DOCKET NOS. 16-70397 & 16-70756

In the United States Court of Appeals *for the* Ninth Circuit

CASINO PAUMA, an enterprise of the **PAUMA BAND OF LUISENO MISSION INDIANS OF THE PAUMA & YUIMA RESERVATION**, a federally-recognized Indian Tribe,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

UNITE HERE INTERNATIONAL UNION,

Intervenor.

On Cross-Petitions for Review and Enforcement from the National Labor Relations Board, Case Nos. 21-CA-125450, 21-CA-126528, & 21-CA-131428

OPENING BRIEF BY PETITIONER AND CROSS-RESPONDENT CASINO PAUMA

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INTRODUCTION/SUMMARY

Of all the actions that the National Labor Relations Board ("NLRB" or "Board") has taken over the past few years to increase its power in a bid to make up for dwindling union membership rates, the decision in this case that turns workplace interiors into battlegrounds for customer loyalties will have the most far-ranging and troubling ramifications. To explain, the Supreme Court of the United States issued a landmark opinion in the mid-1940s called *Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945), that sought to facilitate unionization under the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. § 151 *et seq.*, by creating a common sense compromise between the right of the employer to "maintain discipline in their establishments" and the needs of employees in this austere, low-tech era to have someplace to congregate and discuss collective action. *Id.* at 797-98. The resultant rule was rather straightforward, allowing an employee to speak with his coworkers about organizational issues on the premises of the employer so long as he did so during non-work hours and in non-work areas of the establishment. *See id.* at 803 n.10. What happened in this case is that the NLRB took the basic employee-to-employee solicitation rule from *Republic Aviation* and extended it to the patron context so employees sympathetic to a particular union can solicit customers for support in any "guest area" of the facility – an area that counsel for the General Counsel, the administrative law judge, and the NLRB all agree includes public restrooms. Therefore, Casino Pauma and all other service establishments around the Nation are now facing the prospect of their employees com-

municating union messages (and oftentimes competing union messages) to customers dependent upon their service across dining room tables, throughout bookstore cafes, within department store changing rooms, and even underneath a bathroom stall door.

The one thing potentially more curious than the decision below is how this issue even came before the Court. UNITE HERE International Union ("Union") was the gatekeeper during the early days of Indian gaming in California, ensuring no compact would come about unless it contained the federal labor law protections that the NLRB insisted at the time did not apply to tribal businesses located on reservations. *See Fort Apache Timber Co.,* 226 N.L.R.B. 503 (1976) ("*Fort Apache*"). Big government in California is synonymous with big labor, so Governor Gray Davis did his constituent's bidding by informing the tribes participating in the negotiations for the original compacts during the fall of 1999 ("1999 Compact") that they would need to sit down with the Union and devise labor protections for inclusion in the final agreement. *See In re Indian Gaming,* 331 F.3d 1094, 1102-07 (9th Cir. 2003) ("*Coyote Valley II*"). The ultimate terms found within an addendum to the 1999 Compact known as the "Tribal Labor Relations Ordinance" ("TLRO") not only incorporated the substantive rights and responsibilities of the NLRA, but also created a "binding" and "exclusive" dispute resolution process for resolving any labor issues before an arbitration panel in lieu of the then-inaccessible NLRB. [ER32-ER40]

This arbitration process was something the Union wanted, negotiated, and would do anything to obtain, even if that meant invalidating pending compacts and keeping

tribes destitute. *See Hotel Employees & Rest. Employees Int'l Union v. Davis,* 21 Cal. 4th 585, 597 (1999) ("*HERE*") (detailing the Union's successful effort to nullify the Proposition 5 compact). Yet, a staunch commitment to the TLRO turned into an utter aversion once the Union discovered that it was unable to organize the Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation's ("Pauma" or "Tribe") casino employees pursuant to the secret ballot election provisions that it negotiated as part of the TLRO. After that, the Union went berserk and filed *nine* separate charges against Casino Pauma directly with the NLRB over a two year span, all of which seek to disrupt business by granting the Union unprecedented access to customers until Casino Pauma simply capitulates and gives the Union (but not necessarily its service employees) what it desires. The pending charges are likely just the first of many that this Court will have to deal with, and there are really only two reasonable dispositions at this juncture: (1) vacate an order that grossly distorts basic organizational rules under a patently non-general federal statute that never even applied to Indian tribes until the administering agency determined that they may be making lots of money; or (2) stay the petitions while Casino Pauma develops pivotal arguments that the NLRB either would not or could not hear, such as the issue currently pending before the Southern District of California that asks whether the Board ceded its jurisdiction over tribal-casino labor issues to the State of California through the TLRO of the 1999 Compact. *See Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation v.*

UNITE HERE Int'l Union, No. 16-02660 (S.D. Cal. filed on Oct. 27, 2016) ("*UNITE HERE*").

JURISDICTIONAL STATEMENT

As is explained more fully in Section III of the Argument, *infra*, the NRLB should not have had jurisdiction over the unfair labor practice charges in this matter given that the Union negotiated and knowingly agreed to a State-sponsored addendum to the 1999 Compact that required it to resolve any such labor disputes that the Board was then declining to hear through an "exclusive" and "binding" arbitration process. Nevertheless, the NLRB reversed course and asserted jurisdiction over the charges against Casino Pauma in this case under 29 U.S.C. § 160(a), even though it originally interpreted the NLRA as excluding Indian tribes for the first seventy years of the Act. *See* Argument § II, *infra*. The dispositive administrative decision issued on December 3, 2015, and Casino Pauma timely filed its petition for review on February 9, 2016. *See Casino Pauma v. NLRB*, No. 16-70397, Dkt. No. 1 (9th Cir. Feb. 9, 2016). Putting aside any arbitrability arguments, this Court has jurisdiction pursuant to 29 U.S.C. § 160(f).

ISSUES PRESENTED

1. Whether this Court will condone the NLRB extending the rule created by the Supreme Court in *Republic Aviation* that allows employees to discuss organizational issues with their coworkers in non-work areas of a business to the patron context so employees can solicit customers in any non-work "guest" area of the establishment, including public bathrooms.

2. Whether a statute intended to safeguard the flow of interstate commerce can be generally applicable when, at most, it only benefits 11.1% of the group it seeks to protect (*i.e.*, employees) and excludes category after category of potential participants in the field, including non-employers, governments of all kind, transportation companies, labor unions, small businesses, agricultural workers, domestic workers, religious workers, those employed by a parent or spouse, those with alternative work arrangements (like independent contractors), and those with management authority (including supervisors), amongst others.

3. Whether the test for determining the applicability of a general federal statute to Indian tribes articulated in *Donovan v. Coeur d'Alene Tribal Farm* withstands the subsequent opinions by the Supreme Court that disclaim the use of such tests that try to distinguish between "traditional" governmental and commercial functions as "untenable," "unworkable," "unmanageable," and "unsound;" explain the justification for this rule in the tribal context; and once again reaffirm the basic principle that Congress does not legislate by implication with respect to Indian tribes.

4. Whether a stay of this proceeding is appropriate to permit the development of arguments the NLRB either would not or could not hear, including the jurisdictional issue pending before the Southern District of California that asks whether the Board ceded its jurisdiction over tribal-casino labor disputes to the State of California via the TLRO of the 1999 Compact.

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STATEMENT OF THE CASE

Congress enacted the NLRA in 1935 to ease industrial strife between certain private sector "employers" and "employees" by allowing such employees to bargain collectively regarding basic terms of employment. A patchwork of entities actually participates in the statutory scheme, as Section 2 of the NLRA contains a number of exemptions for both "employers" and "employees." *See* 29 U.S.C. § 152. As to the former, the list of entities excluded from the definition of "employer" covers, amongst others, "the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof." 29 U.S.C. § 152(2). As often happens in legislative drafting, this intricate statute rife with jurisdictional exemptions like the one mentioned above comes with a section that enables the administering agency – in this case the NLRB – to "make in the manner prescribed by the Administrative Procedures Act, such rules and regulations as may be necessary to carry out the provisions of this Act." 29 U.S.C. § 156. On November 7, 1959, the NLRB used this grant of power to issue a series of regulations, one of which clarified that the term "State" as used within the Section 2(2) governmental exemption "include[s] the District of Columbia and all States, Territories, and possessions of the United States." 29 C.F.R. § 102.7.

Whether an Indian tribe falls within the scope of the governmental exemption was the issue the NLRB faced some twenty-years later in *Fort Apache Timber Company*. The union local that acted as the charging party in the case filed an unfair labor practice

complaint after it was unsuccessful in its effort to direct an election at a reservation-based lumber mill owned and operated by the White Mountain Apache Tribe. *See Fort Apache,* 226 N.L.R.B. at 506. One of the primary legal authorities relied upon by the NLRB in deciding the question of whether it had jurisdiction to hear the charge was an opinion the Supreme Court issued five years earlier entitled *NLRB v. Natural Gas Util. Dist.,* 402 U.S. 600 (1971), in which the Court exempted a utility district from the reach of the NLRA on account of it being an entity administered by individuals directly responsible to public officials. *Id.* at 604. Relying on the Supreme Court's reading of a legislative record that sought to exclude governments whose employees generally lack the right to strike, the NLRB began to recount the ways in which a tribe has been perceived as a government in the common meaning of the term over the years. The NLRB first noted that "Indian tribes have been described [in prior court opinions]… as the equivalent of a State, or of a territory, as more than a State or territory, as independent or dependent nations, as a distinct political entity, as a separate political community, as quasi or semi sovereign nations, and as a separate people, 'not brought under the laws of the Union or the State' when they preserved their tribal relations." *Fort Apache,* 226 N.L.R.B. at 506. The discussion about the governmental nature of Indian tribes ultimately concluded with the NLRB exempting tribes from the Act after stating that it "would be possible to conclude that the [Tribal] Council is the equivalent of a State, or an integral part of the government of the United States as a whole." *Id.*

This holding that Indian tribes fall outside the ambit of the NLRA remained in place throughout the ensuing ten year period, at the end of which Congress enacted IGRA to delineate the rules that will apply if a tribe desires to offer a certain form of gambling on its reservation. *See* 25 U.S.C. § 2701 *et seq*. Congress tailored IGRA to coalesce with existing laws by, for one, exempting tribes from the prohibition on possessing or transporting gambling devices that is found elsewhere in the United States Code. *See* 25 U.S.C. § 2710(d)(6) (citing 15 U.S.C. § 1175). Despite this, nothing in IGRA modifies the longstanding rule in *Fort Apache* that federal labor laws do not apply to a tribe or its reservation-based enterprises. Rather, the subject of applicable labor laws is simply one topic left for a tribe and state to discuss during the negotiation of a "compact" that would govern the conduct of a "class III" game. *See* 25 U.S.C. § 2710(d)(3)(C).

As to that, the amount and sort of regulation IGRA imposes depends upon the type of game a tribe plans to offer. Though not defined by the statute, traditional forms of Indian gaming are considered "class I" and only subject to tribal regulation. *See* 25 U.S.C. § 2703(6). On the other hand, house-banked card games, slot machines, and other types of gambling that are typically associated with Las Vegas and Atlantic City casinos are conversely deemed "class III" and come under a tripartite regulatory scheme that involves varying degrees of tribal, state, and federal regulation. *See* 25 U.S.C. § 2703(7)(B)(i), (ii); 2703(8). Since a state historically lacks any civil authority over an Indian tribe (*see, e.g., California v. Cabazon Band of Mission Indians,* 480 U.S. 202

(1986)), IGRA creates a role for the state in the regulation of an otherwise-legal class III game by allowing it to negotiate for the terms it desires as part of a compacting process. *See* 25 U.S.C. § 2710(d)(3)(A). Given the delicate nature of relations between two sovereigns that oftentimes have competing interests, the ultimate compact resulting from such negotiations may only contain regulations related to seven specific topics. *See* 25 U.S.C. § 2710(d)(3)(C). The final catch-all topic affords a state some leeway by allowing it to negotiate for "any other subjects that are directly related to the operation of gaming activities." *See* 25 U.S.C. § 2710(d)(3)(C)(vii). Worker protections is one such subject that is directly related to running a gaming business, which means a state can ask a tribe to comply with some sort of external labor laws – whether those are part of the state system or arise under the NLRA and are resolved through an alternate dispute resolution process given the Board's declination of jurisdiction over tribes at the time. *See Coyote Valley II,* 331 F.3d at 1115-16.

Initial compact negotiations in California for class III gaming devices took more than a decade to occur following the enactment of IGRA, and only after more and more tribes grew impatient with the State's intransigence and began operating gambling devices outside of the compacting scheme envisioned by the statute. *See HERE,* 21 Cal. 4th at 597. Faced with this deteriorating situation, then-Governor Pete Wilson relented from his staunch anti-Indian-gambling stance and began discussions with a single non-gaming tribe named the Pala Band of Mission Indians in order to create a model compact that the State could demand from any other tribe in subsequent nego-

tiations. *See id.* Unlike any other compact in existence at that point, the one-hundred-and-thirty-two page Pala Compact addressed the issue of workers' rights that tribal law traditionally governed and did so in an exhaustive manner, touching on everything from unemployment benefits to the organizational rights of employees. *See* Gregory Elvine-Kreis, *The Effect of the Indian Gaming Regulatory Act on California Native American's Independence*, 35 SAN DIEGO L. REV. 179, 199 (1998).

The response from the majority of California tribes to the Pala Compact was less than enthusiastic, however, as they took issue with both the procedural manner in which Governor Wilson negotiated the agreement as well as the substantive terms like the labor provisions that sought to erode tribal sovereignty by imposing previously-inapplicable outside laws. *See Coyote Valley II,* 331 F.3d at 1100 n.7. Dissatisfaction with the gubernatorial approach to compact negotiations led these tribes to go straight to the people of California by placing an initiative on the ballot for the November 1998 General Election that would amend the State Government Code to include a competing model compact that the sitting governor would have to execute with any interested tribe as a ministerial act within thirty days of receiving a request. *Id.* at 1100.

The compact at the heart of this ballot initiative commonly known as Proposition 5 still addressed a number of workplace issues, such as work-related injuries, disabilities, and unemployment. *See Coyote Valley II,* 331 F.3d at 1102 (citing Cal. Gov't Code § 98004, Sec. 10.1(f)). The one glaring omission, though, concerned the organizational rights of employees, and the failure to address this issue resulted in the Union teaming

up with the Las Vegas casinos that recognized its representative status (and whom employed upwards of 25% of its members) to form a political action committee called the Coalition Against Unregulated Gambling in order to oppose Proposition 5. *See, e.g.,* Alexa Koenig, *Gambling on Proposition 1A: The California Indian Self-Reliance Amendment*, 36 U.S.F. L. REV. 1033, 1042 (2002). Despite spending over $30,000,000 in what was then the "most expensive non-presidential campaign in the history of the United States," the Union and its gaming allies that comprised the Coalition Against Unregulated Gambling ended up on the losing side of the battle, as the voters of the State overwhelmingly approved Proposition 5 by a vote of 62.38% to 37.62%. *See, e.g., id.*; *Coyote Valley II,* 331 F.3d at 1101.

This defeat in the political arena simply caused the Union to shift tactics and seek recourse through the courts instead. Shortly after the passage of Proposition 5, the Union filed a petition for writ of mandate directly with the California Supreme Court that sought to invalidate the measure on the basis that the statutory compact created thereunder contravened the language of Article IV, Section 19(e) of the State Constitution that says "[t]he Legislature has no power to authorize, and shall prohibit, casinos of the type currently operating in Nevada and New Jersey." *HERE,* 21 Cal. 4th at 589 (citing Cal. Const. art. IV, § 19(e)). A case borne out of the supposed harms tribal employees would suffer from having to go without the protections of federal law labor attained the desired outcome that jeopardized the underlying facilities altogether, as the California Supreme Court "prohibit[ed] the Governor and the Secretary

of State from implementing [all but one portion of] Proposition 5" on account of the measure violating the aforementioned ban on casino gambling in the State Constitution. *See HERE,* 21 Cal. 4th at 591, 615-16.

Fortunately for the one hundred-plus tribes in California impacted by the decision, Governor Davis had initiated compact negotiations some three months earlier in the hopes of devising a model compact that was different from the one approved by the voters as part of Proposition 5. *See Coyote Valley II,* 331 F.3d at 1101-02. Among the problems with the Proposition 5 model compact, according to Governor Davis, were the restraints it placed on State revenue sharing receipts and its failure to address the organizational rights of employees. *See id.* at 1102. In an effort to appease arguably the most powerful special interest in California, the State took the position that this latter subject of labor rights was one the tribes could address directly with the Union as the negotiations unfolded. *See id.* Both the pendency of *HERE v. Davis* and the long-adversarial posture between the Union and the tribes put a chill on any discussions, however, which resulted in the State's negotiator circulating a compact proposal on the night before the negotiation deadline that contained a new provision requiring any tribe who planned on signing the compact that evening to subsequently negotiate an addendum to the agreement with the Union concerning the organizational rights of employees by a date certain. *See id.* at 1106. This condition set forth within Section 10.7 of the State's final compact proposal explains that the agreement

> shall be null and void if, on or before October 13, 1999, the Tribe has not provided an agreement or other procedure acceptable to the State for addressing organizational and representational rights of Class III Gaming Employees and other employees associated with the Tribe's Class III gaming enterprise, such as food and beverage, housekeeping, cleaning, bell and door services, and laundry employees at the Gaming Facility or any related facility, the only significant purpose of which is to facilitate patronage at the Gaming Facility.

[ER26]

Virtually all negotiating tribes present on the evening before the deadline signed a letter of intent to execute the compact ("1999 Compact"), and then spent the ensuing weeks negotiating external labor protections with the Union. *See Coyote Valley II*, 331 F.3d at 1106. The end result of the eleventh-hour negotiations is a set of model labor terms called the "Tribal Labor Relations Ordinance" that is found within a portion of the 1999 Compact entitled Addendum B. [ER30-ER40] Harkening back to the structure of the Pala Compact, the Union based the labor terms of the TLRO on the then-inapplicable NLRA, using language from the statute to define both employee rights and employer duties. [ER33-ER34] As to that, the right of employees to engage in concerted activities that is found within Section 4 of the TLRO mirrors the text of the concomitant Section 7 of the NLRA by stating in full that:

> Eligible Employees shall have the right to self-organization, to form, to join, or assist employee organizations, to bargain collectively through representatives of their own choosing, to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities.

[ER33] Alleged unfair labor practices by the tribal employer that interfere with these organizational rights are in the ensuing Section 5 of the TLRO, which also replicates the text of the NLRA aside from including one revision to accommodate the Indian tribes' Constitutionally-protected right to engage in Native preference in employment (*see Morton v. Mancari,* 417 U.S. 535 (1974)):

> It shall be an unfair labor practice for the tribe and/or employer or their agents:
>
> (1) to interfere with, restrain or coerce Eligible Employees in the exercise of the rights guaranteed herein;
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it, but this does not restrict the tribe and/or employer and a certified union from agreeing to union security or dues checkoff;
> (3) to discharge or otherwise discriminate against an Eligible Employee because s/he has filed charges or given testimony under this Ordinance;
> (4) to refuse to bargain collectively with the representatives of Eligible Employees.

[ER34]

With the traditional federal forum for resolving such claims inaccessible as a result of the NLRB declining to assert jurisdiction over Indian tribes, the TLRO created an alternative dispute resolution process that is both "binding" and the "exclusive" means for addressing unfair labor practice charges and any other work-related issues. [ER38-ER40] This process involves the claimant giving the tribe notice of the dispute and an opportunity to resolve it internally before submitting any outstanding matter to binding arbitration in front of a neutral or neutrals selected from a ten-member "Tribal Labor Panel" created under the TLRO that consists of arbitrators knowledgeable

in "federal labor law and/or federal Indian law" and supplied by such reputed providers as the Federal Mediation and Conciliation Service and the American Academy of Arbitrators. [ER39] Although representing a major departure from Proposition 5 and consequent reversion to the NLRA-driven approach of the Pala Compact, the labor terms within the TLRO ultimately found unanimous support from the signatory tribes, each one of whom executed a version of the ordinance by the cut-off date in Section 10.7 of its 1999 Compact. *See Coyote Valley II,* 331 F.3d at 1105.

For the Union, any celebration for successfully negotiating NLRA protections that it had invalidated a model compact to obtain was short lived, as it turned its attention to targeting a very wealthy and uniquely-situated tribe on the outskirts of Los Angeles – the San Manuel Band of Mission Indians – for assisting a rival union in becoming the bargaining representative for its casino employees. *See San Manuel Indian Bingo & Casino,* 341 N.L.R.B. 1055 (2004) ("*San Manuel*"). Seeing a tribe work alongside a labor organization other than the one that was fighting to introduce federal labor laws at tribal gaming facilities, no matter the cost, resulted in the Union filing an unfair labor practices charge directly with the NLRB and asking the Board to overturn nearly seventy years of precedent by asserting jurisdiction over a tribal enterprise located on the reservation. *Id.* In an opinion the discussion for which begins by broaching the perceived newfound wealth of Indian tribes, the NLRB took up the issue raised by the Union and "decided to overrule *Fort Apache* and… establish a new standard for

determining the circumstances under which the Board will assert jurisdiction over Indian owned and operated enterprises." *Id.* at 1056.

Whereas the old standard relied upon a simple black-and-white test to determine whether a tribal enterprise was subject to NLRB jurisdiction, the new multi-pronged test is a repurposing of the one in an old Ninth Circuit case entitled *Donovan v. Coeur d'Alene Tribal Farm,* 751 F.2d 1113 (9th Cir. 1985) ("*Coeur d'Alene*"). After finding that "nothing in the Act's legislative history suggests that Congress intended to foreclose the Board from asserting jurisdiction over Indian tribes," the initial inquiry under the new test in any future case involving a tribal entity is "whether application of the Act would … abrogate any treaty rights." *San Manuel,* 341 N.L.R.B. at 1063. If no such protective treaty rights exist, then the NLRB doubles down on the remaining element of the *Coeur d'Alene* test that asks whether the exercise of jurisdiction would "touch[ ] exclusive rights of self-government in purely intramural matters" by first examining the issue through the Ninth Circuit lens before doing so once again according to an undifferentiated commercial-versus-governmental test of its own devising. *Id.* at 1059.

Although described as a discretionary approach, the administrative variant of the *Coeur d'Alene* self-government inquiry employs bright-line rules based upon the perceived function of the tribal entity. On the one hand, "[w]hen the Indian tribes act in" a commercial manner, "the special attributes of their sovereignty are not implicated" and the NLRB will exert jurisdiction to "effectuate the policies of the Act." *Id.* at 1062-63. On the other hand, when "the tribes continue to act in a manner consis-

tent with [their] mantle of uniqueness" by performing "traditionally tribal or governmental functions that are unique to their status as Indian tribes," the NLRB should "afford the tribes more leeway in determining how they conduct their affairs by declining to assert its discretionary jurisdiction" – though, in this instance, the Board retains the discretion to do otherwise. *Id.* at 1063. Thus, the simple act of overruling *Fort Apache* changed the jurisdictional standard in cases involving on-reservation tribal entities from a complete bar on hearing any such suit to the compulsory obligation to hear any case involving a commercial entity and the discretionary ability to hear any other case. Moreover, the process for adopting this new jurisdictional standard that is nearly antithetical to the original one entailed the NLRB skipping over some difficult-to-reconcile laws – like the regulation the Board issued in 1959 to define the term "State" in the Section 2(2) governmental exemption to include a litany of other political entities, such as "possessions" of the United States. *See Cherokee Nation v. Georgia,* 30 U.S. 1, 17 (1831) (describing Indian tribes as "domestic dependent nations"); BLACK'S LAW DICTIONARY 393 (5th ed. 1979) (defining a "dependency" as a possession over which a country exercises sovereignty by right of conquest).

As the Union shifted its attention from negotiating the TLRO to rewriting federal Indian law, an attorney representing Pauma reached out to the state in the spring of 2000 to obtain for his client a form version of the 1999 Compact that the Office of the Governor had executed with approximately sixty tribes the previous fall. *See Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California,* 813 F.3d 1155,

1161 (9th Cir. 2015) ("*Pauma*"). Signing the compact enabled Pauma to open a 850-machine temporary tent gaming facility on its reservation in May of 2001 that was or would soon be surrounded by much larger destination resort casinos operated by tribes who either had significant prior experience gaming or who were actively involved in the compact negotiations that occurred throughout 1998 and 1999. *See Rincon Band of Luiseno Mission of Rincon Reservation v. Schwarzenegger,* 2008 WL 6136699, *6 (S.D. Cal. 2008) (explaining that Pauma neighbors the Pala, Rincon, and Pechanga tribes).

Being situated at the center of a saturated gaming market was just the first impediment to Pauma generating revenue under the 1999 Compact, with the second being the State restricting the number of slot machines available under the terms of the agreement. After a number of tribes expressed vehement opposition to the State "exploring the concept of an enormous revenue sharing requirement" during the course of negotiations (*see Coyote Valley II*, 331 F.3d at 1103), the final compact proposal presented by the State on the evening before the negotiation deadline contained a new method for determining the total number of slot machines that each tribe could operate, which relied upon a convoluted formula in lieu of a fixed number. *See Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California*, 629 F. Supp. 2d 1091, 1111 (E.D. Cal. 2009) ("*Colusa I*"). This new format allows a tribe to start with a "baseline entitlement" of machines equivalent to the larger of 350 or the number of machines the tribe operated before the compact went into effect, and then to increase this beginning device count up to a maximum of 2,000 by acquiring licenses from a

statewide pool, the total size of which is the output of a formula within Section 4.3.2.2(a)(1) of the 1999 Compact that states:

> The maximum number of machines that all Compact Tribes in the aggregate may license pursuant to this Section shall be a sum equal to 350 multiplied by the number of Non-Compact tribes as of September 1, 1999, plus the difference between 350 and the lesser number authorized under Section 4.3.1.

Colusa I, 629 F. Supp. 2d at 1096.

Nearly two-and-a-half years into the performance of the 1999 Compact, and after the signatory tribes had invested tens if not hundreds of millions of dollars in constructing gaming facilities, the State released an admittedly "conservative" and "low-end" interpretation of the license pool formula, explaining to the tribes that they would have to renegotiate their compacts if they wanted to obtain any more licenses once the suppressed limit was reached. *See, e.g., Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California,* 2013 U.S. Dist. LEXIS 188153, *49 (S.D. Cal. 2013). This fate befell Pauma after the State refused to fulfill the majority of a request for 750 licenses in December of 2003, and the Tribe executed a compact amendment ("2004 Amendment") to obtain licenses that should have been available under the original agreement. *See Pauma,* 813 F.3d at 1161. For Pauma, the financial fallout of amending the 1999 Compact was a 2,460% increase in revenue sharing fees – turning a $315,000 payment into the RSTF (*i.e.*, an account designed to provide largely non-gaming tribes with $1.1 million in annual financial support) into a $2,000,000 payment

into the aforesaid account plus another $5,750,000 into the State's general fund. *Id.* at 1162.

Of the two revenue sharing fees under the 2004 Amendment, the heightened RSTF payment had a delayed start date, such that Pauma paid a fractional amount up until the end of the first quarter of 2008 and then the full $500,000 a quarter thereafter. *See Pauma*, 2013 U.S. Dist. LEXIS 188152 at *24. Within six months of paying on a schedule that required $2,000,000 in RSTF and $7,750,000 in total revenue sharing payments per year, Pauma laid off eighty-one casino employees – or 15.1% of its workforce – in order to eliminate approximately $2,174,000 in salary costs. *See Pauma,* No. 09-01955, Dkt. No. 130, 28:3-4. As Pauma's financial situation continued to deteriorate, the Eastern District of California issued a dispositive order in the *Colusa* suit, disclosing for the first time that the State had restricted the license pool of the 1999 Compact by upwards of 10,549 licenses. *See Colusa I*, 629 F. Supp. 2d at 1113. After learning of this misrepresentation, Pauma filed a complaint with the Southern District of California to stave off any further reductions in force – asking the court to rescind the 2004 Amendment and order restitution of the $36,235,147.01 in excess revenue sharing fees the Tribe had paid under the agreement. *See Pauma*, 813 F.3d at 1162.

In quick succession, the district judge issued a preliminary injunction reducing the revenue sharing fees of the 2004 Amendment to the prior rates of the 1999 Compact and then ordered Pauma to file a unilateral motion for summary judgment. *See, e.g., Pauma,* 410 F. App'x 20 (9th Cir. 2010). As Pauma's summary judgment motion was

pending, the Union sent a letter to Pauma on May 25, 2012, notifying the Tribe of its first alleged unfair labor practice in eleven years and invoking the "binding dispute resolution" process of the TLRO. [ER41]. Informal discussions between the parties failed to resolve the dispute to the satisfaction of the Union, who then sent a follow-up letter to the State Department of Personnel Administration on July 12, 2012 to trigger the arbitration process. [ER42-43]. The outset of the July 12th letter acknowledged that the TLRO contains a "binding dispute resolution mechanism" and that "[a]ll issues shall be resolved exclusively through the binding dispute resolution mechanism[ ]" in the ordinance. [ER42]. This initial dispute never worked its way through the entire process in the TLRO, however, as the Union withdrew its complaint after learning the identity of the three neutrals who would serve on the arbitration panel. [ER41-ER45]

The prior willingness of the Union to abide by the "exclusive" dispute resolution process of the TLRO disappeared entirely once the district court rescinded the 2004 Amendment, including the revision to the TLRO therein that changed the procedure for electing the employee's bargaining representative from the traditional secret ballot process of the NLRA to a card check procedure favored by the Union. *See, e.g., Pauma* 2013 U.S. Dist. LEXIS 188153. Rather than attempt to organize pursuant to the secret ballot election rules it negotiated, the Union simply bypassed the arbitration process of the TLRO and began filing one unfair labor practice charge after the next with the NLRB – lodging nine in total between April 16, 2013 and October 13, 2015. *See Casino*

Pauma, Nos. 21-CA-103026, 21-CA-114433, 21-CA-125450, 21-CA-126026, 21-CA-126528, 21-CA-131428, 21-CA-161239, 21-CA-161598, 21-CA-161832 (N.L.R.B.). All of these charges are at various stages of adjudication, but the common thread running throughout them is that they pertain to the scope of the Union's ability to speak with casino patrons about organizational issues while on Pauma property. For instance, the basis of the current charge under review is that Casino Pauma committed an unfair labor practice by disallowing employees sympathetic to the Union (together with a larger number of Union organizers) from communicating directly with customers about organizational issues in non-work (*i.e.*, guest) areas of the gaming facility and related property, such as the shuttle buses that transport patrons from far-off locales in the Los Angeles metropolitan area to the Pauma reservation. [ER83]

Citing an old Supreme Court case entitled *Republic Aviation,* 324 U.S. 793, that dealt with employee-to-employee organizational communications in non-work areas of a business, the counsel for the General Counsel extended this rule to the employee-to-customer context and argued that employees have the right to solicit casino patrons in *any* guest area within the facility, which explicitly includes public bathrooms:

> The Court and Board have long established that, absent special circumstances, employees have the right to distribute union literature on their employer's premises during nonwork time in nonwork areas. … While solicitations/distributions may be banned in gambling areas (a space that the Board equates with a retail store's selling floor), prohibiting this activity in other areas such as the public restrooms is unlawful.

[ER18-ER19]

The administrative law judge adopted the Union and the counsel for the General Counsel's argument concerning the solicitation rights of employees *en toto*. [ER03-ER13] The analysis section of the opinion – which the NLRB in turn adopted in full – once again extends the employee-to-employee framework of *Republic Aviation* to the employee-to-customer context to establish two supposedly "well-settled" rules: (1) employees, whether aided by union organizers or not, can "distribute union literature [to whomever they want] on their employer's premises during nonwork time [and] in nonwork areas," and (2) the definition of "nonwork" areas includes any and all guest areas, such as public restrooms and parking lots. [ER08-09] A cease and desist order concludes the opinion and instructs Casino Pauma to refrain from "interfering with the distribution of literature by employees in [guest areas of the casino] including the public or guest entrance of its casino." [ER12]

In the process of deciding the solicitation issue, the administrative law judge placed strict limitations on the evidence counsel for Pauma could present at the hearing on the matter. The counsel for the General Counsel issued a subpoena in advance of the hearing to obtain a slew of financial documents from Casino Pauma that would go to show whether the enterprise "affect[ed] commerce" to such a degree that the NLRB could potentially exert jurisdiction over the dispute. [ER61-ER62, ER76-ER-81] On the business day before the start of the hearing, the administrative law judge issued an opinion on the validity of the subpoena that required Casino Pauma to comply with the writ even though the order suggested the neither party would be able to present

evidence on jurisdictional topics. [ER76-81] The basis for this position was the administrative law judge's belief that "a reasonable argument can be made that the issue of the Board's jurisdiction over Respondent may be *res judicata*" in light of a non-final opinion in a prior case between the parties addressing some such subjects, and that it "would [thus] be antithetical to judicial efficiency and economy" to analyze jurisdictional topics in the present case as well. [ER79]

At the outset of the hearing the following business day, counsel for Casino Pauma explained that he "didn't realize that [he] would be completely precluded [from arguing jurisdiction] until I saw that order on Friday afternoon" and he "had no way to know [before then] that [he] would be limited" in such a manner. [ER65] On the spur of the moment, counsel for Casino Pauma came up with one jurisdiction-related topic that it wanted to argue at the hearing. [ER66] The administrative law judge relented a bit, allowing counsel for Casino Pauma to present evidence in a "limited fashion," which meant introducing *one* public document that counsel for Casino Pauma would have nevertheless submitted as part of a request for judicial notice. [ER68] Allowing the presentation of this specific piece of evidence was the most the administrative law judge would do on the jurisdictional topic, as it still forbade counsel for Casino Pauma from presenting other documents or "any extended testimony" on the subject. [ER69] This restraint on the ability of Casino Pauma to present evidence on a foundational issue that can never be waived was then compounded by the administrative law judge giving counsel for the General Counsel the explicit right to address in its post-hearing

brief whether the singular document counsel for Casino Pauma sought to introduce even satisfied some supposedly "newly discovered" standard in order to circumvent the *res judicata* bar that the administrative law judge seemed set on imposing. [ER69] The discussion about jurisdiction ended with the administrative law judge explaining that "the whole issue may be moot" and, because of that, he "intend[ed] to not allow ourselves to drift into the jurisdictional issue, with the limited exception that we just discussed." [ER70-ER71]

As the hearing unfolded, the administrative law judge also hampered the ability of counsel for Casino Pauma to present evidence challenging the NLRB's application of solicitation rules. During the cross-examination of one of the employees who had participated in the solicitation of customers, counsel for Casino Pauma asked the witness how many people in total were present at the time of the events in order to ascertain the number of union organizers who were involved in the effort. [ER56] This question elicited an objection from counsel for the General Counsel and a comment from the administrative law judge that the discussion was "getting a little far afield." [ER56] After counsel for Casino Pauma indicated with a "yes" that he thought his question was relevant because the rules pertaining to workplace solicitation are even more stringent for professional union organizers than for employees, the administrative law judge admonished "I think you're skating on real thin ice" before repeatedly exclaiming various iterations of "that's not the law." [ER57]; *but see NLRB v. Town & County Elec.,* 516 U.S. 85, 97 (1995). Further explanation about the justification for the line of

questioning did not lead the administrative law judge to change its stance, as it simply instructed counsel for Casino Pauma to "make your offer of proof" but that "I'm not going to allow you to go into that [subject], because I think it's really [irrelevant]." [ER58]

STANDARD OF REVIEW

The general rule is that a decision by the NLRB receives deference if it concerns an issue within the agency's particular competence, such as the interpretation of the NLRA. *See Morris v. Ernst & Young, LLP*, 834 F.3d 975, 980-81 (9th Cir. 2016). A *de novo* standard of review applies, however, when the NLRB ventures outside of its traditional area of expertise and does things like address an issue of federal Indian law or construe a Supreme Court opinion, just as the Board did in this case. *See NLRB v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537, 543 (6th Cir. 2015) ("*Little River*") (indicating a court does not defer to the NLRB on federal Indian law issues); *N.Y.N.Y, LLC. v. NLRB*, 313 F.3d 585, 590 (D.C. Cir. 2002) (explaining the "Board's interpretation of Supreme Court opinions" is "not entitled to judicial deference").

ARGUMENT

I. THE NLRB PERVERTED THE STANDARD EMPLOYEE-TO-EMPLOYEE SOLICITATION RULE IN *REPUBLIC AVIATION* TO GIVE EMPLOYEES SYMPATHETIC TO PARTICULAR UNIONS THE RIGHT TO SOLICIT CUSTOMERS IN SENSITIVE AREAS OF BUSINESS ESTABLISHMENTS, SUCH AS BATHROOMS

The cease and desist order issued by the NLRB rests on the faulty premise that Casino Pauma has no ability to prevent employees from soliciting customers in the

"guest areas" of the establishment, like bathrooms. [ER08] Though the NLRB puts forward this rule without any analysis, the principal basis for this conclusion in the subordinate order by the administrative law judge is the opinion by the Supreme Court in *Republic Aviation,* 324 U.S. 793, that dealt with the completely separate issue of an employee's right to discuss organizational issues *with his coworkers* during an outmoded technological era when the only convenient forum for doing so may have been the non-work areas of the workplace.

To explain, the opinion in *Republic Aviation* came out in 1945 and concerned a military aircraft manufacturer that had imposed a rule prohibiting "[s]oliciting of any type… in the factory or offices" of its plant that was situated in the middle of a six thousand acre tract of land. *See Republic Aviation,* 324 U.S. at 794-97. A public road ran through this landholding and bisected the plant, which meant any solicitation-related communications that were to take place outside of the facility would likely occur along this public road and only involve the fraction of employees walking to work from the nearby public highway or others who were able to stop their "private automobiles, buses or other conveyances on the public roads for communications." *Id.* at 797. After all, conversations away from work were unlikely since the "employees' dwellings [were] widely scattered" at distances of "10 to 50 miles" from the rural area of Long Island, New York where the manufacturing plant was located. *Id.* at 795, 797, 800; *see In re Republic Aviation Corp.,* 51 N.L.R.B. 1186, 1195 (1943).

Given the physical layout of the property, disallowing solicitation between employees in this particular plant would have been "inimical to the right of organization," which led the NLRB and the Supreme Court to "work[ ] out an adjustment between the undisputed right of self-organization assured to employees under the [NLRA] and the equally undisputed right of employers to maintain discipline in their establishments." *Republic Aviation,* 324 U.S. at 797. The resultant compromise recognized that working areas and "[w]orking time is for work," while "time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property." *Id.* at 803 n.10. Thus, balancing the competing interests produced a rule that employees have the right to distribute union organizational literature *to other employees* in nonworking areas of a business during nonwork times, "absent a showing by the employer that a ban is necessary to maintain plant discipline or production." *Eastex, Inc. v. NLRB,* 437 U.S. 556, 570 (1978).

An age-old rule permitting unobtrusive workplace solicitation between coworkers has now morphed into explicit approval for employees to harass customers should they veer too far from the main service area of an establishment. According to the administrative law judge, the sacrosanct "work" area for a service provider is the portion of the facility devoted to the primary activity or lure. [ER08] For instance, the traditional or normal working area for a retail store is the selling floor, while for a casino the gaming area. [ER08] Yet, existing between this locus and the hidden

backrooms where non-working employees congregate to discuss organizational issues under *Republic Aviation* are sensitive guest areas deserving of heightened privacy protections that the NLRB seems all too eager to invade. Import the decades of precedent in *Republic Aviation* and its progeny defining relaxed non-work areas for employees to the customer context and suddenly the ancillary food courts and restaurants in Casino Pauma become fair game for employees to grandstand about competing unions beside their on-duty coworkers who are dishing out slices of pizza or preparing Caesar salads tableside. *See Beth Israel Hosp. v. NLRB,* 437 U.S. 483, 495, 507 (1978) (explaining a cafeteria or lounge is a non-work area for employees under the *Republic Aviation* standard). An intimate lounge area next to the bar for customers to unwind becomes a forum where employees sympathetic to a union can prey on the unsuspecting and vulnerable. *See id.* And, arguably worst of all, restrooms become places where customers have to worry about being tapped on the shoulder by an overzealous employee while standing at a urinal, or seeing union literature slide underneath a stall door.

The issues caused by employee solicitation of customers *within* a business establishment will not be unique to Casino Pauma and other employers in the gaming sector. Rather, the whole service industry will feel the effects – from airports, to hospitals, to shopping malls, to movie theatres, to sports stadiums. On top of which, this gross extension of *Republic Aviation* will bring a whole new class of cases into federal court and put the judiciary into the unenviable position of having to engage in line drawing

of the most arbitrary sort. For instance, did the Southwest gate agent inappropriately regale a customer with stories about perceived employer intransigence because the conversation happened closer to the departure gate than the cell-phone charging kiosks across the way? Similarly, did an usher at a sports stadium violate this new-fangled interpretation of *Republic Aviation* by distributing leaflets while patrolling the aisles even though the traditional work area is the playing field below? Yet, questions of this nature will not address the real issue of whether allowing employees to discuss union issues directly with customers will negatively impact the patronage rates at service establishments.

The federal courts will soon find out the answer to that question, though. One of the lynchpin tactics of this particular Union in trying to organize business establishments is filing unfair labor charges in the hopes of moving the solicitation boundary line further and further inside of a facility. The administrative decision in this case has served as a springboard for the Union in its efforts to accomplish this feat. It is presently attempting to do this at the Jonathan Club – the exclusive and private social club in downtown Los Angeles – by forcibly opening up its interior lounge to solicitation even though the sidewalk outside of the main entrance is less than fifteen feet away. *See Jonathan Club,* Case Nos. 21-CA-167497, 21-CA-169746, 21-CA-173130, 21-CA-176821, 21-CA-176825 (N.L.R.B.). More importantly, the Union has recently succeeded in doing this at the Aston Waikiki Beach Hotel in Honolulu, Hawaii – exposing an interior, open-air hotel lobby offering foods and beverage service to employee solici-

tation. *See Aqua-Aston Hospitality, LLC,* 2016 NLRB LEXIS 402, *50-*54 (2016). The administrative law judge in that case felt that extending *Republic Aviation* was appropriate because most of the guests in the lobby were either eating, "watching television, napping or engaging with their smartphones" rather than receiving the sort of lodging services that the hotel principally provides. *See id.* at *52. In reaching its decision, the administrative law judge made it known that the *entire* non-work, guest area is open to solicitation regardless of where the implicated employees are stationed. *See id.* at *53. Going back to the public restroom issue, the current state of administrative law truly means that an employee's right to solicit customers in a public bathroom is as strong at a urinal or stall door as it is at the entranceway. A rule like this that is designed to invade the privacy rights of eating, napping, and otherwise preoccupied customers will have a profoundly negative impact on business.

Lost revenues is just one of many real world harms that will befall Pauma from extending *Republic Aviation* into the customer context. Whatever sovereign immunity Pauma once possessed from tort claims brought by those who entered the reservation disappeared with respect to casino patrons following the execution of the 1999 Compact. Section 10.2(d) of the agreement requires Casino Pauma to "[c]arry no less than five million dollars ($5,000,000) in public liability insurance for patron [tort] claims" and to waive its sovereign immunity so a customer alleging injury can have its day in arbitration. [ER24-ER25, ER29] Without getting into too much nuance, one non-service interaction between an employee and customer gone wrong can spawn a state

of affairs where Pauma pays for arbitration, sees its premiums go up, watches on as its insurer expends what could be a considerable amount of money, and subsequently worries about whether it will be liable for some or all of the payout under the terms of the insurance policy between the parties.

Lest anyone think that a series of events like this is outside the realm of possibility, it is worth remembering that a number of unions compete for the position of bargaining representative at Indian casinos in California, which resulted in the overreaching in this case that involved multiple employees strategically staked out to solicit customers at multiple times during the day despite the employer's instructions to the contrary. [ER04-ER05]; *see Viejas Band of Kumeyaay Indians,* No. 21-CA-166290 (N.L.R.B. filed on Dec. 16, 2015) (indicating casino employees are represented by the United Food and Commercial Workers International Union); *San Manuel Indian Bingo & Casino,* 31-CA-023803 (N.L.R.B. 2009) (suggesting the Communication Workers of America is the representational party). Reinterpret *Republic Aviation* and all it takes is one small step to go from the fact pattern underlying this dispute to having employees sympathetic to Unite Here International Union, the United Food and Commercial Workers International Union, the Communication Workers of America, and other rival unions lurking in the tinderbox of low-lit, close-quartered corridors and bathrooms of Casino Pauma.

All of the discussion up to this point says nothing about the shift in the balance of interests from those in *Republic Aviation.* A sovereign nation like Pauma has a property

interest that is significantly stronger than any run-of-the-mill employer. Nevertheless, one of the fundamental tenets for a normal business owner, as has been oft-repeated, is that it has to open the non-work areas of its property to employees so they can discuss organization *with other employees*. A change in the intended audience does not necessarily lead to the application of the same rule, though. This is due to the fact that, "[w]hile employees involved in organizational activity look to communicate with other employees, striking employees seek to communicate with both employees *and customers of the employers*." *Fuji Food US, Inc.*, 2002 NLRB LEXIS 313, *40 (2002); *Scott Hudgens*, 230 N.L.R.B. 414, 416 (1977) (explaining the different audiences for employees attempting to organize versus strike). Thus, employees focused on communicating organizational messages to customers – whether inside or outside the establishment – do so with an eye on striking.

A distinction of this magnitude possesses implications for the rights of any normal business owner, but it has even more profound effects for a sovereign nation whose labor laws are spelled out within a federally-mandated gaming compact that the State demanded and the very union engaging in this questionable activity negotiated. As to that, Section 11 of the TLRO explains that "[s]trike-related picketing shall not be conducted on Indian lands as defined in 25 U.S.C. Sec. 2703(4)." [ER37] One logical corollary of this rule banning strike-related activities is that any solicitations done for the purpose of mobilizing a strike – such as laying the groundwork for this effort with customers – should also be prohibited from taking place on the reservation as well.

This means that neither the Union nor employees sympathetic to this or any other labor organization should have the right to come on to Pauma's trust land to rabble-rouse in the hopes of fraying if not altogether severing the employer-employee relationship. The Union should know this, though, seeing that Section 8 of the TRLO it personally negotiated prohibits it from "interfere[ing] with the patronage of the casino or related facility." [ER35] Fortunately for the Union, a rule prohibiting employees from soliciting customers on the reservation will only have a minor impact on any would-be strikers, as those employees can still display signs or hand out union paraphernalia to potential customers at the lighted intersection of State Road 76 and Pauma Reservation Road that borders the reservation. *See* Google Maps Page for CA-76 and Pauma Reservation Road, *available at* https://www.google.com/maps/place/CA-76+%26+Pauma+Reservation+Rd,+Pauma+Valley,+CA+92061 (last visited Oct. 27, 2016).

Adding weight to the employer scale in the *Republic Aviation* balance of interests causes the employee one to move in the opposite direction, just as it should. All of the dicta in *Republic Aviation* concerning the difficulties employees experience in meeting outside of the workplace to discuss organizational issues serves as an apt reminder about the utterly disconnected state of the war-torn world in the early 1940s. Means of communication in this era were limited, lacking both the obvious – like the various social media sites on the Internet – and the less apparent, such as the Interstate Highway System. Even the bedrock form of communication in the United States, the

telephone, was a luxury for many households, as only about 150 people out of 1,000 actually owned one.[1] [RJN05]; *see* United States Census Bureau, *Statistical Abstract of the United States: 1944-45* at Part 7, p. 433, *available at* http://www2.census.gov/library/publications/1945/compendia/statab/66ed/1944-07.pdf (last visited Jan. 16, 2017). Rather this was a period when sending messages by telegraph was still commonplace and a company like Western Union was setting personal records for both its miles of wire and annual revenues. [RJN06]; *see* United States Census Bureau, *Statistical Abstract of the United States: 1944-45* at Part 7, p. 438, *available at* http://www2.census.gov/library/publications/1945/compendia/statab/66ed/1944-07.pdf (last visited Jan. 16, 2017).

Given that laborers in the war economy worked long hours and burned out fast, having the plant serve as the heart of the organizational effort made sense so the employees spearheading the effort would not have to try and track down a constantly-changing roster of dispersed coworkers over unpaved backroads or by slow-moving telegrams. [RJN02-RJN03]; *see* United States Census Bureau, *Statistical Abstract of the United States: 1944-45* at Part 3, pp. 129 & 171, *available at* http://www2.census.gov/

[1] As is explained more fully in the preceding factual background, the administrative law judge seriously constrained the ability of counsel for Casino Pauma to present its case. Argument designed to contest the NLRB's current understanding of solicitation rules was welcomed with comments like "you're skating on real thin ice" and barred from consideration. [ER57] Thus, counsel for Casino Pauma submits the judicially-noticeable evidence questioning the continued viability of *Republic Aviation* in this and the following paragraph so the Court may consider it in deciding the issue or, if not, as the sort of further evidence Casino Pauma would adduce on remand under Section 10(e) of the NLRA, as the accompanying motion makes clear. *See* 29 U.S.C. § 160(e).

library/publications/1945/compendia/statab/66ed/1944-03.pdf (last visited Jan. 16, 2017). Advancements in technology over the past seventy years have simply put an employee's need to use the non-work areas of a workplace for organizational efforts at an all-time low, and that assumes the individual is actually using the area in the manner intended by *Republic Aviation*.

The discussion of *Republic Aviation* up to this point focuses solely upon the employees and not the even "larger number of non-employee organizers" who were also involved and would simply loiter on the gaming floor or at the pizzeria inside the casino when a round of solicitations died down. [ER51, ER74] Consider yet again how the basic solicitation rule has mutated over time. *Republic Aviation* concerned an employee who was *terminated* from his job for distributing union literature in a "uniquely appropriate" non-work area of a manufacturing plant to co-workers who would be difficult to reach otherwise given the gas rationing and limited transportation options of that wartime era. *See In re Republic Aviation Corp.,* 51 N.L.R.B. at 1195. The present case concerns "a number" of employees coupled with an even "larger number of non-employee organizers" who were simply instructed to stop approaching casino patrons about unionization issues, with the employees informed they could still pass out such information to their colleagues in the very break rooms and conducive back areas of the workplace that the Supreme Court in *Republic Aviation* sought to protect. [ER5]

A grave misconstrual of precedent might be unusual for a federal administrative agency acting in the normal course, but not for one that has sought to rewrite the law

within its field over recent years in order to make up for declining union membership rates that have plummeted from 20.1% to 11.1% over little more than two decades. [RJN07]; *see* Bureau of Labor Statistics, *Union Members – 2015, available at* http://www.bls.gov/news.release/pdf/union2.pdf (last visited Jan. 11, 2017). *Republic Aviation* is not the only federal court precedent the NLRB has misread, as it also reinterpreted the rule in a Supreme Court opinion entitled *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) ("*Catholic Bishop*") that says religious institutions fall outside of the NLRA by creating an antithetical test that allows the Board to assert jurisdiction over such entities unless they affirmatively prove that they "hold out the petitioned-for faculty members themselves as performing a specific role in creating or maintaining the college or university's religious educational environment." *See Pacific Lutheran Univ.,* 261 NLRB No. 157, 2014 NLRB LEXIS 1002, *2 (2014).

When not rewriting federal court opinions to suit its needs, the NLRB has been busy overturning its own well-established precedent to bring previously-exempted entities into the fray. *San Manuel* is one opinion in which the NLRB reversed seventy years of precedent to assume jurisdiction over a new class of defendants, but it is just a single example amongst a litany of others that include charter schools and scholastic "employers" of graduate students. *See, e.g., Trustees of Columbia Univ.,* 364 NLRB No. 90, 2016 NLRB LEXIS 619 (2016); *Hyde Leadership Charter Sch.,* 364 NLRB No. 88, 2016 NLRB LEXIS 623 (2016). Not every case can involve the expansion of jurisdiction, so others concern strengthening the position of unions by, amongst other things,

overturning longstanding precedent concerning the hiring of permanent replacements for striking workers (*see Am. Baptist Homes of W.*, 364 NLRB No. 13, 2016 NLRB LEXIS 404 (2016)), continuing dues payments following the expiration of a collective bargaining agreement (see *WKYC-TV, Inc.*, 359 NLRB No. 30, 2012 NLRB LEXIS 851 (2012)), and allowing an employee to obtain more than "make whole" relief if the NLRB finds that the employee was fired in violation of the NLRA. *See King Soopers, Inc.*, 364 NLRB No. 93, 2016 NLRB LEXIS 625 (2016). What the opinions in these cases and the instant one show is that an administrative court imbued with both political and judicial attributes walks a fine line and can easily stray from its judicial function if political forces become too involved. Simply put, reinterpreting *Republic Aviation* to allow employees aligned with one union or another to approach customers in any "guest area" of an establishment may be politically desirable, but it will absolutely crush an employer's ability to effectively run its business.

II. A SPECIALIZED STATUTE RIDDLED WITH EXCEPTIONS LIKE THE NLRA DOES NOT WARRANT APPLICATION OF THE *COEUR D'ALENE* TEST AND ITS CHIEF INQUIRY INTO TRADITIONAL GOVERNMENTAL FUNCTIONS THAT THE SUPREME COURT VIEWS AS BEING "UNTENABLE," "UNWORKABLE," "UNMANAGEABLE," AND "UNSOUND"

One of the bedrock principles of Indian law that arises out of Congress having the power to define relations between the federal government and some five hundred and sixty-two once-separate tribal nations is that a federal statute will not apply to tribes without sufficient evidence of Congressional assent. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978) ("[A] proper respect both for tribal sovereignty itself and for

the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent."). Decades have passed since the issuance of *Santa Clara Pueblo* but the principle articulated therein remains as vibrant as ever, with the Supreme Court recently reaffirming that "a fundamental commitment of Indian law is judicial respect for Congress's primary role in defining the contours of tribal sovereignty," which ensures "courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. __, 134 S. Ct. 2024, 2031-32, 2039 (2014) ("*Bay Mills*").

For the judiciary, this rule was borne to address the middle ground case of the general federal statute that rests between the clearly applicable (*i.e.*, specialized statute pertaining to Indian tribes) and the clearly inapplicable (*i.e.*, specialized statutes relating to other entities). Nevertheless, an opportunity for the Ninth Circuit to address the fit between a general federal statute and an Indian tribe resulted in the adoption of a contrary rule that requires the tribal party to bear the burden of proving "by legislative history or some other means that Congress intended [the law] *not* to apply to Indians on the reservations." *Coeur d'Alene*, 751 F.3d at 1116. Thus, the core principle of statutory interpretation with respect to Indian tribes in the Ninth Circuit has inverted, going from a near-absolute presumption of exclusion to a contrary presumption of inclusion that a tribe can only rebut through proof from the triumvirate of the legislative record, treaty rights, or interference with the "exclusive rights of self-governance in purely intramural matters." *Id.*

Outside of this circuit, the reception to a test that flipped the inveterate principle in *Santa Clara Pueblo* on its head has been utterly mixed. In an effort to bring tribes under its jurisdiction, the NLRB adopted the *Coeur d'Alene* test and then tightened it by doubling-down on the self-governance exemption to create a secondary "discretionary" test that asks the duplicative question of whether the tribal enterprise at issue serves a traditional governmental or commercial function. *See San Manuel*, 341 N.L.R.B. at 1062. Applying this secondary filter allows the NLRB to still retain jurisdiction over those commercial businesses that are "not an expression of sovereignty in the same way that running a tribal court system is," but then to possess the unbridled discretion to also bring into the fold these courts systems and other entities occupying spaces in the "particularized sphere of traditional tribal or governmental functions" that would have previously been excluded under *Coeur d'Alene*. *See id.* at 1063.

The enthusiasm exhibited by the NLRB for the *Coeur d'Alene* test finds no equal in the federal circuit courts. Some conspicuously avoid mentioning the case by name while nevertheless attacking the interpretation of Supreme Court dicta that serves as the basis for the decision. *See NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1199 (10th Cir. 2002) ("*Pueblo of San Juan*"). Others dismiss the test while fashioning their own that allows for the exercise of jurisdiction so long as the affront to tribal sovereignty is not *too* egregious. *See San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1315 (D.C. Cir. 2007). And yet others begrudgingly accept the test even though they "do not believe that the *Coeur d'Alene* framework properly addresses inherent tribal sover-

eignty under governing Supreme Court precedent," simply because they were beat to the punch, by a matter of weeks, by a divided panel in a different case whose deciding vote came from a judge who assumed senior status some fifteen years earlier. *Compare Soaring Eagle Casino & Resort v. NLRB*, 791 F.3d 648 (6th Cir. July 1, 2015) ("*Soaring Eagle*") *with Little River*, 788 F.3d 537 (6th Cir. June 9, 2016). Needless to say, misgivings similar to those raised by the sister circuits would have come up repeatedly in Casino Pauma's submissions below if not for the administrative law judge foreclosing any jurisdictional argument save one that counsel for Casino Pauma was able to devise on the spot at the outset of the hearing. [ER65-ER71]

Blocking argument on jurisdiction enabled the administrative law judge to avoid having to discuss the many holes in the NLRB's *Coeur d'Alene* based-test at a point in time when the *San Manuel* opinion was under attack in multiple petitions before the Sixth Circuit. *See Soaring Eagle,* 791 F.3d 648; *Little River,* 788 F.3d 537. One such hole is the assumption in *San Manuel* that the NLRA is a generally-applicable federal statute in the first place. A statute of general applicability is one that is "comprehensive" and possesses only "narrow exceptions." *See Coeur d'Alene,* 751 F.2d at 1115 (classifying the Occupational Safety and Health Act as a statute of general applicability because its "coverage is comprehensive"); *Stormans, Inc. v. Selecky,* 586 F.3d 1109, 1134-35 (9th Cir. 2009) (explaining a law is generally applicable if it has only narrow exceptions). The understanding of the term "generally" within this circuit matches the dictionary definition of the world, which is universally along the lines of "to or by most people;

widely, popularly, [or] extensively." *See* WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE p. 581 (2d ed.).

Yet, the NLRA is anything but "widely" or "extensively" applicable amongst the "universe of entities that participate" in the field Congress sought to regulate (*see Reno v. Condon*, 528 U.S. 141, 151 (2000)), which in this case is all those participating in the "free flow of interstate commerce." *See NLRB v. Hollywood-Maxwell Co.*, 126 F.2d 815, 817-18 (9th Cir. 1942); 29 U.S.C. § 151 ("It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce."). In fact, the jurisdictional sections of the NLRA are riddled with exceptions, as the Tenth Circuit previously noted in holding that the Act was not generally applicable. *See Pueblo of San Juan,* 276 F.3d at 1199. Exceptions exist for both employers and employees, covering such a diverse array of entities as non-employers, small employers who only have a negligible impact on interstate commerce, employers in the railroad and airline industries, governmental employers, agricultural employees, domestic employees, independent contractors and those with alternative work arrangements, and supervisors and those with managerial authority, amongst others. *See, e.g.,* 29 U.S.C. §§ 152(2) & (3), 160(a).

Proving that the NLRA is not generally applicable requires little more than simply subtracting the individuals employed by some of the major groups listed above from

the 131,431,000 individuals aged sixteen or older who participate in the labor force.[2] [RJN08]; *see* Bureau of Labor Statistics, *Union Members – 2015, available at* http://www.bls.gov/news.release/pdf/union2.pdf (last visited Jan. 11, 2017). Nonemployers, or persons who employ themselves, make up the majority of business establishments in the Nation and number 23,836,937. [RJN13]; *see* United States Census Bureau, *2014 Nonemployer Statistics*, *available at* http://censtats.census.gov/cgi-bin/nonemployer/nonsect.pl (last visited Jan. 11, 2017). Full and part-time employees working for the various non-tribal governments in our federalist system add 21,955,609 more individuals to the excluded list. [RJN09-RJN10]; *see* United States Census Bureau, *Government Employ-ment & Payroll*, *available at* https://www.census.gov//govs/apes/historical_data_2014.html (last visited Jan. 12, 2017). Those with alternative work arrangements, like independent contractors, comprise at least another 14,813,000. [RJN11-RJN12]; *see* Bureau of Labor Statistics, *Contingent and Alternative Employment Arrangements*, February 2005, *available at* http://www.bls.gov/news.release/pdf/conemp.pdf (last visited Jan. 11, 2017). And perhaps most surprisingly, fifty-five percent or more of the remaining total consists of managerial and professional employees who likely fall outside the ambit of the NLRA. *See* Bryan M. Chugrin, *The Managerial Exclusion under the National Labor Relations Act: Are Workers Participation Programs Next?,* 38 CATH. U. L.

[2] The four governmental documents from the Census Bureau or Bureau of Labor Statistics cited within this section are subject to judicial notice as the accompanying motion explains, and once again should either be used by the Court in resolving the petitions or, if not, as proof of the additional evidence Casino Pauma would adduce if further agency proceedings are needed.

REV. 557, 560-61 (1999). This means that without even accounting for the tens of millions of small business, family, domestic, agricultural, transportation, and religious employees that this brief simply lacks the space to discuss, the NLRA, at best, is only able to reach 31,871,454 employees or approximately 24.25% of those participating in the labor force. In essence, the NLRA is simply a boutique statute designed to regulate relations in certain private industries, which makes it easy to see why the total percentage of employees who have unionized in this Nation under either federal or state laws is stagnating at 11.1%. [RJN07]; *see* Bureau of Labor Statistics, *Union Members – 2015, available at* http://www. bls.gov/news.release/pdf/union2.pdf (last visited Jan. 11, 2017).

The problem with these *Coeur d'Alene* tests concern not only whether they apply, but how they apply as well. More often than not, the pivotal element in contention under the *Coeur d'Alene* test is the first one that looks at whether a tribal activity touches on "exclusive rights of self-governance in purely intramural matters." *Coeur d'Alene*, 751 F.3d at 1116. As the majority opinion in *Soaring Eagle* notes, this "self-governance" language creates an "analytical dichotomy between commercial and more traditional governmental functions of Indian tribes." *Soaring Eagle*, 791 F.3d at 674. Yet, the use of these sorts of propriety-versus-governmental tests was called into question – if not outright condemned – by the Supreme Court in an opinion released shortly after *Coeur d'Alene* called *Garcia v. San Antonio Metro. Transp. Auth.,* 469 U.S. 528 (1985). The issue in this analogous case concerned whether the minimum wage and

overtime protections of the Fair Labor Standards Act ("FLSA") – a far more generally applicable federal statute than the NLRA – extended beyond state commercial activities and applied to "traditional governmental functions" like the operation of a public mass transit program. *Id.* at 530. Before reaching the question, the Supreme Court overruled the case that set up the distinction between the two activities, finding that it was "untenable," "unworkable," "unmanageable," and "unsound." *Id.* at 542, 545-46. The reasons for this conclusion were myriad and included that the tests failed to accommodate the changing functions of governments and "invite[d] an unelected federal judiciary to make decisions about which… policies it favors and which ones it dislikes." *Id.* at 546.

An illustration relevant to this case will show the necessity for this rule. Every administrative opinion released by the NLRB from *San Manuel* to *Casino Pauma* would have the reader believe that tribal gaming is a clear-cut commercial activity. *See, e.g., San Manuel*, 341 N.L.R.B. at 1062 ("Running a commercial business [like the casino involved herein] is not an expression of sovereignty in the same way that running a tribal court system is."). This conclusion, nevertheless, is diametrically opposed to the one reached by this Court nearly twenty years earlier when it held that "[t]he Tribes [operating gambling establishments] in this case are engaged in the traditional governmental function of raising revenue. They are thereby exercising their inherent sovereign governmental authority." *See Cabazon Band of Mission Indians v. Riverside*, 783 F.2d 900, 906 (1986), *aff'd sub nom. California v. Cabazon Band of Mission Indians,* 480 U.S.

202 (1986). Obviously, the earlier perception of the traditional character of gaming held by this Court is more in line with that of Congress, who declared that the purpose of allowing tribes to engage in gaming under IGRA was to promote "strong tribal governments." 25 U.S.C. § 2702.

This linkage between gaming and tribal governments was anything but attenuated to Justice Sotomayor when discussing the importance of the activity in her recent concurrence in *Bay Mills*. *See Bay Mills,* 134 S. Ct. at 2040-45. The two are, in fact, part and parcel, as "tribal gaming operations cannot be understood as mere profit-making ventures that are wholly separate from the Tribe's core governmental functions." *See id.* at 2043. The reason for this is that "[t]ribes face a number of barriers to raising revenues in [what are often perceived as] traditional ways," and commercial enterprises like casinos will have to be the "central means" for overcoming these obstacles. *See id.* at 2041. Arguably the biggest impediment to revenue generation relates to the internal and external forces that render tax collection practically meaningless. For one, imposing taxes on individuals or corporations who seek to relocate to the reservation is often made impossible by states who insist on still levying taxes of their own. *Id.* at 2043-44. As for the existing tax base, assessments directed at tribal members who are still struggling to climb out of poverty or patrons coming on to the reservation to purchase goods or services cannot serve as the backbone (or even a key component) of governmental funding because "there is very little income, property, or sales they could tax." *Id.* at 2044-45.

Thus, changing one's perception about the "traditional" governmental nature of Indian gaming twenty years post-*Cabazon* and after the activity has blossomed in both scope and prevalence raises the specter that a court is simply making a policy judgment that it, unlike Congress, disfavors the activity in question. Decisions that depart from established principles oftentimes carry with them unexpected consequences, though. Many such ramifications may be impossible to pinpoint in advance, but it is worth remembering that states do not receive the benefit of an express commercial exemption under the NLRA like the federal government. *See* 29 U.S.C. § 152(2) (listing "the United States *or any wholly owned Government corporation*" vis-à-vis "any State"). Adhering to a test that tries to determine jurisdiction based on the character of the enterprise at issue will position the power-hungry NLRB so it can exert authority over a slew of commercial enterprises operated by states that lack a textbook connection to traditional government activities, like the North Dakota Mill and Elevator, the Bank of North Dakota, the South Dakota Public Broadcasting service, liquor and wine stores in the State of Utah, the interstellar spaceport operated by the State of New Mexico, or a corporation like the Alaska Permanent Fund that distributes dividends to residents from natural-resource-extraction revenues. *See, e.g.,* Alaska Permanent Fund Corporation, *Homepage*, *available at* http://www.apfc.org/home/Content/home/index.cfm (last visited Oct. 28, 2016); Spaceport America, *Homepage*, *available at* http://spaceportamerica.com/ (last visited Oct. 28, 2016). Thus, an analysis like the "self-governance" inquiry of the *Coeur d'Alene* test that tries in vain to categorize govern-

mental entities based on tradition is "clearly irreconcilable" with the reasoning in the intervening Supreme Court decision in *Garcia* that denounces such tests, which means this panel can and should reconsider *Coeur d'Alene*. *See Rodriguez v. AT&T Mobility Servs., LLC,* 728 F.3d 975, 979 (9th Cir. 2013).

With that said, the third prong of the *Coeur d'Alene* test that seeks proof "by legislative history *or other means* that Congress intended [the law] not to apply to Indians on the reservation" still leads to the conclusion that the NLRB lacks the authority to assert jurisdiction over Casino Pauma. *See Coeur d'Alene,* 751 F.2d at 1116. As the Ninth Circuit recently explained in the NLRA context, one of the primary rules of statutory construction is that a court reads a provision in light of the statute as a whole, presuming that Congress intended to "create a 'symmetrical and coherent regulatory scheme.'" *See Morris*, 834 F.3d at 981 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). Approaching a statute with this consideration in mind is precisely what the NLRB did during the first forty years of its existence when addressing the scope of the governmental carve-out in Section 2(2) of the NLRA. In addition to holding that Indian tribes *generally* fall within this exception in *Fort Apache*, the NLRB also promulgated a regulation detailing an exhaustive list of excluded governmental entities into which Indian tribes *specifically* fit. *See* 29 C.F.R. § 102.7.

To explain, the regulation issued by the NLRB in 1959 defines the term "State" for purposes of Section 2(2) to "include the District of Columbia and all States, Territor-

ies, and possession of the United States." 29 C.F.R. § 102.7. "A standard legal definetion" of "possession" includes dependencies over which a "country exercises sovereignty by right of conquest." *Dare v. Sec'y of Air Force,* 608 F. Supp. 1077, 1079 (D. Del. 1985) (citing BLACK'S LAW DICTIONARY 393 (5th ed. 1979)); *see Posadas v. Nat'l City Bank,* 296 U.S. 497, 502 (1936) (explaining the one-time possession of the Philippine Islands was a dependency "held by right of cession from Spain."). The earliest judicial nomenclature for tribes is that they are "domestic dependent nations" (*see Cherokee Nation,* 30 U.S. at 17), specifically because "[c]onquest renders the tribe subject to the legislative power of the United States, and… terminates the external powers of sovereignty of the tribe." Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 123 (1942).

Little doubt should remain that tribes are "possessions" of the United States, as even the senior judge from this circuit who authored the nutshell on American Indian Law, William Canby Jr., recently described tribes as being insular and distant federal "possessions" while presenting at the 2016 Ninth Circuit Judicial Conference. *See* United States Court of Appeals for the Ninth Circuit, *2016 Ninth Circuit Judicial Conference – Tribes and Territories: Unique and Active Members of the American Political/Legal Family* at 1:14, *available at* http://www.ca9.uscourts.gov/judicial_conference/2016/video.html (last visited Oct. 29, 2016). While the NLRB expertly dodged the "possession" discussion when creating a way to encroach on tribal sovereignty in *San Manuel,* this Court can interpret the governmental exemption in Section 2(2) and its clarifying

regulation to include Indian tribes, which will accomplish twin aims of statutory construction. The first is that affording tribes with the same protections as states will vindicate the all-important consideration in statutory interpretation of "comity" that Justice Sotomayor stressed at great length in her recent concurrence in *Bay Mills*. *See Bay Mills,* 134 S. Ct. at 2041; *see Reich v. Great Lakes Indian Fish & Wildlife Comm'n,* 4 F.3d 490, 495 (7th Cir. 1993) (Posner, J.) (treating tribes and states the same under the FLSA due to comity). The second comes full circle and recognizes that this interpretation of the governmental exemption will result in the NLRA having a perfectly "symmetrical" public versus private dichotomy, just as Congress intended when drafting the statute. *See Catholic Bishop,* 440 U.S. at 504 (explaining "congressional attention focused on employment in private industry" (citing, *e.g.*, 79 Cong. Rec. 7573 (1935) (remarks of Sen. Wagner)).

III. STAYING THIS MATTER UNTIL THE SOUTHERN DISTRICT OF CALIFORNIA RESOLVES THE OUTSTANDING JURISDICTIONAL ISSUE OF WHETHER THE BOARD CEDED ITS JURISDICTION OVER UNFAIR LABOR PRACTICE CHARGES TO THE STATE OF CALIFORNIA VIA THE TLRO OF THE 1999 COMPACT WILL STREAMLINE THE PROCEEDING AND CONSERVE SUBSTANTIAL JUDICIAL RESOURCES

As the statement of the case suggests, one paramount and unresolved issue in this matter is whether the NLRB ceded its jurisdiction over unfair labor practice charges to the State of California through the TLRO in the 1999 Compact. *See, e.g.,* 29 U.S.C. §§ 160(a), 164(c). The statement of the case herein contains a rather sanitized depiction of the circumstances leading to the creation of this agreement, with a more can-

did picture set forth within the most-recent complaint filed by Pauma with the district court. *See UNITE HERE,* Dkt. No. 20-3. All of the material allegations in the complaint are based on indisputable evidence from such sources as the mouths of Union agents, or the hands of State and federal archivists that maintain governmental records related to the 1999 Compact and its bookending lawsuits.

The posture of the NLRB remains the same, with it long disclaiming any jurisdiction over labor disputes at tribal enterprises located on the reservations. *See Fort Apache,* 226 N.L.R.B. 503. What is different is the actions of the Union, however, with the new allegations not only revealing that the Union specifically sought to invalidate Proposition 5 because it did not provide the protections of federal labor law, but that it also believed the resultant terms it negotiated into the TLRO would guarantee "the same type of worker rights at Indian casinos as you would find off-reservation." *See UNITE HERE,* Dkt. No. 20-3, ¶ 87. More than just admitting that it negotiated and agreed to a "binding" and "exclusive" arbitration agreement to resolve any federal labor law issues, the Union went one step further and explicitly acknowledged that the TRLO was *supposed to* take the place of the NLRA. As to that, one of the briefs the Union filed in the hopes of convincing a district judge that the State negotiated the 1999 Compact in good faith admits that the State-mandated TLRO was intended to act as a "substitute" for the NLRA:

> [This Court] held that consequently, it was not bad faith for the state to negotiate for a TLRO that substitutes for the National Labor Relations

> Act. Indeed, the State's proposal presupposes the inapplicability of the NLRA.

[RJN20] Another brief then doubles down on this admission by clarifying in a subsection entitled "The Compact Provisions Would Not Be Preempted if the NLRA Were Held to Apply to Indian Casinos" that the TLRO was to remain the *only* vehicle for addressing unfair labor practice charges *even if* there was a change in the law pertaining to the NLRB's jurisdiction over Indian tribes:

> The ultimate outcome of the question whether there is NLRB jurisdiction over the Indian casinos will not be known for years, but in the end it really doesn't matter with respect to the Compact, because its provisions are entirely proper and enforceable under the NLRA.

[RJN16-17]

These admissions somehow evaded disclosure during years of administrative litigation, but were nevertheless recently found by counsel for Pauma at the federal records center in San Bruno, California. See UNITE HERE, Dkt. No. 20-2, ¶ 3. This foundational jurisdictional evidence should suffice to stay the cross-petitions until the Southern District of California can declare the fit between the TLRO and the NLRA, which would enable the Court to avoid addressing whether the Union should be estopped from pursuing the underlying charges in contravention of an arbitration agreement it knowingly negotiated and accepted. *See, e.g., Life Techs. Corp. v. AB Sciex Pte. Ltd.*, 803 F. Supp. 2d 270, 273-74 (S.D.N.Y. 2011).

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CONCLUSION

For the foregoing reasons, Casino Pauma respectfully requests that this Court vacate the order below or stay the cross-petitions pending the resolution of the aforementioned solicitation or jurisdictional issues before the appropriate tribunals.

RESPECTFULLY SUBMITTED this 30th day of January, 2017

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, the undersigned submits that it is not aware of any other cases currently pending before this Court that are related to the instant matter.

Dated: January 30, 2017

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, the undersigned certifies that this opening brief is proportionally-spaced with a typeface of fourteen points, and contains 14,000 words (excluding the portions exempted under Fed. R. App. P. 32(a)(7)(B)(iii)), in compliance with the 14,000 word type-volume limitation within Federal Rule of Appellate Procedure 32(a)(7)(B).

Dated: January 30, 2017

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APPENDIX[3]

SECTION 7 OF NLRA [29 U.S.C. § 157]

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [29 U.S.C. § 158(a)(3)].

SECTION 8(A) OF NLRA [29 U.S.C. § 158(A)]

(a) Unfair labor practices by employer. It shall be an unfair labor practice for an employer--

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 U.S.C. § 157];
>
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6 [29 U.S.C. § 156], an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by an action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the

[3] This appendix attempts to present the pertinent NLRB provisions discussed in the brief in a coherent manner by describing in order: (1) the rights of employees as to organization and collective bargaining, (2) unfair labor practices by the employer, (3) the prevention of unfair labor practices, (4) definitions, and (5) regulations pertaining to said definitions.

employees as provided in section 9(a) [29 U.S.C. § 159(a)], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [29 U.S.C. § 159(e)] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [29 U.S.C. § 159(a)].

SECTION 10(A) OF NLRA [29 U.S.C. § 160(A)]

(a) Powers of Board generally. The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [29 U.S.C. § 158]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [29 U.S.C. §§ 151-158, 159-169] or has received a construction inconsistent therewith.

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SECTION 2(1)-(3) OF NLRA [29 U.S.C. § 152(1)-(3)]

When used in this Act –

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under title 11 of the United States Code, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

SECTION 6 OF NLRA [29 U.S.C. § 156]

The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act [5 U.S.C. § 551 *et seq.*], such rules and regulations as may be necessary to carry out the provisions of this Act.

SECTION 102.1 OF TITLE 29 OF THE CODE OF FEDERAL REGULATIONS

The terms person, employer, employee, representative, labor organization, commerce, affecting commerce, and unfair labor practice, as used herein, shall have the meanings set forth in section 2 of the National Labor Relations Act, as amended by title I of the Labor Management Relations Act, 1947.

SECTION 102.7 OF TILE 29 OF THE CODE OF FEDERAL REGULATIONS

The term State as used herein shall include the District of Columbia and all States, Territories, and possessions of the United States.

9th Circuit Case Number(s) 16-70397 & 16-70756

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

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