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

REPLY BRIEF BY PETITIONER AND CROSS-RESPONDENT CASINO PAUMA

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INTRODUCTION

A common feature of the arguments in the principal briefs filed by the respondent/cross-petitioner National Labor Relations Board ("NLRB" or "Board") and intervenor UNITE HERE International Union ("Union") is the contention that some difficult-to-address argument raised by Casino Pauma is not properly before the United States Court of Appeals for the Ninth Circuit ("Court"), and of no concern in any event given that the facts of this matter are supposedly undisputed and limited to the select few that the administrative law judge ("ALJ") was willing to include in its order. [ER3-ER13] This concerted, tag-team approach to arguing begins with the NLRB suggesting that the Court lacks the power to hear the basic substantive issue underlying the cease-and-desist order issued by the Board and then devoting a staggering forty-plus pages of its argument to trying to justify its use of an *ad hoc* test for determining jurisdiction over Indian tribes that is allegedly modeled on a universally-beloved federal court opinion, but has nevertheless been questioned, if not outright derided, by every external circuit to consider the issue in the context of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. § 151 *et seq*.

Where the waiver argument ends for the NLRB is just the start for the Union, who claims that Casino Pauma is precluded from not only arguing the substantive matter but also any jurisdictional issues as well. The only thing the petition for review can accomplish, in the opinion of the Union, is for the Court to simply enforce the agency order in the manner it was written. The principal way the opposing parties hope to

convince the Court of doing this is by painting the background as innocuously as possible, with the NLRB starting this off by claiming that Casino Pauma "does not contest any of the [background] facts" in this case. [Dkt. No. 70, p. 52] The opening brief makes it clear, though, that Casino Pauma had, and continues to have, a fundamentally different perception of the manner in which the Union conducted its solicitations, and was simply prevented from developing these facts by an ALJ who believed that the composition of the solicitors is of no relevance to the legality of the activity. [Dkt. No. 61-1, pp. 22-26] Feigned consensus about the material facts has thus enabled the NLRB to focus on the perceived equities by painting the casino as some monolith "comprised of 7 buildings… [and] 35,000 square feet… of gaming and restaurant" space that abused the solicitation rights of "small groups of Casino employees" who were "distribut[ing] union flyers at the exit and entry points" of the establishment. [Dkt. No. 70, pp. 5, 26] After all, this narrative sounds much more compelling than the one where the casino is actually a fifteen-year-old temporary, tent structure that the Pauma Band of Mission Indians ("Pauma" or "Tribe") has been unable to replace after unnecessarily paying an extra $36.3 million in revenue to the State of California (*see Pauma Band of Luiseno Mission Indians v. California,* 813 F.3d 1155, 1161-62 (9th Cir. 2015)), and the admittedly "small groups of Casino employees" just vessels for a much larger number of Union organizers who sought to disrupt business before loitering inside the facility when the solicitations died down. [Dkt. No. 61-1, pp. 22, 36]

The desire to present the facts in as sanitized a manner as possible infects the procedural history of the case as well. The Union makes a number of statements about the administrative hearing, touching on everything from the receptivity (or lack thereof) of the ALJ to Casino Pauma's efforts to present evidence on the Union organizers who were spearheading the solicitation efforts, to the availability of a "rejected exhibits" file that could have housed any denied offers of proof. [Dkt. No. 82, pp. 22 & 23 n.13] A critically important piece of information that the Union has omitted from its discussion, however, is that it never even appeared in the administrative case below and is simply basing these conclusions upon a cold record. [ER3] Save for the first case between the parties, this tactic of leaving the prosecution of unfair labor practice charges to the counsel for the General Counsel has been the chosen course of action for the Union – one that imposes substantial, one-sided costs on Casino Pauma while allowing the Union to direct its energies towards filing further unfair labor practice charges in its quest to become the employee's bargaining representative by force rather than by consent of the workers.

These clarifications hopefully emphasize the point that the facts – the real facts – are important, and there is a reason why the participants in this case, including the ALJ below, have been so loathe to discuss them. Shift focus away from the specifics of the gaming facility and the handling of the administrative proceeding below and three facts come to the forefront. The first is that Casino Pauma had a rule in place that disallows employees from soliciting in working or guest areas of the facility, but

does not interfere with their compact-guaranteed right to solicit coworkers – with or with-out the help of union organizers – in the very nonworking areas of the building that *Republic Aviation Corporation v. NLRB,* 324 U.S. 793 (1945), sought to protect:

> Circulation of Petitions
> No one shall be allowed to distribute literature in working or guest areas at any time. Team Members may not solicit other Team Members for any purpose during scheduled work time. Work time does not include break time. In addition, a Team Member who is on his/her break may not solicit or distribute literature of any kind to a Team Member who is working.

[ER4, ER35] The second fact is that this rule became a test case for the Union, as it recurrently stationed its organizers and small numbers of employees in the valet area outside the front entrance of the casino to solicit customers in the hopes that any employer interference would enable it to contest any limitation on employee-to-customer solicitation in the interior or otherwise enclosed portions of the property, from any guest area, to any non-work area, to even confined work areas with inherent captive audience problems like the "casino's shuttle buses" that transport patrons from far-off metropolitan areas to the Pauma reservation. [ER83] After blocking any testimony about the involvement of union organizers in the solicitations, the ALJ then provided the third fact by issuing a cease-and-desist order that capitulates to the Union's request and instructs Casino Pauma to refrain from "[i]nterfering with the distribution of union literature by employees in nonworking public or guest areas" [ER1] – this final term being one that the NLRB contends encompasses the sensitive

areas of a facility in which patrons have a heightened expectation of privacy, like restaurants and restrooms. [Dkt. No. 70, p. 55]

In other words, a case that the other parties portray as being about nothing other than unassisted employee solicitation in front of an establishment has produced an order that potentially opens up large swaths of the interior of the facility to employee-on-customer solicitation, and union organizer-on-customer solicitation if the ALJ is to be believed. The Union tries to downplay the seismic shift in business operations and federal labor law resulting from this order by explaining that the parties can save any line-drawing for future suits in which the Union-besotted agency can presumably get a first crack at deciding what portions of those interior bars, lounges, restaurants, restrooms, family changing rooms, and other guest areas are subject to solicitation. [Dkt. No. 82, p. 18] Yet, this question is far too pressing to save for a future case and, as this reply brief will explain, the Union has already conveyed in a recent suit its position that solicitation inside of a business is an absolute right so long as the message stays on point. On top of this, a recent opinion in another case also shows rather clearly what measures this particular Union will take if its first-line solicitations fail to achieve the desired end, which this brief will also detail.

The unfortunate reality is that the solicitation activities underlying this suit are likely just the first of what will be many efforts by the Union to disrupt business at Casino Pauma, which is something the Union covenanted not to do when it negotiated and accepted the Tribal Labor Relations Ordinance ("TLRO") that comprises part of the

1999 Compact between Pauma and the State of California. [ER35] This TLRO that lays out the basic, agreed-upon organizational rules for Casino Pauma – and which the Union went to great lengths to defend in its principal brief – also contains a section requiring the parties to resolve "all issues" in arbitration, including any alleged unfair labor practices that, as the Union concedes, "replicate" and are "nearly identical" to those found in the NLRA. [ER33-ER34, ER38] The presence of this "binding" and "exclusive" arbitration provision again raises the bedrock question of whether this Court should address the weighty issues involved in this case or stay its hand to allow the district court to decide whether the Union waived its right to pursue the underlying charges before the administrative fora of the NLRB. *See Pauma Band of Luiseno Mission Indians v. UNITE HERE Int'l Union,* No. 16-02660 (S.D. Cal. filed on Oct. 27, 2016).

ARGUMENT

I. THE JURISDICTIONAL ARGUMENTS BY THE OPPOSING PARTIES ARE MISTAKEN IN BELIEVING THAT THE APPROPRIATE ACCOMMODATION BETWEEN FEDERAL INDIAN AND LABOR LAW IS THE NLRB UNILATERALLY AND UNNECESSARILY ASSUMING JURISDICTION OVER INDIAN TRIBES RATHER THAN THE UNION ADHERING TO THE LABOR TERMS OF THE 1999 COMPACT THAT IT DESPERATELY WANTS TO UPHOLD (SO LONG AS IT DOES NOT HAVE TO ABIDE BY THEM)

A significant portion of the forty-page jurisdictional argument advanced by the NLRB is actually addressed to issues raised by the amici, with the Board simply tacking on Casino Pauma's name in strategic places to make it appear that the argument responds to the opening brief. [Dkt. No. 70, pp., *e.g.*, 14, 21-22, 36] With that said, the

central issue both parties focus upon, though, is whether the groundbreaking test created by the NLRB in *San Manuel Indian Bingo and Casino,* 341 N.L.R.B. 1055 (2004), for deciding whether to exert jurisdiction over Indian tribes "appropriately accommodates both important congressional policies" in the labor and Indian-relations fields. [Dkt. No. 70, p. 11] If anything, this newfound *San Manuel* test does not accommodate Indian rights *at all*. Lest anyone forget, the original test for determining jurisdiction over Indian tribes that the NLRB adhered to for at least thirty years afforded tribes the same treatment as all of the other governments in our federalist system by implicitly excluding them from the definition of employer in Section 2 of the NLRA. *See Fort Apache Timber Co.,* 226 N.L.R.B. 503 (1976). The revised approach in *San Manuel* does an about-face by bringing most every aspect of a tribe under the NLRB's jurisdiction, from the business enterprises that are automatically subject to jurisdiction in the absence of protective treaty rights to the non-commercial entities that the NLRB repeatedly explains it still has the discretion to regulate. *See San Manuel,* 341 N.L.R.B. at 1062-64.

A. *SAN MANUEL*

While it speaks in terms of reconciling incongruous interests and respecting the "special status of Indian tribes in our society and legal culture," the *San Manuel* test in effect treats tribes no differently than any run-of-the-mill private entity. In fact, it may treat Indian tribes *even worse* considering that many private non-profits would fail to affect commerce to a sufficient extent to fall under the ambit of the Act, while the

NLRB would still retain the unbridled discretion to determine whether to exert jurisdiction over their tribal counterparts. *See* 29 U.S.C. § 160(a). And yet, in the ten years since the District of Columbia Circuit enforced the order in *San Manuel* that allowed the NLRB to assert jurisdiction over a tribal casino, this fact has become increasingly more evident as cunning plaintiff's attorneys have begun to lodge unfair labor practice charges at the sorts of institutions that make up the very heart of tribal sovereignty, like schools and public utility programs. *See, e.g., Haskell Indian Nations Univ.,* No. 14-CA-169542 (N.L.R.B. 2016); *Flathead Indian Irrigation Project,* Nos. 19-CA-112568 & 19-CA-112574 (N.L.R.B. 2014). The very heart of tribal society, thus, now rests in the hands of an agency that has shown little sensitivity to Indian rights and is adamant in its position that it has the discretion to exercise jurisdiction over any tribal entity that it sees fit. And this slow creep of jurisdiction that has started at casinos and surrounded public programs has now even encroached upon tribes themselves, as the NLRB has been sitting on an unfair labor practice charge by the Union for five-plus months that asks it to assert jurisdiction over the federally-recognized Pauma tribe for the non-commercial and Constitutionally-protected reason that it filed a lawsuit to obtain clarification about its federal contract rights. *See Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation,* No. 21-CA-189734 (N.L.R.B. filed on Dec. 12, 2016).

Perhaps the craziest part of this situation is that the current state of affairs resulted from the NLRB claiming there was a need to impose federal labor laws at tribal casinos at the time the *San Manuel* opinion came out in 2004 even though those laws

largely applied to the operating tribes through alternate mechanisms that truly do take into account the unique characteristics of these sovereign-run businesses. As to that, Congress was well aware at the time it enacted the Indian Gaming Regulatory Act, 29 U.S.C. § 2701 *et seq*., in 1988 that the Board had excluded Indian tribes from the scope of the NLRA for roughly twenty years. *See Fort Apache,* 226 N.L.R.B. 503. Extending these federal labor protections to the glut of impending Indian casinos would have required nothing more than inserting some basic, magic words in the final version of the legislation. Yet, rather than change this aspect of federal law, Congress took a different approach and decided to alter a separate one, impinging upon the general rule set forth in *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1986), that a state does not have civil jurisdiction over an Indian activity conducted on the reservation by allowing a state to negotiate for the regulations it hoped would govern the tribal casino as part of a compacting process. Although the scope of the negotiations is limited to the seven topics set forth within Section 2710(d)(3)(C) of the statute, the Ninth Circuit has explained that labor laws fall squarely within the matters the two sovereigns can negotiate during the compacting process. *See In re Indian Gaming,* 331 F.3d 1094, 1115-16 (9th Cir. 2003) ("*Coyote Valley II*"). Thus, compact negotiations can involve a state asking a tribe to comply with state labor laws, the NLRA, or even some variant of the Act that might be more stringent overall but also has attributes that accommodate and respect the sovereign nature of Indian tribes.

B. THE TLRO OF THE 1999 COMPACT

This latter approach is what happened in California when Governor Gray Davis enlisted the aid of the Union to devise labor regulations that would become a part of the initial 1999 Compacts known as the TLRO. *See Coyote Valley II,* 331 F.3d at 1102, 1106. As previously mentioned, the TLRO is really just a subject-specific set of rules for organizing employees at tribal casinos with much of the language therein, as the Union concedes, simply "replicating" the NLRA. [Dkt. No. 82, pp. 39-40] For instance, the centerpiece of the TLRO is the all-too-familiar language from Section 7 of the NLRA that protects an employee's right to engage in concerted activities from any unfair interference by either an employer or a union. [ER33-ER34] What follows is a list of such proscribed unfair labor practices by the tribal employer that the TLRO imports wholesale from the NLRA, aside from one revision to capture the tribes' Constitutionally-protected right to give Native preference in employment decisions. [ER33-ER34] Any charges arising from this list of unfair labor practices that is "nearly identical" to the NLRA are then directed into an "exclusive" and "binding" arbitration process that seeks to reduce the time and expense of administrative adjudication and ensure that the filing of a charge is meant to correct a true grievance rather than serve as a weapon in a corporate campaign. [ER38] One other revision the TLRO makes out of respect for the sovereignty of Indian tribes is that it places strict limits on a union's ability to disrupt business by explaining that it shall "not interfere with patronage of the casino" when granted access to the non-work areas of the establish-

ment to discuss unionization with employees, and that it shall under no circumstances engage in any "[s]trike-related picketing… on Indian lands." [ER35, ER37] Thus, contrary to the argument by the NLRB, *these rules* in the TLRO that embody the NLRA and make slight adjustments to protect tribal sovereignty are the proper accommodation between federal labor and Indian law.

C. SHARED PERCEPTIONS OF THE TLRO CONTROLLING

These perceptions about the importance of the TLRO are not limited to Casino Pauma alone. In the wake of the United States Court of Appeals for the Sixth Circuit issuing conflicting opinions on whether the NLRA should apply to Indian tribes, Representative Todd Rokita and nine other sponsors introduced legislation in the United States House of Representatives to amend Section 2(2) to explicitly list "any Indian tribe, or any enterprise or institution owned and operated by an Indian tribe and located on its Indian lands" amongst the governments and sub-entities excluded from the NLRA. *See* United States Congress, *H.R. 986, available at* https://www.congress.gov/bill/115th-congress/house-bill/986/text (last visited Apr. 30, 2017). The first action on the bill was a hearing by the Subcommittee on Health, Employment, Labor and Pensions on March 29, 2017, during which the Political Director for the Union testified about the proposed statutory change and how removing the safety net of NLRA jurisdiction could harm the Union if the TLRO was ever weakened or altogether removed in future compact negotiations:

> While UNITE HERE workers enjoy the protections of Tribal Labor Ordinances at a number of casinos, they rely upon the National Labor Relations act as a backstop if a TLRO is weakened or not enforced. This could happen when or if a state-tribal compact is amended in the future. The elimination of NLRA jurisdiction over tribal enterprises would undermine these collective bargaining agreements in tribal casinos and in many other commercial enterprises owned and operated by tribes[.]

[SRJN04] Thus, a shared perception exists that the TLRO is supposed to be the foremost rules for resolving labor issues at tribal casinos, which helps explain counsel for the Union's impassioned defense of the TLRO in its principal brief so long as its client does not have to abide by those portions it finds disagreeable. [Dkt. No. 82, pp. 35-41] As a matter of fact, the Union made this point clear in the district court action between the parties, wherein it claimed the federal court was the improper forum for hearing a declaratory suit brought by Pauma because the language of the TLRO required the Tribe to arbitrate "all issues between Pauma and the Union." [SRJN06] Hopefully this discussion goes to show that the petition for review filed by Casino Pauma is not about trying to find a way to "disregard federal labor policies embodied in the NLRA," as the Board contends, but about ensuring these policies are applied in the appropriate forum, in the appropriate manner, and with an appropriate purpose in mind that is something other than rubber stamping the Union's request and position-ing it to run roughshod over a tribal business.

D. THE RECEPTION OF *SAN MANUEL* IN OTHER CIRCUITS

The NLRB nevertheless believes that it satisfied this middle prong of handling the case in the correct manner because the test it conjured up to bring virtually all tribal

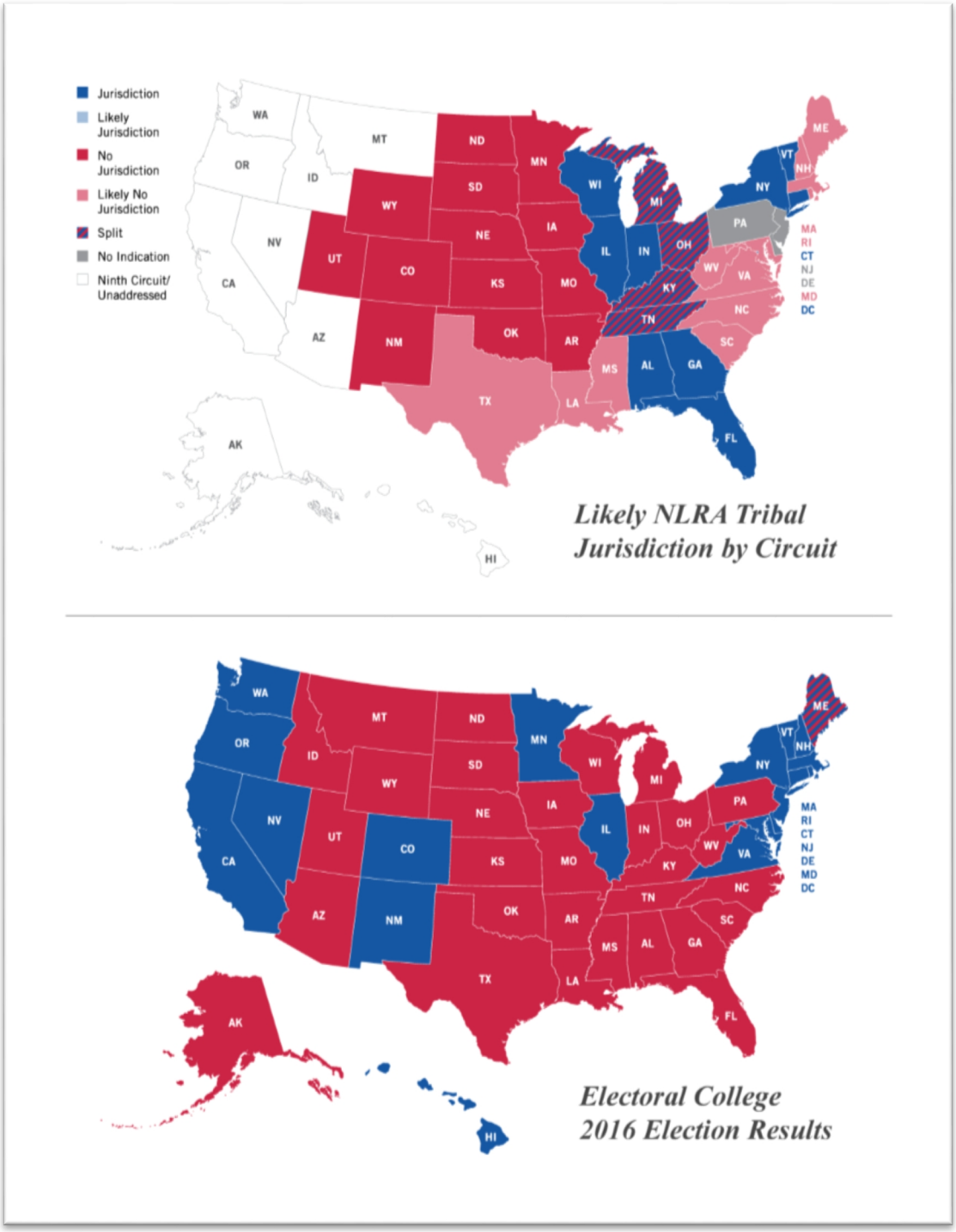
instrumentalities under its jurisdiction, seventy years of precedent notwithstanding, is based upon an old opinion from this circuit entitled *Donovan v. Coeur d'Alene Tribal Farm,* 751 F.2d 1113 (9th Cir. 1985). However, one can gauge the reasonableness of this test by seeing how the other circuits have greeted it (or the authority upon which it is based) when the NLRB has tried to exercise jurisdiction over Indian tribes. The first such instance occurred in the United States Court of Appeals for the Tenth Circuit, which rejected the NLRB's argument that Congress had silently divested the "Pueblo of its sovereign authority to enact [a] right-to-work ordinance" by not explicitly including tribes amongst the governments exempted from the ambit of the NLRA in Section 2(2). *NLRB v. Pueblo of San Juan,* 276 F.3d 1186, 1196-99 (10th Cir. 2002). The United States Court of Appeals for the District of Columbia Circuit was next in line, and allowed the NLRB to exercise jurisdiction according to an *ad hoc* test of its own devising after it declined to adopt the *Coeur d'Alene* approach and follow possible "dictum" from a Supreme Court opinion that was of "uncertain significance" and "in tension" with basic precepts of federal Indian law. *San Manuel Indian Bingo & Casino v. NLRB,* 475 F.3d 1306, 1311 (D.C. Cir. 2007). Ironically, the reticence of using a *Coeur d'Alene* based test may be most apparent in the Sixth Circuit, where one panel adopted *Coeur d'Alene* over a vociferous dissent (*see NLRB v. Little River Band of Ottawa Indian Tribal Gov't,* 788 F.2d 537 (6th Cir. 2015)), and a second begrudgingly followed the month-old precedent even though all three judges disagreed with the prior ruling and explained that the *Coeur d'Alene* framework "overly constrains tribal

sovereignty, fails to respect the historic deference that the Supreme Court has given to considerations of tribal sovereignty in the absence of congressional intent to the contrary, and is inconsistent with the Supreme Court directives in *Montana* and *Hicks*." *Soaring Eagle Casino & Resort v. NLRB,* 791 F.3d 648, 674 (6th Cir. 2015).

E. THE POLITICS OF CRAFTING A JUDICIAL SOLUTION

The other language in the *Soaring Eagle* opinion worth noting is that detailing the contours of the circuit split on applying supposedly general federal statutes to Indian tribes without evidence of Congressional intent – with the Second, Seventh, and Eleventh Circuits on one side; the Eighth and Tenth Circuits on the other; and the Sixth Circuit wedged right in the middle. *Soaring Eagle,* 791 F.3d at 673. While not every circuit has directly addressed this question, most of the remaining ones have tipped their hand as to their likely alignment in this split, with two seeming to side in favor of tribal sovereignty in the wake of the Supreme Court breathing new life into the clear intent rule in M*ichigan v. Bay Mills Indian Community,* 572 U.S. __, 134 S. Ct. 2024, 2032, 2039 (2014). *See Massachusetts v. Wampanoag Tribe of Gay Head,* __ F.3d __, 2017 U.S. App. LEXIS 6148, *10 (1st Cir. 2017); *King v. Burwell,* 759 F.3d 358, 371 (4th Cir. 2014), *aff'd,* 576 U.S. __, 135 S. Ct. 2480 (2015); *see also TTEA v. Ysleta Del Sur Pueblo,* 181 F.3d 676, 680 (5th Cir. 1999) (explaining the benefits of a tribe's sovereign status remain intact until Congress abrogates them, even if there are "reasons to doubt the wisdom" of such a hands-off approach). Putting aside this Court, pair the circuits that have expressed their opinions on the *Coeur d'Alene* issue with those that appear to be

of like mind and the visual depiction of the conservative-versus-liberal circuit split on reading federal Indian law precedent looks curiously like the state-by-state voting results for the past couple of general elections.



In fact, the only significant anomalies are in the traditional battleground areas in or around states like Florida, Michigan, and New Hampshire that tend to vote on the basis of specific issues or the quality of the candidates rather than party allegiance. Then again, a revelation like this should not come as a complete surprise seeing that the *Coeur d'Alene* test, at its heart, is simply a judicial fix to a legislative question. At present, applying this statutory patch or some other variant that allows the NLRB to exercise jurisdiction over Indian tribes has not caused significant consternation since there are no tribes in the District of Columbia Circuit and only one in the Sixth Circuit outside of Michigan. Thus, a circuit split that seems horribly divisive has actually been rather tepid to date, as the two heartland circuits that cover many of the larger tribes in this Nation and a substantial percentage of the Indian population (*i.e.*, the Eight and Tenth Circuits) are steadfastly on the side of tribal sovereignty and requireing the NLRB to make the mile-long walk from its headquarters down to Capitol Hill in order to ask Congress to simply amend the Act to expressly include Indian tribes. *See* United States Census, *The American Indian and Alaska Nation Population: 2010* at p. 7, *available at* https://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf (last visited May 1, 2017). Of course, this simmering circuit split will quickly spill over if the tribe-laden Ninth Circuit applies *Coeur d'Alene* and comes down on the opposite side of the issue from the Eighth and Tenth Circuits – a decision that will surely create especially difficult problems for the Navajo Nation, the Confederated Tribes of the

Goshute Reservation, the Zuni Pueblo, and any other tribe whose reservation falls on both sides of the Ninth and Tenth Circuit border.

F. *TUSCARORA* AND THE MEANING OF "INDIANS"

This potential state of affairs exemplifies the danger of trying to resolve legislative questions in the judiciary, where each judge involved in the decision-making process has a different perception of what is vital to Indian self-government and how far the Executive can intrude without unduly stepping on Congress' plenary power over Indian affairs. *See San Manuel,* 475 F.3d at 1315 (enforcing the NLRB's order because, in its view, "[t]he total impact on tribal sovereignty… amounts to some unpredictable, but probably modest effect on tribal revenue and the displacement of legislative and executive authority that is secondary to a commercial undertaking"). *All* of this debate and *all* of the underlying lawsuits have only come about because of a single sentence in a Supreme Court opinion that says "*Indians*" are subject to generally-applicable federal laws to the same extent as other "persons." *FPC v. Tuscarora Indian Nation,* 362 U.S. 99, 116 (1960). Yet, nomenclature is important for understanding this comment. An "Indian" is a person with a requisite blood quantum who is regarded as being as such by his or her community (*i.e.*, a tribe). *See* Felix Cohen, HANDBOOK OF FEDERAL INDIAN LAW 2 (1942). In other words, Indians are recognized members of a tribe and not the tribe itself. Equating Indians with a tribe would be no different than equating a resident or citizen of a state with the state government. Surely, the federal courts would not apply a generally-applicable federal statute – like the Internal Revenue

Code – to the government of a state simply because the residents or citizens of a state must comply with it. So why then is the NLRB asking the federal courts to do just that with respect to Indian tribes?

G. THE NRLB DEFINES "STATE" TO INCLUDE POSSESSIONS LIKE TRIBES

What makes the NLRB's insistence on reading *Tuscarora* in such a manner all the more confounding is that it has a regulation in place defining the term State that would seemingly exclude Indian tribes from the ambit of the Act. *See* 29 C.F.R. § 102.1(g) (defining the term "State" to include "the District of Columbia and all States, territories, and possession of the United States"). However, the NLRB claims that this definition is only for use in the Board's interpretative rules and regulations for the NLRA, as is proven by some "as used herein" language that is, in reality, not part of the definition. [Dkt. No. 70, p. 17] One thing the NLRB is overlooking, though, is that these rules and regulations exist to "interpret[] the Act and [help] adjudicate[e] unfair labor practice charges." *Kelley v. NLRB,* 79 F.3d 1235, 1245 (1st Cir. 1996). The only time "State" is mentioned in the regulations is with respect to an agency or court of a State obtaining an advisory opinion as to whether the Board would assert jurisdiction over the "State" itself or a private entity situated therein. *See* 29 C.F.R. § 102.98. Thus, the regulations use "State" in a jurisdictional context, and consequently giving this definition of "State" a unique meaning that does not match-up with that in the statute would lead the General Counsel to either act in an under or overinclusive manner when issuing jurisdictional opinions. Undermining the NLRB's position even

further is the fact that tribes have routinely received these advisory opinions in the past (*see, e.g., Chukchansi Gold Resort & Casino,* 2005 NLRB GCM LEXIS 68 (2005); *Toiyabe Indian Health Project, Inc.,* 1993 NLRB GCM LEXIS 7 (1993)); and this supposedly special definition of State somehow mirrors the federal courts conception of the governmental exemption in Section 2(2) – save for Indian tribes, so far. *See Saipan Hotel Corp. v. NLRB,* 114 F.3d 994, 997-98 (9th Cir. 1997) (indicating the Northern Mariana Islands government is exempt from the Act); *Chaparro-Febus v. Int'l Longshoremen's Ass'n,* 983 F.2d 325 (1st Cir. 1992) (same for Puerto Rico); *Osekre v. Gage,* 698 F. Supp. 2d 209 (D.D.C. 2010) (same for the District of Columbia); *V.I. Port Auth. v. Siu De P.R.,* 354 F. Supp. 312 (D.V.I. 1972) (same for the Virgin Islands). Thus, the existence of this regulatory definition of "State" should have provided the NLRB with an answer to the tribal jurisdiction question before it even ventured into the murky waters of *Coeur d'Alene.*

H. ISSUE PRECLUSION IN TIMES OF AGENCY OVERREACH

Punctuating the lengthy substantive discussion about jurisdiction by the NLRB is an argument by the Union that contends Casino Pauma is precluded from arguing jurisdiction in this case because the issue was allegedly decided in a prior administrative lawsuit between the parties. [Dkt. No. 82, p. 24] Issue preclusion involves a four-prong test that looks in part at whether the "precise issue… [was] raised and actually litigated in [a] prior proceeding" and "the party against whom estoppel is sought… had a full and fair opportunity to litigate the issue in the prior proceeding." *United*

States. v. Cinemark USA, Inc., 348 F.3d 569, 583 (6th Cir. 2003). The "precise" issue component of the test requires an identity of issues and does not apply "if the second action involves application of a different legal standard, even though the factual setting of both suits may be the same." *Turner v. U.S. DOI,* 815 F.3d 1108, 1113 (8th Cir. 2016). The party asserting issue preclusion has the burden of proving with "clarity and certainty" what was determined in the prior case, and must introduce a "sufficient record of the prior proceeding" to enable a court to pinpoint the exact issue previously litigated. *Clark v. Bear Stearns & Co.,* 966 F.2d 1318, 1321 (9th Cir. 1992).

All the Union has done in this matter is simply point to the order in the prior case between the parties and say that the "Board applied the standard established in *San Manuel."* [Dkt. No. 82, p. 3] Quite to the contrary, the administrative order in the prior case does not apply *any* standard and simply allows for jurisdiction because "[t]he Board has repeatedly asserted jurisdiction over casinos notwithstanding that they are owned and operated by tribal governments and located on reservation lands." *Casino Pauma,* 362 NLRB No. 52, 2015 NLRB LEXIS 227, *8 (2015). Even if one could contort the words of the prior order so it looked like the ALJ was going through the elements of the *San Manuel* test, that inquiry is still fundamentally different from both *Coeur d'Alene* and the basic federal Indian law question of whether the NLRB can exercise jurisdiction when faced with Congressional silence. On this point the NLRB agrees, as its brief explains that the *San Manuel* test essentially reads out the third prong of the *Coeur d'Alene* test that looks for some indication of Congressional intent

and then "augment[s] the… framework with a Board specific discretionary balancing of the labor and Indian policies implicated in each case." [Dkt. No. 70, pp. 12, 35] Not to mention, the expertise of the NLRB does not include federal Indian law (*see Soaring Eagle,* 791 F.3d at 655), which countenances in favor of the Ninth Circuit heeding the acute need to proceed cautiously in the area of administrative issue preclusion so as to not raise the serious Constitutional question of whether an overreaching, political agency can tie the hands of an Article III court that actually possesses "competent jurisdiction." *See, e.g., Montana v. United States,* 440 U.S. 147, 153 (1979).

II. THE SOLICITATION ARGUMENTS BY THE OPPOSING PARTIES TAKE THE POSITION THAT SOLICITATION IN RESTROOMS AND RESTAURANTS INSIDE A FACILITY IF PERMISSIBLE, AND THUS SET THE TABLE FOR THE UNION TO CONTINUE ITS PATTERN OF INTERFERING WITH BUSINESSES WHEN IT IS UNABLE TO PERSUADE EMPLOYEES TO ORGANIZE THROUGH IT

A. GUEST AREA SUNDRIES

Neither the NLRB nor the Union shy away from expressing their belief that the standard solicitation rules embodied in the cease-and-desist order allow employees (possibly with the aid of union organizers) to solicit in the sensitive areas of business establishments like restaurants and restrooms. [Dkt. No. 70, p. 55 (explaining the solicitation ban may not extend "to areas such as public bathrooms and restaurants")] This perception of the permissible loci for employee-on-customer solicitation makes no sense because the guiding principle in *Republic Aviation* was to ensure that the speech was compatible with the area in which it occurred. *See Republic Aviation*, 324 U.S. at 803 n.10. Thus, employees performing a function for which they were being

paid in an area of a manufacturing plant fraught with potential dangers could not divert either their or their coworker's attention to solicitation issues that were unrelated to the task at hand. *Id.* In the wake of *Republic Aviation,* the NLRB simply took the existing work-versus-non work dichotomy and slapped on new "selling" and "guest" labels, assuming the test would work just as well in the employee vis-a-vis customer context even though the audience is entirely different. If anything, this lazy extension of *Republic Aviation* produces a backwards set of rules, though, as customers are much more inclined to interact with representatives of a business in the main selling area of a service establishment than when they are seeking to disengage and enjoy a heightened level of privacy within the various rest areas of a facility. The truth of the matter is that the entire productive area of a business (including the whole interior) should be off limits from employee-to-customer solicitation, but the NLRB used the opening the Supreme Court created in *Republic Aviation* to push the solicitation dividing line further into an establishment – going from the outside sidewalks, to interior lobbies, to walkways leading into the service area, to all of the rest spots that are deserving of special protection yet receive none according to the Board.

B. THE UNION AND INTERIOR "SOLICITATIONS"

Lest there be any doubt, the Union is running with the extra freedom the NLRB is providing and believes that it has an unrestricted right to solicit *inside* of a business so long as the message being conveyed is on point. As to that, the Union is engaged in a protracted and vitriolic labor dispute with another gaming facility known as the

Ameristar Casino, which is located in East Chicago, Indiana. *See Ameristar Casino E. Chi., LLC v. UNITE HERE,* 2016 U.S. Dist. LEXIS 174831 (N.D. Ill. 2016). As the dispute worsened, the Union decided that it was going to target the customers of the casino by frequenting their homes and personal businesses, even going so far as to enter multiple businesses in an effort to solicit the Ameristar customer's *customers* "to support the boycott of Ameristar." *Id.* at *5. On one such occasion, the Union "entered the restaurant" owned by one Ameristar customer "at dinner time and began distributing leaflets to customer patrons," and refused to leave until the proprietor threatened to call the police. *Id.* In reviewing the legality of these actions, the district judge made sure to emphasize that there was a big difference between "traditional handbilling, which occurs outside the premises" and "[d]istributing leaflets and approaching patrons inside a [service establishment]." *Id.* at *11 (citing *520 S. Mich. Ave. Assocs., Ltd. v. UNITE HERE,* 760 F.3d 708, 731 (7th Cir. 2014)). Nevertheless, the district judge noted that the Union believed that "handbilling is always permissible and protected speech no matter the circumstances of its distribution" (*id.* at *10), a perception that aligned with the "sort of scorched-earth strategy" the Union had taken in another recent case. *See id.* at *12 (citing *520 S. Mich. Ave.,* 760 F.3d at 731). This conclusion that the district judge put forward was based in part on a brief that counsel for the Union filed in that case, in which it took no issue with its client entering "three private businesses" for the purposes of solicitation because the proscrip-

tions of the current law only focused upon the "content" of the message and not the location where it was conveyed. [SRJN09-SJRN10]

C. WHAT TOMORROW HOLDS

This particular Union is especially adamant about communicating its message to customers even if the first-line solicitation efforts fail to achieve the desired results. One may recall a discussion in the opening brief by Casino Pauma about the *Aqua-Aston* case, which dealt with the Union claiming a resort hotel had committed an unfair labor practice by trying to prevent solicitations in an interior open-air lobby wherein customers were generally "watching television, napping or engaging with their smartphones." *See Aqua-Aston Hospitality, LLC,* 2016 NLRB LEXIS 402, *52 (2016). The cease-and-desist order issued in the case permits solicitations *anywhere* in interior spaces that can be classified as "nonwork" areas (*see id.* at *53), but this concession has not stopped the Union from trying to engage in even more coercive communications with the customers of the business. As to that, the semi-circular driveway in front of the hotel that serves as the lone drop-off and pick-up point for customers became the target of the Union, who set-up a picket line comprised of between ten and sixty individuals who would block any vehicle – whether driven by a guest, carrier, or uniformed hotel valet – from leaving the hotel for upwards of two minutes. *See UNITE HERE! Local 5,* 2017 NLRB LEXIS 22, *5 (2017). The stated purpose of this blockade was to keep the persons waiting to the point of annoyance because it "draws more attention to the action" and thus "gets the message out," and the picketers

would not deviate from this strategy "[e]ven if a driver lost patience or expressed an urgent need to exit." *Id.* With the base solicitation strategies in *Casino Pauma* and *Aqua-Aston* bearing similar markings, this second opinion should serve as a fair warning of what will come next if the Court does not intervene. The obvious response from the Union is that it would *never* picket at the casino in light of the prohibition in the TLRO. [ER37] However, the TLRO also requires the Union to arbitrate unfair labor practice charges and solicit in a manner that does not interfere with business, both of which it has flatly refused to do in this case. [ER35, ER38]

D. WAIVER IN TIMES OF BOARD COGNIZANCE

Akin to the jurisdictional topic, the opposing parties advance a final argument that asserts Casino Pauma waived any substantive challenge in this matter because the exceptions filed with the Board were not specific enough to provide notice that guest-area solicitation of customers was in contention. [Dkt. Nos. 70, p. 59; 82, p. 13] However, the exception list contains numerous iterations of "Respondent's rule prohibiting solicitation and distribution in 'guest areas' [is] unlawful" [FER02-FER04], which was clear enough to the Board that it actually debated the propriety of solicitation within guest areas in its typical footnote commentary to the ALJ opinion. [ER1] Thus, this discussion is proof positive that the Board had "adequate notice of the basis for objection" to allow Casino Pauma to challenge the rule through its petition for review. *See NLRB v. FedEx Freight, Inc.,* 832 F.3d 432, 437-38 (3d Cir. 2016). With that said, additional specificity would not have changed the Board's stance regarding

what the opposing parties admit is a "well-settled" rule that has been in place for over thirty years. *See Indep. Elec. Contrs. of Houston, Inc. v. NLRB,* 720 F.3d 543, 551 (5th Cir. 2013) (explaining futility provides an exception to the objection requirement of Section 10(e)). [Dkt. Nos. 70, pp. 56-58; 82, p. 15] Not to mention, the issue of employees and union organizers soliciting free from tribal interference and in a manner greater than that authorized by the TLRO raises a distinctly federal Indian law issue under *Montana v. United States,* 450 U.S. 544 (1981) – one that falls patently "outside the orbit of [the Board's] authority" and can thus be raised for the first time in a petition for review. *Noel Canning v. NLRB,* 705 F.3d 490, 497 (D.C. Cir. 2013), *aff'd*, 573 U.S. __, 134 S. Ct. 2550 (2014). Nevertheless, Casino Pauma remains open to debating these issues before a new ALJ who is actually amenable to letting the charged party present its case, just as the previously-filed request to adduce additional evidence makes clear.[1] [Dkt. No. 63-1]

CONCLUSION

For the foregoing reasons, Casino Pauma respectfully requests that this Court vacate the underlying order *en toto.*

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[1] Despite the NLRB's contention, summary enforcement of any derivative violations is inappropriate given that the validity of those rulings turns upon whether Casino Pauma had a right to prevent the solicitations in the first place. [Dkt. No. 70, p. 52]

RESPECTFULLY SUBMITTED this 3rd day of May, 2017

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Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned certifies that this reply brief is proportionally-spaced, with a typeface of fourteen points, and contains 6,999 words (excluding the portions exempted by Fed. R. App. P. 32(f)), in compliance with the 7,000 word type-volume limitation of Ninth Circuit Rule 32-1(b).

Dated: May 3, 2017

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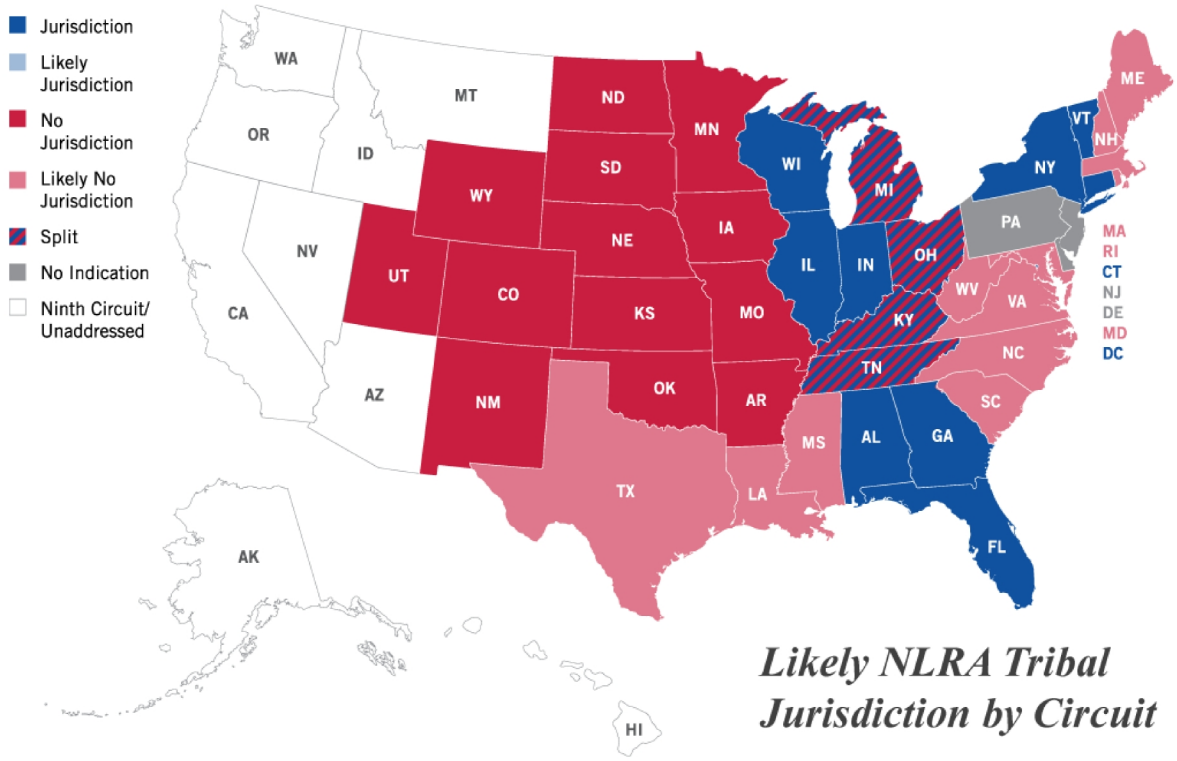
ADDENDUM A



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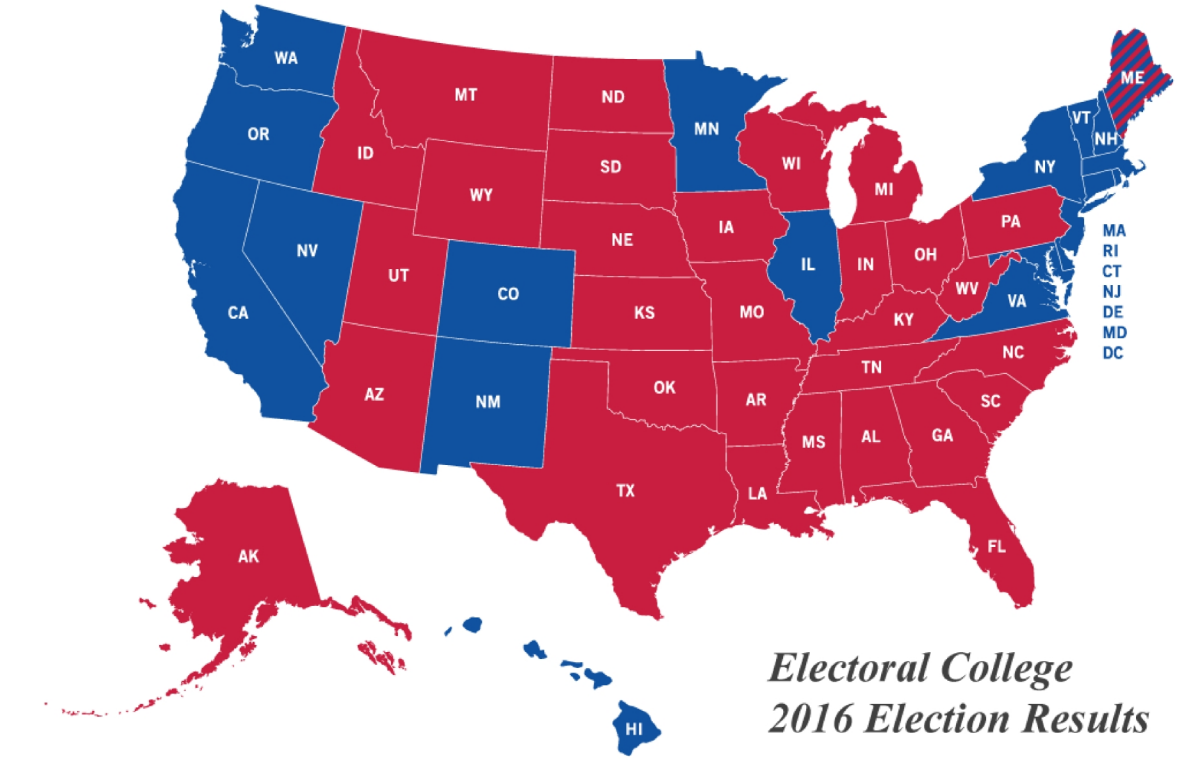

Electoral College 2016 Election Results

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