposal is 'typically' a local government function." *Id.*

As indicated by Justice Sotomayor in her *Bay Mills* concurrence, the issue of classifying an enterprise as either governmental or commercial becomes even more difficult when an Indian tribe is involved. The inherent nature of the reservation system means that impoverished tribes from the earliest days typically had to earn money by using their land in one of two ways: (1) exploiting the natural resources contained therein,[9] or (2) allowing activities to take place on the reservation that may otherwise be illegal or frowned upon in the outside environment. This latter category contains a host of innocuous "NIMBY" activities, such as devoting a portion of the reservation for a garbage dump or a railroad right-of-way. *See United States v. S. Pac. Transp. Co.,* 543 F.2d 676 (9th Cir. 1976); *Snohomish County v. Seattle Disposal Co.,* 70 Wn.2d 668 (Wash. 1967).

However, these unremarkable ventures often brought in less money than "vice" activities or underselling private businesses situated in the surrounding state. As a result, a myriad of cases from prior centuries show tribes engaging in the sale of cheap cigarettes, *M v. Tax Com. of State,* 72 Wn.2d 613 (Wash. 1967); the sale of discounted gasoline, *La. Dep't of Revenue & Taxation v. Chitimacha Tribe,* 1987 U.S. Dist. LEXIS 16916 (W.D. La. 1987); the cultivation of drugs like peyote, *State v. Big Sheep,* 75 Mont. 219 (1926); prostitution, *United States v. Sandoval,* 231 U.S. 28, 44 (1913); *Moapa Band of Paiute Indians v. U.S. Dep't of Interior,* 747 F.2d 563 (9th Cir. 1984); and the operation of card rooms and slot machines. *Rincon Band of Mission Indians v. County of San Diego,* 324 F. Supp. 371 (S.D. Cal. 1971); *United States v. Sosseur,* 87 F. Supp. 225 (W.D. Wis. 1949). It is worth noting that federal court opinions date tribal gaming all the

[9] *See, e.g., United States v. Algoma Lumber Co.,* 305 U.S. 415, 417 (1939) (selling timber extracted from the reservation); *Merrion v. Jicarilla Apache Tribe,* 617 F.2d 537, 539 (10th Cir. 1980) (leasing reservation lands for the production of oil and gas); *United States v. Nat'l Gypsum Co.,* 49 F. Supp. 206, 208 (W.D.N.Y. 1942) (same for the mining of gypsum).

way back to the 1940s (*see Sosseur,* 87 F. Supp. at 225), a practice that goes back even further despite the absence of formal prosecutions by the federal government. In fact, gambling appears to have commenced on tribal reservations during the 1800s when the federal government took back portions of reservations in order to provide land for the settlement of white persons moving west. *See United States v. Dupris,* 612 F.2d 319, 328 n.11 (8th Cir. 1978) (explaining the "opening of Cheyenne River Reservation… [quickly led to] bootleggers, gamblers, horse thieves, cattle rustlers and soldiers of good fortune generally," which resulted in"[g]ambling, whiskey, prostitution, and usury" being "found in abundance."); *Ute Indian Tribe v. State,* 521 F. Supp. 1072, 1100 n.87 (D. Utah 1981) (explaining gambling, whiskey sales, and prostitution became commonplace on lands ceded from the Ute reservation).

Thus, the arguments within this section paint the NLRB into the corner. The Board could choose to comply with *Garcia* by refraining to use the *Sam Manuel Indian Bingo & Casino* test on account of the fact that it is unmanageable, unworkable, untenable, and unsound. Should that happen, then the NLRB will face the reality that it does not have a test to employ for determining whether it can lawfully exercise jurisdiction over Indian tribes. On the other hand, if the NLRB elects to continue relying on *San Manuel Indian Bingo & Casino*, then the Board will have to confront the fact that the "traditional" component of the test set forth therein includes all the vice activities like Class IIII gambling that Indian tribes have historically offered in order to provide for their members. For this and the myriad of other reasons detailed throughout this section, the only two possible outcomes for this appeal are either dismissing the present case outright for lack of jurisdiction or vacating the June 25th opinion and remanding the matter to the ALJ for consideration of the jurisdictional issue anew after reopening the hearing for purposes of accepting evidence on the topic from both of the parties.

V. THE RESPONDENT HAD A NON-DISCRIMINATORY POLICY DISALLOWING UNION BUTTONS IN ORDER TO PROTECT ITS PUBLIC IMAGE.

The ALJ rules that Respondent's policy is invalid and overly broad because it is not uniformly enforced, it applies to employees that allegedly do not interact with customers and, that even if such employees have contact with customers, the button is justified as it is not offensive.

A. The Casino's Policy is Uniformly Enforced To The Extent That Violation of It Was Detected.

As noted above, Annelle Lerner testified that to the extent that employees were detected wearing emblematic buttons in violation of the rule they were told to remove them (TR 40:6-25; 41:1-7). Badge holders without emblematic significance were not a violation of the rule. Likewise similar testimony was offered by Harry Taylor (TR 303:4-25; 304:1-4. The ALJ in his decision disputes this saying that the presence of Taylor and Lerner on the Casino floor is not consistent with their statements that the non-employer issued buttons were undetectable. (ALJD 6-7)

General Counsel's exhibits 4 and 7 are examples of items worn on employee uniforms that the General Counsel contends violate the rule and show inconsistent enforcement. The testimony as to these items was offered by only two employees, Maria Garcia and Catalina Gutierrez. As can be seen by the exhibits the items are extremely small and would be easily undetectable. Additionally, there is no evidence offered by these employees that they regularly encountered supervisors in situations where the supervisors would notice such items. Consequently, the complete discrediting of the testimony of Taylor and Lerner should not be upheld by the Board and there is no evidence to the contrary presented by the General Counsel, i.e. that they were confronted with these items.

There are over 400 employees in the Casino working three different shifts. The General Counsel at most established that over a two year period there were arguably diminimus violations of this rule by two employees. This hardly establishes a policy of lack of uniform enforcement.

B. The Rule Was Not Overly Broad and Properly Applied by the Employer.

Harry Taylor and Annelle Lerner testified as to the rationale behind the policy, i.e., not wishing to potentially offend customers by the wearing of such buttons. The ALJ additionally rules that the rule is overly broad as it might apply to employees who did not interact with customers. (ALJD 6-7)

However, the evidence presented by the General Counsel as noted by the testimony of the employees and Harry Taylor (see above II, A, subparagraph 9) established that every witness called by the General Counsel did in fact interact with customers. Additionally, the General Counsel presented no evidence that there are broad categories of job classifications which include employees who would have no customer interaction.

Considering that the only evidence in the record establishes that the employees who testified interact with customers and there is no evidence of job classifications that do not involve customer interaction the ruling of the ALJ in this respect should be disregarded.

C. Respondent Has A Right to Maintain A Certain Image With Its Customers.

The ALJ in its decision essentially states that the buttons are small and not offensive and therefore can be worn. It is not for the AJL to make that determination. Respondent is in the business of catering to customers in a highly competitive environment and it is for Respondent to make that determination as to what might potentially be offensive. Why should Respondent lose a single customer simply because in the ALJ's opinion he does not deem the buttons offensive? Respondent's position in this respect is supported by long standing case law and should be

upheld by the Board. *NLRB v. Harrah's Club* 337 F.2d 177, 180 (9th Cir. 1964), *Pay 'n Save Corp. v. NLRB* 641 F.2d 697, 700 (9th Cir. 1981), *Starwood Hotels & Resorts Worldwide, Inc.* 348 NLRB 372, 373 (2006).

D. The Proposed Remedy and Order is Overbroad and Unnecessary.

The ALJ in its decision (ALJD 7-9) issues a remedy requiring the Casino to rescind its handbook rule, withdraw the email to Victor Huerta and post a notice to employees cited in his decision.

At the very most the Board should determine that the rule at issue is valid on its face. And, merely order Respondent to enforce the rule uniformly. This is assuming a violation is found.

VI. CONCLUSION

For the reasons stated herein as well as in Respondent's exceptions to the ALJ's decision, his ruling should be reversed.

RESPECTFULLY SUBMITTED this 4th day of August, 2014

Respondent **CASINO PAUMA**

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CERTIFICATE OF SERVICE BY MAIL

I, Dawn M. Eastman, declare and state as follows.

I am an employee of the Law Offices of Scott Wilson, which represents Casino Pauma in the above-entitled action. My business address is 711 Eighth Avenue, Suite C, San Diego, CA 92101.

I am a citizen of the United States and reside in San Diego County, California. I am over the age of eighteen (18) years and not a party to the within case or proceeding.

On August 4, 2014, I served a copy by email of the following documents:

BRIEF OF RESPONDENT CASINO PAUMA IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

on the parties to the action and/or their attorney of record via email addressed as follows:

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Robert MacKay
Robert.MacKay@nlrb.gov

I declare the above to be true under penalty of perjury. This Declaration is signed on August 4, 2014 in San Diego, California.

LAW OFFICES OF SCOTT A. WILSON

By: Dawn Eastman
Dawn M. Eastman