Nos. 16-70397 & 16-70756

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 16-70397 & 16-70756

CASINO PAUMA

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

UNITE HERE INTERNATIONAL UNION

Intervenor

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

BRIEF FOR INTERVENOR UNITE HERE INTERNATIONAL UNION

Richard G. McCracken
Kristin L. Martin
McCRACKEN, STEMERMAN & HOLSBERRY, LLP
rmccracken@msh.law
klm@msh.law
595 Market Street, Suite 800
San Francisco, CA 94105
Telephone: 415-597-7200
Fax: 415-597-7201

Attorneys for Intervenor UNITE HERE International Union

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 16-70397 & 16-70756

CASINO PAUMA

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

UNITE HERE INTERNATIONAL UNION

Intervenor

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

BRIEF FOR INTERVENOR UNITE HERE INTERNATIONAL UNION

STATEMENT OF JURISDICTION

Intervenor UNITE HERE International Union ("Union") adopts the statement of jurisdiction set forth in the brief filed by Respondent National Labor Relations Board ("Board" or "NLRB").

ISSUES PRESENTED FOR REVIEW

1. For three decades, the Board has construed § 7 of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. § 157, as giving casino employees the right to distribute leaflets to customers in nonwork areas of casino property. Casino Pauma ("Employer") did not ask the Board to reconsider that rule. Should the Court reject the Employer's unexhausted challenge to this longstanding rule?

2. In *Casino Pauma*, 362 NLRB No. 52 (March 31, 2015) ("*Casino Pauma I*"), the Board decided that the NLRA regulates the Employer's casino. The facts on which that decision was based have not changed so in this case the Board decided only that *Casino Pauma I* has preclusive effect. Should the Court enforce the Board's decision on the ground that it was a proper application of the issue-preclusion rule?

3. The Indian tribe that owns and operates Casino Pauma sued the Union in district court, alleging that the Union made an agreement with it in which the Union waived its statutory right to file charges with the Board. The Employer failed to raise this waiver defense in the Board proceedings. Should this Court

decline the Employer's request to stay this petition for review to give the Employer time to pursue a collateral attack on the Board's proceedings?

STATUTORY ADDENDUM

Except as follows, all applicable statutes and regulations are contained in the Statutory Addendum to the Board's brief. Additional provisions are contained in the Statutory Addendum to this brief.

STATEMENT OF THE CASE[1]

A. The Employer is subject to the NLRA.

Casino Pauma is a casino and entertainment facility that the Pauma Band of Luiseno and Mission Indians ("Tribe") owns and operates. ER[2] 4. In *Casino Pauma I*, the Employer litigated the question whether its casino is subject to the National Labor Relations Act. The Board applied the standard established in *San Manuel Indian Bingo & Casino*, 341 NLRB 1005 (2004), *enfd.* 475 F.3d 1306 (D.C. Cir. 2007) and concluded that the NLRA does apply to the Employer's

[1] The facts, as set forth in the Board's decision (*Casino Pauma*, 363 NLRB No. 60 (Dec. 3, 2015) are undisputed. The Employer did not file exceptions to the administrative law judge's factual findings, and does not dispute those findings in its brief to this Court.

[2] "ER" refers to the Petitioner's Excerpts of Record. "SER" refers to the Respondent's Supplemental Excerpts of Record. "IER" refers to the Intervenor's Supplemental Excerpts of Record.

casino. SER 1 n.3, 3-4. The Employer did not seek judicial review of *Casino Pauma I*.

The facts relating to the Employer's casino operations have not changed since *Casino Pauma I*. The Employer stipulated to the same facts that were presented to the Board in *Casino Pauma I*, ER 3; and did not introduce any new evidence about its operations. The Employer did introduce its Compact with the State of California, which includes a provision on labor organizing rights known as the Tribal Labor Relations Ordinance ("TLRO"), and a series of documents related to the TLRO. ER 20-45; IER 73-130, 136-42.

Because the facts had not changed since *Casino Pauma I*, the administrative law judge concluded that "the issue of jurisdiction is res judicata." ER 4. The administrative law judge did consider two arguments that the Employer made. Citing *Casino Pauma I*, the judge rejected the Employer's argument that the Supreme Court's decision in *Michigan v. Bay Mills Indian Community*, __ U.S. __, 134 S.Ct. 2024 (2014) implicitly overruled *San Manuel*. ER 4. The judge also rejected the Employer's argument that the TLRO, and not the NLRA, governed labor relations at its casino. ER 4.

The Board summarily adopted the judge's conclusions that NLRA applied to the Employer, but noted that the applicable preclusion rule is issue preclusion (i.e., collateral estoppel), not claim preclusion (i.e., res judicata). ER 1 n.1.

B. The illegal restriction on customer leafleting

The Employer maintains a written rule prohibiting employees from distributing literature in "working or guest areas." ER 4; SER 41. On December 14, 2013, Casino Pauma employees, in groups of two to four at time, distributed leaflets about union organizing to casino customers near the casino's public entrance. ER 5, 7; SER 193-94. The employees did not litter, obstruct pedestrians or vehicles, or harass customers but the Employer's security officers told each group of employees to stop distributing leaflets and threatened them with discipline if they did not. ER 4-5, 7. The security officers did not rescind the threats when employees handed them a card explaining their rights under the NLRA as employees of a tribal casino to distribute leaflets to customers. ER 5 n.11; IER 71.

The administrative law judge found that the Employer violated § 8(a)(1) by "maintaining and enforcing a rule in its employee handbook prohibiting the distribution of literature in 'guest areas,' [and] by interfering with the distribution of Union literature by employees in these areas, including the public or guest entrances to its casino." ER 11. The Board adopted the administrative law judge's findings and issued a cease and desist order, prohibiting the Employer from "[m]aintaining a rule that prohibits employees from distributing literature in 'guest areas'" and "[i]nterfering with the distribution of union literature by employees in nonworking public or guest areas of the hotel." ER 1.

C. The Employer's opening brief

The Employer's brief largely disregards these facts, and instead asserts facts that are not part of the administrative record or supported by a request for judicial notice.[3] Factual assertions not contained in administrative record should be disregarded or stricken. Fed. R. App. P. 16(a), 28(a)(6), 28(a)(8)(A); *NLRB v. Fred Meyer Stores, Inc.*, 466 Fed. Appx. 560, at *1 (9th Cir. 2012).[4]

The sources that the Employer cites for facts not contained in the record or supported by a request for judicial notice include:

- decisions of this and other courts. Petitioner's Opening Brief ("Pet. Br."), at 9-13, 15, 17-21.

- law review articles. Pet. Br., at 10-11, 43.

[3] Because sources cited for these "facts" are not part of the record in the case, we do not point out the Employer's misrepresentations.

[4] The first opening brief that the Employer filed suffered from the same flaw. In response, the Union filed a motion to strike, which the Appellate Commissioner granted in part. The order states that "the opening brief improperly cites documents and information not included in the administrative record" and directs the Employer to "file a replacement brief that complies with [FRAP 16(a), 28(a)(6) and 28(a)(8)(A)]." ECF Doc. No. 53. On reconsideration, the Appellate Commissioner clarified that the Employer was not precluded from filing a request for judicial notice. ECF Doc. No. 60. The Employer disregarded the Appellate Commissioner's orders when it filed its second opening brief. This is grounds for dismissal of the appeal. *Han v. Stanford Univ.*, 210 F.3d 1038, 1040 (9th Cir. 2000) (appeal dismissed because the appellant "exhibited complete disregard for the requirements of the appellate rules respecting citations to the record"); Circuit Advisory Committee Note to Circuit Rule 28-2 (sanctions may be imposed for failure to comply with the briefing rules "particularly with respect to record references").

- documents filed in a district court case. Pet. Br., at 3-4, 50-52.
- websites. Pet. Br., at 34.
- unfair labor practice charges not addressed in the Board's order under review. Pet. Br., at 21-22, 30.

In addition, the Employer asserts facts for which the Employer offers no citations at all, including about the State of California's motives; the Union's motives, organizing strategies and objectives elsewhere; and competing unions. Pet. Br., at 12, 13, 15, 21, 30, 32.

SUMMARY OF ARGUMENT

The Employer wants this Court to decide a case that it did not present to the Board. This is not an isolated misstep in the Employer's argument on one issue. It infects every section of the Employer's brief, beginning with the statement of facts.

In its Argument, the Employer jumps past the threshold issue whether the NLRA applies to its casino so we start our response in the same place. There are two reasons why the Court should reject the Employer's contention that casino employees do not have an NLRA right to distribute leaflets to customers at their workplace.

First, the Court cannot consider the argument because the Employer did not make it to the Board. Failure to exhaust deprives the reviewing court of

jurisdiction. *NLRB v. Friendly Cab Co., Inc.*, 512 F.3d 1090, 1103 n.10 (9th Cir. 2008). *See* Section I.A.

Second, the Employer's meandering argument against *Republic Aviation* rights runs into established principles every way it turns. When employees want to communicate about organizing a union, they are not confined to speaking to each other. They may also distribute leaflets about their efforts to the public, including their employer's customers, and they may do so on their employer's property, as long as they remain in nonwork areas. *New York-New York LLC v. NLRB*, 676 F.3d 193, 196-97, 200 (D.C. Cir. 2012); *Santa Fe Hotel & Casino*, 331 NLRB 723, 723 (2000). This right is not absolute. The Board takes employers' interests in maintaining production and discipline into account, allowing an employer to show that "special circumstances" warrant greater restrictions. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 n.10 (1945). But in this case, there is no evidence in that employees disrupted its business by handing out leaflets. *See* Section I.C.1-2.

The Supreme Court and Board have already rejected the Employer's other arguments. An employer's property rights are not at issue when its own employees seek to distribute leaflets. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 572-73 (1978). It does not matter that employees might have been able to find another way to get the leaflets to customers. An "alternative means" test does not apply. *Id.* at 571; *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 505 (1978). And it is irrelevant that union

organizers gave the leafletting employees logistical support. Employees don't give up their NLRA rights by acting in concert with nonemployees. *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85 (1995); *Be-Lo*, 318 NLRB 1, 10 n.25 (1995), *enf. denied on other grds.* 126 F.3d 268 (4th Cir. 1997).

Next, the Employer backtracks to the threshold issue of NLRA applicability. The Board answers the Employer's arguments, and the Union joins the Board's response in the event that the Court decides to reach the issue. This brief takes a step back and explains why the Court should not. All that the Board decided in the case under review is that its prior final decision in *Casino Pauma I* had preclusive effect on the NLRA-applicability question. That was a proper application of the issue-preclusion rule. *See* Section II.B. This is so, even though decisions about whether the NLRA regulates a class of employers are labeled "jurisdictional." The Board had authority to decide that the NLRA applies to the Employer's casino because the scope of an agency's *regulatory authority* does not limit the agency's *power to decide* whether it has authority to regulate. *City of Arlington v. Federal Communications Comm.*, __ U.S. __, 133 S.Ct. 1863, 1870 (2013); *Polynesian Cultural Center, Inc. v. NLRB*, 582 F.2d 467, 472-73 (9th Cir. 1978). *See* Section II.C. Moreover, even decisions about a federal court's subject-matter jurisdiction – decisions which actually address the court's power to hear the case – have

preclusive effect. *United States v. Van Cauwenberghe*, 934 F.2d 1048, 1958-60 (9th Cir. 1991). *See* Section II.D.

The Court need not decide whether the NLRA preempts the Tribal Labor Relations Ordinance, which the Tribe enacted to comply with its gaming compact with California. The administrative Law judge said it did, but that statement was unnecessary to his decision. Whether the NLRA preempts a provision of a tribal-state compact is a question of constitutional significance that should be avoided. *See* Section III.

Finally, this case should not be stayed so that the Employer can litigate in district court defenses to the unfair labor practice charges that it failed to make before the Board. The district court case is an improper collateral attack on the Board's proceedings. *United Ass'n of Journeymen v. Valley Engineers*, 975 F.2d 611, 615 (9th Cir. 1992) *as amended* (Oct. 16, 1992). However the district court resolves that case, the decision cannot limit or affect this Court's power to review and enforce the Board's order. *See* Section IV.

//

//

//

//

//

ARGUMENT

I. The § 7 right to distribute leaflets to customers at the workplace.

A. This Court lacks jurisdiction to consider the Employer's arguments against employees' distribution of leaflets to customers.

This Court may only review those issues that the parties raised before the Board. Section 10(e) of the Act provides that "[n]o objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). This exhaustion rule is jurisdictional: the appellant's failure to present an issue to the Board deprives the reviewing court of power to consider that issue. *Friendly Cab Co*, 512 F.3d at 1103 n.10; *see also Chevron Mining, Inc. v. NLRB*, 684 F.3d 1318, 1328-29 (D.C. Cir. 2012).[5]

The exhaustion requirement also serves a practical function. When the Board has "the opportunity to bring its experience to bear," the reviewing court gets "the benefit of the Board's analysis." *NLRB v. International Bhd. of Elec. Workers Local 952*, 758 F.2d 436, 439 (9th Cir. 1985); *see also United States v.*

[5] The "extraordinary circumstances" exception to § 10(e) is limited. *See Alden Leeds, Inc. v. NLRB*, 812 F.3d 159, 168 (D.C. Cir. 2016). This Court has never found circumstances justifying consideration of an issue not raised before the Board.

L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 37 (1952) ("Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.").

A party must preserve its objections to an administrative law judge's decision by filing "exceptions" with the Board. *Sever v. NLRB*, 231 F.3d 1156, 1171 (9th Cir. 2000). Regardless of whether a party seeks to challenge the Board's conclusions of law or fact, exceptions must be specific. A party that makes only a general objection to the Board's conclusions forfeits its objection altogether. *See NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 350 (1953); *NLRB v. Legacy Health Sys.*, 662 F.3d 1124, 1126 (9th Cir. 2011). The Board's rules reinforce this specificity requirement. Exceptions to the administrative law judge's decision must "set forth *specifically* the questions, procedure, fact, law, or policy to which exception is taken." 29 C.F.R. § 102.46(b)(1)(i) (emphasis added). The rules caution that "[a]ny exception to a ruling, finding, conclusion, or recommendation which is not *specifically* urged shall be deemed to have been waived." 29 C.F.R. § 102.46(b)(2) (emphasis added). It is not enough to list the findings or conclusions to which exceptions are taken. The excepting party must "concisely state the grounds for the exception." 29 C.F.R. § 102.46(b)(1)(iv). Without this, exhaustion

is incomplete. The Board cannot be expected to address a claim that the judge made the wrong decision unless the excepting party explains why that is so.

The Employer did not exhaust the arguments it makes in this Court. It filed only general (and repetitive) exceptions to the administrative law judge's conclusion that it acted unlawfully by prohibiting distribution in "guest areas" and by enforcing that rule against the employees who distributed leaflets. IER 180-82 (Exception Nos. 6-11, 17, 20).[6] The Employer did not state any grounds for these exceptions, but referred to two sections of its brief where it argued that the TLRO governs labor relations at its casino, and that, as an Indian tribe, it has the right to regulate activities on its reservation. IER 167-76. On appeal, the Employer has come up with a grab-bag of different arguments why the *Republic Aviation* principles do not apply when employees distribute leaflets to customers. The Employer did not raise those arguments in its exceptions or in its brief in support of the exceptions, and does not assert that extraordinary circumstances excuse its failure. The Court lacks jurisdiction to consider these unexhausted arguments.

[6] The Board filed a motion to lodge with the Court the Employer's Brief in Support of its Exceptions to the Decision of the Administrative Law Judge. (ECF Doc. No. 70). In response, the Employer asked that its Exceptions to the Decision of the Administrative Law Judge also be available to the Court. (ECF Doc. No. 80). We cite these documents repeatedly so, for the Court's ease, we include them in the Intervenor's Supplemental Excepts of Record.

B. A deferential standard of review applies.

If the Court decides to reach the Employer's arguments about leafleting rights, review is limited. The NLRA does not specifically address leafleting rights. Section 7 gives employees the right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U.S.C. § 157; and § 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [§ 7]." 29 U.S.C. § 158(a)(1). It is the Board's – not the Court's – job to "fill the interstices of the broad statutory provisions." *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990); *see also Republic Aviation*, 324 U.S. at 798; *see also Sierra Publishing Co. v. NLRB*, 889 F.2d 210, 215 (9th Cir. 1989) ("[T]he Board has the responsibility in the first instance to delineate the precise boundaries of § 7's mutual aid and protection clause."). Thus, courts give the Board's choice of rules "considerable deference" so long as the rules are "rational and consistent" with the NLRA. *Curtin Matheson*, 494 U.S. at 786-87. When an appellant challenges how the Board chose to balance employees' § 7 rights against management's interest in maintaining production or discipline,[7] judicial review is

[7] The Employer incorrectly says that in *Republic Aviation*, the Supreme Court devised the rules for when and where employees may solicit and distribute. In fact, the Court enforced the Board's choice of rules, finding them to be an acceptable "adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers

"narrow." *Beth Israel Hospital*, 437 U.S. at 501. The reviewing court must ensure that the Board's chosen accommodation "accomplish[es] the dominant purpose of the legislation" which "is the right of employees to organize for mutual aid without employer interference." *Republic Aviation*, 324 U.S. at 798 (internal citation omitted).

C. Casino employees have had the right to distribute leaflets to customers at casinos' front doors for thirty years.

The Board did not create new law when it held that the Employer unlawfully prohibited its employees from distributing leaflets to customers outside the front doors of its casino. Distributing leaflets at the workplace is a core § 7 right that was first recognized in *Republic Aviation*. For three decades, the Board has held that employees who work at hotels and casinos have the right to distribute to customers, and the front doors are a place where they may do so. *See*, *e.g.*, *Sheraton Anchorage*, 362 NLRB No. 123, at slip op. 1 & n.4 (2015), *pet. for review on other grds. pending* Case No. 15-71924 (9th Cir.); *Santa Fe Hotel & Casino*, 331 NLRB at 723; *Dunes Hotel*, 284 NLRB 871, 876-877 (1987); *see also New York-New York*, 676 F.3d at 200 (enforcing 356 NLRB 907 (2011)).[8] There is

---

to maintain discipline in their establishments." 324 U.S. at 797-798, 803; *see also Eastex*, 437 U.S. at 571.

[8] This case concerns distribution, not solicitation. The rule that the Board found to be facially unlawful prohibits only distribution in guest areas, and the Casino Pauma employees did not attempt to solicit any customers. Thus, the Board's rules

nothing new about the Employer's arguments. They have all be previously rejected.

1. *Republic Aviation* rights do not stop with intra-employee communications.

In *Republic Aviation*, the Court found valid a series of presumptions the Board established for when employees may solicit and distribute leaflets on their employer's property. 324 U.S. at 802-03 & nn. 8, 10. The cases on review in *Republic Aviation* involved communication between employees, but the same presumptions apply when employees communicate with their employer's customers. "[T]he fact that the off-duty employee distributions on both dates were to customers rather than to other employees appears to be a distinction without a difference." *Santa Fe Hotel*, 331 NLRB at 730; *see also New York-New York*, 676 F.3d at 196-97 (explaining that there is no "substantive distinction" between coworker and customer leafleting); *Stanford Hospital & Clinics v. NLRB*, 325 F.3d 334, 343 (D.C. Cir. 2003) (same). This is because § 7 enables employees to "seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer

---

for solicitation – which differ somewhat from its rules for distribution – are not at issue. *Beth Israel Hospital*, 437 U.S. at 493 n.10. *Cf. ISKCON v. Lee*, 505 U.S. 672, 690 (1992) (O'Connor, J. concurring) (explaining why distribution is less disruptive to customer traffic than solicitation).

relationship," *Eastex*, 437 U.S. at 565, including by communicating with the employer's customers. *Sierra Publishing*, 889 F.2d at 216; *see also Glendale Assoc., Ltd. v. NLRB*, 347 F.3d 1145, 1153 (9th Cir. 2003) (leafleting of customers protected).[9]

2. Employees must be able to go to some "guest areas" in order to distribute leaflets to guests.

The Board divides workplaces between "work" and "nonwork" areas, and treats restrictions on distribution during nonworking time in nonworking areas as presumptively unlawful. *New York-New York*, 676 F.3d at 197; *see also Beth Israel Hospital*, 437 U.S. at 492-93. The area in front of a casino is a nonwork area where distribution may not be prohibited. *New York-New York*, 676 F.3d at 195, 197; *Santa Fe Hotel & Casino*, 331 NLRB at 723. That is where Casino Pauma employees distributed leaflets, and the Employer does not challenge this location as improper.

Instead, the Employer predicts chaos in the future: if employees can distribute outside the front doors, distribution in bathrooms, shuttle-busses,

[9] Disloyal appeals to third-parties may lose § 7 protection if the content lacks a connection to the employees' work-related grievances. *Sierra Publishing*, 889 F.2d at 216. The disloyalty exception does not apply here because the leaflets addressed only the employees' grievances with the Employer. SER 193-94.

restaurants and bars will be next.[10] There are two reasons why the Employer's predictions are irrelevant.

First, the Board did not order the Employer to allow distribution wherever guests are present. The Board's order prohibits the employer from interfering with literature distribution only "in *nonworking* public or guest areas." ER 1 (emphasis added). The Employer may still restrict distribution in working areas. The parties did not litigate what parts of the Employer's facility, apart from the front doors, are nonwork areas.[11]

---

[10] An example of the Employer's bald misrepresentation of the record appears at page 22 of its brief. The Employer says that what is under review is an allegation that the Employer violated the NLRA by disallowing leafleting in shuttle buses. The Employer cites an unfair labor practice charge with that allegation, ER 83; but the complaint that the Board's General Counsel issued that did not allege anything about shuttle buses. IER 25-31. *Cf.* 29 U.S.C. § 153(d) (giving the General Counsel "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complains under section 160 of this title, and in respect of the prosecution of such complaints before the Board"); *NLRB v. UFCW Local 23*, 484 U.S. 112, 123-125 (1987).

[11] Soon after *Republic Aviation* was decided, the Board created special rules for retail store interiors, carving out the "selling floor" as a place where *Republic Aviation* rights could not be exercised. *Marshall Field & Co.*, 98 NLRB 88, 89-90 (1952), *enfd. as modified*, 200 F.2d at 375 (7th Cir. 1953). The Board later explained that other parts of the workplace may be "nonwork" areas even if some work is performed there. *Santa Fe Hotel & Casino*, 331 NLRB at 723 (citing *U.S. Steel Corp.*, 223 NLRB 1246, 1247-48 (1976)). The "selling floor" rule applies to hotels, restaurants and casinos, *Beth Israel Hospital*, 437 U.S. at 493; *Double Eagle Hotel & Casino*, 341 NLRB 112, 113 (2004) (*enfd. in rel. part* 414 F.3d 1249 (10th Cir. 2005)); but it is not at issue in this case because employees did not attempt to leaflet customers inside the casino.

The Board's order would also prohibit the Employer from "maintaining a rule that prohibits employees from distributing literature in 'guest areas.'" ER 1. This is not an affirmative requirement that the Employer allow distribution in *all* guest areas. The Employer's rule is illegally overbroad because it prohibits distribution in all areas where guests are, regardless of whether those areas are *work* areas.[12] The Board may prohibit an employer from enforcing an overbroad rule, even if some applications of the rule would be lawful. *Double Eagle Hotel & Casino*, 341 NLRB at 113; *see also Contemporary Cars, Inc. v. NLRB*, 814 F.3d 859, 874 (7th Cir. 2016); *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 374, 377-78 (D.C. Cir. 2007).

Second, the Board's demarcation between work and nonwork areas is not absolute. An employer may overcome the *Republic Aviation* presumptions by showing that restrictions on distribution in some nonwork areas are necessary to maintain production or discipline. *Republic Aviation*, 324 U.S. at 803 n.10. The Employer did not even try to make this showing. The administrative law judge

[12] The Employer cannot legitimize its overbroad rule against distribution in "guest areas" by claiming that "guest areas" means something other than areas where guests are. When an employer's rule is so vague that employees cannot discern with certainty what activities are prohibited, the rule is unlawful. *NLRB v. Ohio Masonic Home*, 58 F.2d 449, 453 (6th Cir. 1989); *see also Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), *enfd*. 203 F.3d 52 (D.C. Cir. 1999) (any ambiguity regarding the rule's scope must be construed against the employer).

found that "[n]o unusual or special circumstances have been shown to exist in the present case," ER 8; and the Employer did not file an exception to that finding. IER 179-83.

3. The Employer's property rights are not at issue when employees distribute leaflets.

The Employer says in passing that, as a tribe, its property interest is stronger than that of other employer-property owners, but cites no authority to support this assertion and does not develop this comment into an argument. Pet. Br., at 32-33. The Employer abandons the thought after one sentence. This Court does not consider issues unless they are specifically and distinctly argued in an appellant's opening brief. *Medical Lab. Mgmt. Consultants v. Am. Broad Cos., Inc.*, 306 F.3d 806, 820 n.8 (9th Cir 2002); *Laboa v. Calderon*, 224 F.3d 972, 981 n.6 (9th Cir. 2000). In any event, the Employer misunderstands *Republic Aviation* balancing. When *nonemployee union organizers* seek to use an employer's property to assist employees to organize, the Board balances the organizers' "derivative" § 7 rights against the employer's property rights. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533 (1992). But when *employees* exercise their § 7 rights, the Board considers only the employer's right to maintain production and discipline. The employer's property rights are not at issue because employees are rightfully on the employer's property. *Eastex*, 437 U.S. at 572-73; *Hudgens v. NLRB*, 424 U.S. 507, 521-22 n.10 (1976).

The case is even stronger here because the Employer does not prohibit employees from returning to the property while off-duty. SER 30, 34.

4. It is irrelevant whether employees have other ways to communicate with customers.

Next, the Employer says that the *Republic Aviation* accommodation is outdated because its employees have ways of communicating with customers that did not exist when *Republic Aviation* was decided. The Employer is really just arguing for an "alternative means" test to limit *Republic Aviation* rights. Courts have repeatedly rejected that argument, starting with *Republic Aviation* itself. *See Eastex*, 437 U.S. at 571 (stating that the *Republic Aviation* Court enforced the Board's rules "even though the employees had not shown that distribution off the employer's property would be ineffective"). "[O]utside of the health care context, the availability of an alternative means of communication is not, with respect to employee organizational activity, a necessary inquiry." *Beth Israel Hospital*, 437 U.S. at 505; *see also ITT Industries, Inc. v. NLRB*, 413 F.3d 64, 76 (D.C. Cir. 2005) (inquiry into alternative means is appropriate only when nonemployees seek access to the employer's property); *First Healthcare Corp. v. NLRB*, 344 F.3d 523 (6th Cir. 2003) (same).

In support of this argument, the Employer asks this Court to take judicial notice of census records pertaining to the use of telephones and telegraphs in the 1940s when *Republic Aviation* was decided. When this Court reviews an NLRB

order, the record on review is the same as the record before the Board. It consists of the order, any findings or reports upon which the order was based, and the pleadings, evidence and proceedings before the Board. Fed. R. App. P. 16(a). This Court may not consider evidence that a party failed to present to the Board. *Fred Meyer Stores*, 466 Fed. Appx. 560, at *1; *see also L'Eggs Prod., Inc. v. NLRB*, 619 F.2d 1337, 1352 (9th Cir. 1980) (any additional evidence must be taken by the Board, not the court).

The Employer also asks the Court to instruct the Board to take this evidence, but the Court may do so only if "the evidence is material and . . . there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board." 29 U.S.C. § 160(e). This evidence is not material because an "alternative means" test does not apply when employees seek to use their employer's property to distribute leaflets. Nor can the Employer show reasonable grounds for not introducing this evidence before the Board. The Employer implies that it was precluded from doing so by the administrative law judge, Pet. Br., at 25-26, 35 n.1; but that is not true. The administrative law judge discouraged questioning about whether nonemployee union organizers patronized the casino, ER 49-51; and cut off questioning about whether organizers waited in the parking lot of a restaurant located across the street. ER 55-58; IER 132-33. The Employer

did not attempt to introduce census records from the 1940s when the case was before the Board.[13]

5. It is irrelevant that the employees who passed out leaflets associated with nonemployee union organizers.

The Employer argues that the administrative law judge should have allowed it to elicit additional testimony that nonemployee organizers drove the employees to casino property and remained there while the employees distributed leaflets.[14] Such testimony would have been irrelevant. Employees do not lose their § 7 right to distribute on their employer's property by associating with nonemployees. *Be-Lo*, 318 NLRB at 10 n.25; *see also Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1163, 1177 (D.C. Cir. 1993); *Mardi Gras Casino*, 359 NLRB 895, 913 (2013),

[13] The record in NLRB proceedings includes rejected offers of proof and a "rejected exhibits" file, where documents offered as part of a rejected offer of proof are placed, upon any party's request. *Omaha World-Herald*, 357 NLRB 1870, 1872 n.13 (2011); *Crown Corrugated Container, Inc.*, 123 NLRB 318, 320 (1959). If the Employer had offered these records, the offer would be reflected in the record. There is not a rejected exhibits file in this case because the judge did not deny permission to introduce any exhibits.

[14] The Employer misrepresents the record. It suggests that its security officers told employees to stop leafleting at a time when they were "coupled with an even 'larger number of non-employee organizers.'" Pet. Br., at 35. There is no evidence to support this characterization. The Employer places the phrase "larger number of non-employee organizers" in quotes without telling the Court that it is quoting from its counsel's opening statement. ER 74. In any event, the Employer was free to tell nonemployee organizers to leave its property. *Lechmere*, 502 U.S. at 537. There is no evidence that it did so. The Employer simply told employees to stop leafleting.

adopted by 361 NLRB No. 59 (2014) (explaining that "concerted activities in pursuit of a legitimate employee objective do not lose their protected character because engaged in concertedly with nonemployees who happen to have a legitimate concurrent interest with employees"). This is an application of the general principle that employees do not lose § 7 protection because they collaborate with a union. *Town & Country Elec.*, 516 U.S. 85.

II. The Employer cannot use this case to seek review of the Board's decision in *Casino Pauma I*.

The Employer challenges the NLRA's application to its casino. But in this case, the Board did not revisit the question whether the NLRA so applies. The Board answered that question in *Casino Pauma I* by following the rule set out in *San Manuel*. SER 1 n.3. All that the Board decided in this case is that *Casino Pauma I* has preclusive effect on this threshold issue. ER 1, 3-4.

A. Standard of Review

This Court applies two different standards when reviewing a decision that collateral estoppel precludes relitigation. The determination that collateral estoppel applies is reviewed *de novo*, but the decision to give preclusive effect to a prior decision is reviewed for an abuse of discretion. *Wabakken v. California Dep't of Corr. & Rehab.*, 801 F.3d 1143, 1148 (9th Cir. 2015); *Miller v. County of Santa Cruz*, 39 F.3d 1030, 1032 (9th Cir. 1994); *see also Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979).

B. The Board had discretion to disallow the Employer from relitigating the question whether the NLRA applies to its casino.

"[I]ssue preclusion, or collateral estoppel, bars relitigation, even in an action on a different claim, of all issues of fact or law that were actually litigated and necessarily decided in the prior proceeding." *Americana Fabrics, Inc. v. L&L Textiles*, 754 F.2d 1524, 1529 (9th Cir. 1986). The rule is not limited to judicial decisions. It also applies equally to administrative decisions made in the course of proceedings which are judicial in nature. *B&B Hardware, Inc. v. Hargis Industries, Inc.*, __ U.S. __, 135 S.Ct. 1293, 1303 (2015); *International Bhd. of Teamsters v. Allegiant Air, LLC*, 788 F.3d 1080, 1089 (9th Cir. 2015). Issue preclusion applies to the administrative agency's legal and factual decisions, *Wehrli v. County of Orange*, 175 F.3d 692, 694 (9th Cir. 1999); *Miller*, 39 F.3d at 1032-33; *Eilrich v. Remas*, 839 F.2d 630, 634 n.2 (9th Cir. 1988). It applies even if the administrative decision has not been subjected to judicial review. What matters is whether the litigant had the opportunity to seek review, not whether the litigant did so. *University of Tennessee v. Elliott*, 478 U.S. 788, 799 (1986); *Eilrich*, 839 F.2d at 632-33; *Plaine v. McCabe*, 797 F.2d 713, 720-21 (9th Cir. 1986). *Cf. B&B Hardware*, 135 S.Ct. at 1305 ("Ordinary preclusion law teaches that if a party to a court proceeding does not challenge an adverse decision, that decision can have preclusive effect in other cases, even if it would have been reviewed *de novo*.").

The NLRB's unfair labor practice hearings are judicial in nature, *see* 29 U.S.C. § 160(b-c); and its decisions have been afforded preclusive effect. *Building Materials & Constr. Teamsters Local No. 216 v. Granite Rock Co.*, 851 F.2d 1190, 1195 (9th Cir. 1988); *Electrical Workers Local 58 Pension Trust Fund v. Gary's Elec. Svc. Co.*, 227 F.3d 646, 658 (6th Cir. 2000). The NLRA's applicability to Casino Pauma was litigated and decided in *Casino Pauma I.*[15]

[15] The Employer might argue that its failure to seek judicial review of *Casino Pauma I* means that the Board's decision in that case is not final. That argument should be rejected for several reasons. First, Board decisions are "final" even before judicial review occurs. *See* 29 U.S.C. § 160(f) (authorizing judicial review of "a final order of the Board"). Second, a decision may be sufficiently "final" to have preclusive effect even if there is a chance that that the decision will be reversed on appeal. *Leaschauer v. Huerta*, 667 Fed. Appx. 253 (9th Cir. 2016), *cert. denied* 2017 WL 1114986 (March 27, 2017) (federal agency appropriately gave prior agency decision preclusive effect because "the preclusive effects of a lower court judgment cannot be suspended simply by taking an appeal that remains undecided") (quoting *Robi v. Five Platters, Inc.*, 838 F.2d 318, 327 (9th Cir. 1988)); *see also John Morrell & Co. v. Local Union 304A, UFCW*, 913 F.2d 544, 563-64 (8th Cir. 1990) ("finality in the context of issue preclusion may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again"); *Electrical Workers Local 58 Pension Trust Fund*, 227 F.3d at 658-60 (district court properly gave preclusive effect to NLRB decision that was not yet reviewed by appellate court). Third, if the Board could not give preclusive effect to threshold issues resolved by a prior decision, then the losing party (such as the Employer here) could force the Board to waste resources by continually relitigating the issue in each successive proceeding. That would encourage a vexatious approach to Board proceedings that the issue-preclusion rule exists to prevent. *Cf. B&B Hardware*, 135 S.Ct. at 1302-03.

C. *Casino Pauma I* has preclusive effect even if a decision about the NLRA's reach is labeled "jurisdictional."

On appeal, the Employer does not dispute the application of issue preclusion in Board proceedings generally or argue that some flaw in the prior Board proceeding deprives *Casino Pauma I* of preclusive effect. Instead, the Employer simply launches into a critique of *Casino Pauma I*'s holding that the NLRA applies to Casino Pauma. That question is not before this Court. "[A] fact, question or right distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law." *Montana v. United States*, 440 U.S. 147, 162 (1979); *see also Richey v. United States Internal Revenue Svc.*, 9 F.3d 1407, 1410 (9th Cir. 1993). "[O]nly an intervening *change* in the law . . . defeats collateral estoppel – the correctness of a prior ruling, even if based upon an erroneous application of the law, is irrelevant." *Id.* at 1412 (emphasis original) (citing *Montana*, 440 U.S. at 162). There was no intervening change: the Board still follows *San Manuel*.[16]

[16] The Employer argues that *Michigan v. Bay Mills Indian Community*, *supra*, provides an intervening change in the law, but that is wrong for two reasons. First, *Bay Mills* was decided in 2014, one year before *Casino Pauma I* and is addressed in *Casino Pauma I*. SER 1 n.3. Second, *Bay Mills* involved a tribe's sovereign immunity from suit, not immunity from federal regulation. 134 S.Ct. at 2030 ("We granted certiorari to consider whether tribal sovereign immunity bars Michigan's

The Employer says it can ignore the Board's decision and ask this Court to review *Casino Pauma I*'s determination that the NLRA governs its casino because "jurisdiction" can be raised at any time. Pet. Br., at 24. There are two reasons why the Employer is wrong.

1. The Board had authority to decide whether the NLRA applies to the Employer's casino.

The Employer does not cite any authority in its opening brief for its claim to be able to contest the Board's jurisdiction at any time, but in the Request for Judicial Notice and in its Reply in Support of its Request for Judicial Notice, the Employer relied on cases involving federal courts' jurisdiction. (ECF Doc. Nos. 63, 69). The Employer misunderstands the difference between a federal court's subject-matter jurisdiction and an agency's regulatory jurisdiction.[17]

---

suit against Bay Mills."). Those are two different issues. A tribe may be immune from suit by a private party, even though a law applies to it. *Kiowa Tribe of Oklahoma v. Manufacturing Tehcnologies, Inc.*, 523 U.S. 751, 755 (1998); *Carsten v. Inter-Tribal Council of Nevada*, 599 Fed. Appx. 659, 660 n.2 (9th Cir. 2015). The Employer's immunity from suit is not at issue because the federal government prosecutes NLRA violations. "[T]ribal sovereign immunity does not act as a shield against the United States, even when Congress has not specifically abrogated tribal immunity." *EEOC v. Peabody Western Coal Co.*, 400 F.3d 774, 781 (9th Cir. 2005). The same is true when federal agencies sue tribes. *EEOC v. Karuk Tribe Housing Auth.*, 260 F.3d 1071, 1075 (9th Cir. 2001).

[17] The word "jurisdiction" is often loosely to mean different things. Describing its own use of the term "jurisdiction" as "profligate and "less than meticulous," *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006); the Supreme Court "has endeavored in recent years to bring some discipline" its use. *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) (internal quotation marks omitted) .

In the Article III context, jurisdiction means "a court's adjudicatory authority" and it "applies only to prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) implicating that authority." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160-61 (2010); *see also Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998) (subject-matter jurisdiction refers to "the courts' statutory or constitutional *power* to adjudicate the case"). But when one says that the Board lacks (or has) jurisdiction over tribal casinos (or any other class of employer), the speaker is referring to the Board's authority to regulate. This type of "jurisdiction" does not implicate the Board's power to hear the case because the Board has authority to decide the scope of its regulatory authority. *City of Arlington*, 133 S.Ct. at 1870. *Cf. NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 830 n.7 (1984) (Board's decisions about scope of NLRA coverage entitled to deference); *Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 298, 303-04 (1977) (same for Board decision about agricultural worker exclusion from coverage). By contrast, questions about the Board's power to adjudicate a case can be raised at any time. *Community Hospitals of Central Cal. v. NLRB*, 335 F.3d 1079, 1088 (D.C. Cir. 2003) ("The exception to the rule that an objection to an agency decision must be timely raised before the agency in order for the court to grant review is limited to jurisdictional challenges that concern the very composition or constitution of any agency."); *NLRB v. New Vista Nursing &*

Rehabilitation, 719 F.3d 203, 212 (3d Cir. 2013) (giving, as an example, the lack of a quorum at issue in *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010)); *Noel Foods v. NLRB*, 82 F.3d 1113, 1121 (D.C. Cir. 1996) ("As long as the Board is not purporting to exercise an authority entirely foreign for this particular agency, we will regard even a challenge to the jurisdiction of the Board as a question of law to be raised first before the agency.") (internal quotation marks omitted).

The decision in *Polynesian Cultural Center, Inc. v. NLRB*, 582 F.2d 467 (9th Cir. 1978) demonstrates this point. At issue was whether the NLRA applied to a church-owned nonprofit corporation. On appeal, the employer asserted for the first time that the Board lacked "jurisdiction" because of its religious affiliation. *Id.* at 472. *Cf. NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (construing the NLRA not to require collective bargaining in church-run schools because the alternative would implicate the First Amendment's Religion Clauses). The Court refused to consider the argument because the Board's adjudicatory jurisdiction – "in the sense of power to hear and determine the controversy" – was not at issue. 582 F.2d at 472-73. Even if the NLRA did not regulate church-owned employers, the NLRB had authority to hear the case.[18] *Id.*

[18] An analogy to the distinction between an agency's adjudicatory and regulatory jurisdiction is the distinction between jurisdictional and nonjurisdictional statutory questions in federal court. It is "erroneous[]" to "conflate[]" subject-matter jurisdiction with a "plaintiff's need and ability to prove the defendant bound by the federal law asserted as the predicate for relief – a merits-related determination."

The same principle that guided the decision in *Polynesian Cultural Center* applies here. The Board has authority to decide the threshold question whether the NLRA applies to tribal casinos. That question -- which is about the Board's regulatory jurisdiction – is not one that can be raised at any time.

2. Decisions about jurisdiction have preclusive effect.

This is a second, discrete reason why the Employer does not get another chance to challenge the NLRA's application because it calls the determination whether the NLRA applies "jurisdictional." Even decisions about courts' subject-matter jurisdiction have preclusive effect. *American Surety Co. v. Baldwin*, 287 U.S. 156, 166 (1932); *Americana Fabrics*, 754 F.2d at 1529. An earlier decision that jurisdiction exists has preclusive effect in a subsequent proceeding. *Van Cauwenberghe*, 934 F.2d at 1958-60 (decision of prior court denying motion to dismiss for lack of subject-matter jurisdiction had preclusive effect); *U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 250-51 (9th Cir. 1992) (giving preclusive effect to state court decision that tribe lacked immunity from suit); *Glacier Elec. Cooperative, Inc. v. Estate of Sherburne*, 385

Arbaugh, 546 U.S. at 511 (court had jurisdiction over a Title VII claim even though Title VII did not govern employer's operations because employer had an insufficient number of employees); *see also Steel Co.*, 523 U.S. at 89 (subject-matter jurisdiction exists regardless of whether a plaintiff wins under one construction of the jurisdiction-conferring federal statute and loses under another).

Fed. Appx. 686, at *1 (9th Cir. 2010) (issue preclusion attached to district court's prior decision that tribal court had subject-matter jurisdiction). The often-repeated rule that subject-matter jurisdiction may be raised at any time is not implicated because the rationale for that rule – that a court without subject-matter jurisdiction lacks authority to hear the case -- does not apply when parties seek to *relitigate* jurisdictional questions. Just as with decisions about other matters, "[t]here is no reason to expect that the second decision [as to jurisdiction] will be more satisfactory than the first." *Durfee v. Duke*, 375 U.S. 106, 114 (1963).

There is nothing to be gained by allowing the Employer to relitigate the NLRA's applicability to its casino in this case. Preclusion rules "serve[] to protect adversaries from the expense and vexation attending multiple lawsuits, to conserve judicial resources, and to foster reliance on judicial action by minimizing the possibility of inconsistent decisions." *Americana Fabrics*, 754 F.2d at 1529 (quoting *Montana*, 440 U.S. at 153-54); *see also Parklane Hosiery Co.*, 439 U.S. at 326 ("Collateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation."). Exempting this Employer (and other respondents in NLRB proceedings) from the rule against relitigation would promote waste of administrative resources. The Employer points out that there are multiple unfair

labor practice charges against it and there will likely be more. Pet. Br., at 3, 21-22. In each successive case, the Employer could force the Board and the appeals courts to expend resources hearing evidence and issuing decisions on a question that has already been decided.

D. The Employer failed to ask the Board to reconsider *San Manuel*'s holding.

This is another reason why the Court should not reach the question whether the NLRA governs the Employer's casino. In its brief to the Board in support of its exceptions, the Employer conceded that it "has no basis to argue that the Board lacks jurisdiction" but contended that "while the Board under *existing* law has jurisdiction over Respondent's operation, the Board within its discretion should refuse to exercise such jurisdiction." IER 171 (emphasis in the original). The Employer also stated that it was "reserv[ing] the rights to make such an argument should there be contrary Circuit Court and/or Supreme Court decision or contrary legislation." IER 171. As explained in Section I.A of this Brief, exhaustion before the Board is a necessary prerequisite for this Court to exercise jurisdiction. The Employer cannot challenge the *San Manuel* rule (that the NLRA regulates tribal casinos) for the first time on appeal. 29 U.S.C. § 160(e); *Polynesian Cultural Center*, 582 F.2d at 472-73.

E. The Employer was not prevented from introducing evidence in the administrative hearing.

The Employer says that the administrative law judge prevented it from introducing evidence about whether the NLRA applies to its casino. Pet. Br., at 24, 41. Here, too, the Employer misrepresents the record.

At the start of the hearing, the judge explained that he considered "the issue of jurisdiction [to be] res judicata," but that he would allow the Employer's counsel to make an offer of proof, ER 64; and to present any newly-discovered evidence that was not introduced in *Casino Pauma I*. ER 66. The Employer's counsel responded that he wanted to offer documentary evidence related to the TLRO, ER 65-66; and the judge permitted him to introduce that evidence. The Employer introduced ten exhibits on this topic. ER 20-45; IER 73-130, 137-43. The Employer's counsel did not seek to present any other documents or any testimony about facts related to whether the NLRA applies to the Employer's casino. He did not make an offer or proof and did not place documents in the rejected exhibits file. Rather, the Employer's counsel said repeatedly that he wanted only to introduce documents related to the TLRO. ER 66 ("I would ask that we be allowed to simply put in these documents."; "If they'll stipulate to it, we wouldn't even need testimony."); ER 67-68 ("So we don't really need much testimony on it. I mean, we can enter the documents. There's really no dispute

over that. And then it's something we can argue in out briefs."); IER 136 ("I have no more witnesses.").

III. The Tribal Labor Relations Ordinance, adopted by the Tribe as a requirement of its gaming compact with California, is not at issue in this case.

Amici California Nations Indian Gaming Association *et al.* try the alarm tactic. They say that the TLRO is an integral element of the model gaming compact that California negotiated with dozens of tribes across the state, and if the Board's decision stands, those gaming compacts will crumble. Amici's concerns are contrived.

The Board first asserted jurisdiction over tribal casinos in 2004 when it decided *San Manuel*, and that case involved a California tribe that had entered into the same TLRO as all other tribes in the state. 341 NLRB at 1055, 1065. Amici do not give any concrete examples how the Board's exercise of jurisdiction over tribal casinos over the past thirteen years has had the negative impact they say are a necessary consequence. They speculate about conflicts but provide no examples of the Board deciding that a tribe violated the NLRA by complying with the TLRO, or of an arbitrator acting under the TLRO deciding that a tribe violated the TLRO by complying with the NLRA. In fact, the TLRO and the NLRA have operated

concurrently at tribal casinos without any problems.[19] Notably, California has not expressed any opposition to application of the NLRA to California tribes by filing an amicus brief in this case or in *San Manuel*.

But a decision from this Court about the TLRO's relation to the NLRA could adversely impact the tribal-state gaming compacts in California in a different way. The administrative law judge said that the TLRO is a state law and, as such, the NLRA preempts it. ER 4. This Court should not reach that question for several reasons.

First, the judge failed to understand the complexity of this issue. While the Board decided in *San Manuel* that IGRA does not preempt the NLRA, 341 NLRB at 1064; neither the Board nor any federal court has explored whether the NLRA preempts agreements made by a tribe and state in the course of IGRA compact negotiations about labor relations at a casino.[20]

---

[19] The Employer declares that allowing employees to distribute leaflets on casino property will lead to strike-related picketing on the property in violation of the TLRO's provision (§ 11) prohibiting picketing on Indian lands. Pet. Br., at 33. This specuation shows just how hard the Employer has to work to find a conflict between the TLRO and NLRA.

[20] The Supreme Court has left unsettled the question whether *Chevron* deference applies to an agency's view on preemption. *See Bell v. Blue Cross & Blue Shield of Oklahoma*, 823 F.3d 1198, 1202-03 (8th Cir. 2016). This Court's decisions are inconsistent. *Compare Ass'n of Am. R.R.s v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010) (deference) *with Do Sung Uhm v. Humana, Inc.*, 620 F.3d 1134, 1155-56 (9th Cir. 2010) (no deference).

Second, the judge's off-the-cuff conclusion about the NLRA's preemptive effect was not necessary to his decision. The Employer argued first to the judge and then to the Board that the NLRA and the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*, are federal laws with equal authority, and since the TLRO was a product of IGRA compact negotiations, the Board should decline to exercise its jurisdiction and defer to the alternative-dispute resolution procedure set up by the TLRO. ER 67; IER 171-72. The judge (and the Board) could have addressed the Employer's request that that the Board decline jurisdiction and defer to TLRO's alternative dispute resolution procedure without reaching the weightier and constitutional question whether the TLRO is a preempted state law.[21]

This Court should follow the constitutional avoidance doctrine, which discourages courts from deciding constitutional questions when other grounds for decision are available. *Ashwander v. Tenn. Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). While the Ninth Circuit has not yet invoked this doctrine to avoid deciding whether federal law preempts a state or local law, other courts have. *See Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150, 161 (4th

---

[21] In *San Manuel*, the Board considered whether to decline to exercise jurisdiction over tribal casinos in order to accommodate federal Indian gaming policy reflected in IGRA, and decided not to do so. 341 NLRB at 1062.

Cir. 2010) ("[W]ere we to pass on the [parties'] bases for preemption, we could offer nothing more than an advisory opinion on potentially difficult questions of federalism and constitutional law. . . . The *Ashwander* doctrine of constitutional avoidance—which applies with equal force to preemption claims—cautions against any such endeavor."); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1267 n. 7 (10th Cir. 2004) ("Because federal preemption of a state or local law is premised on the Supremacy Clause of the United States Constitution and because of the longstanding principle that federal courts should avoid reaching constitutional questions if there are other grounds upon which a case can be decided."); *BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1176 (11th Cir. 2001) ("Because federal preemption of a state or local law is premised on the Supremacy Clause of the United States Constitution, and because of the longstanding principle that federal courts should avoid reaching constitutional questions if there are other grounds upon which a case can be decided, we first decide whether the ordinances are preempted by Florida state law before considering whether they are federally preempted by the Act."); *Louisiana Health Serv. & Indem. Co. v. Rapides Healthcare Sys.*, 461 F.3d 529, 533 n.5 (5th Cir. 2006).

Third, there are compelling arguments why federal labor law does not preempt the TLRO. The TLRO is not merely a state or tribal law. The Indian

Gaming Regulatory Act compelled California and the Tribe to enter into a compact governing the Tribe's gaming operations, 25 U.S.C. § 2710(d); and the TLRO is part of that agreement. ER 26, 30-31. Moreover, the TLRO was a proper subject for IGRA compact negotiations. *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1115-16 (9th Cir. 2003).[22]

The NLRA does not preempt private agreements relating to labor organizing. Such agreements are enforceable under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. *SEIU v. St. Vincent Medical Ctr.*, 344 F.3d 977, 984-85 (9th Cir. 2003); *HERE Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1469-70 (9th Cir. 1992). *Cf. Retail Clerks Int'l Ass'n v. Lion Dry Goods, Inc.*, 369 U.S. 17, 25-26 (1962). This principle would unquestionably apply if the TLRO is a contract with the Union, as the Tribe says it is. *See* Pet. Br., at 4, 51. No court has ever addressed whether it also applies to IGRA compacts.

Just as a private agreement governing labor organizing and the NLRA can operate concurrently without conflict, so too can the TLRO and NLRA. As the Employer states, much of the TLRO's language replicates the NLRA. Pet. Br., at

[22] When *In re Indian Gaming Related Cases* was decided, the Board had not yet decided in *San Manuel* that it had jurisdiction over tribal casinos, but the Court was aware that NLRB jurisdiction over tribal employers was a possibility. Five months earlier, the Court so held in *NLRB v. Chapa de Indian Health Program, Inc.*, 316 F.3d 995 (9th Cir. 2003).

13-14. The Board's decision in this case was based on §§ 7 and 8(a)(1) of the NLRA. The TLRO contains nearly identical language in §§ 4 and 5(1). ER 33. *Cf. San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1314 (D.C. Cir. 2007) (stating that applying the NLRA to a tribal casino will only impinge on the TLRO "to some extent").

Moreover, when an Indian tribe acts in its capacity as a casino owner and operator, its actions are not preempted. While the NLRA occupies much of the field of labor relations, it does not preempt actions by a nonfederal government acting as a proprietor in the market. *Building & Constr. Trades Council v. Associated Builders & Contractors of Massachusetts/ Rhode Island, Inc.*, 507 U.S. 218, 227 (1993) ("When a State owns and manages property, for example, it must interact with private participants in the marketplace. In so doing, the State is not subject to pre-emption by the NLRA, because pre-emption doctrines apply only to state *regulation.*"); *Hotel Employees Local 57 v. Sage Hospitality*, 390 F.3d 206, 211-18 (3d Cir. 2004).[23]

[23] Attacking the *Donovan v. Couer d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985) test on which the Board relied in *San Manuel*, the Employer contends that the distinction between governmental and commercial acts is unworkable. But that distinction is alive and well in other areas of law. It exists not only in the market-participant exception to labor law preemption, but also in the case law limiting the Dormant Commerce Clause's reach. *See Engine Manufacturers Ass'n v. South Coast Air Quality Management Dist.*, 498 F.3d 1031, 1040-42 (9th Cir. 2007). A tribe is more likely to act in a proprietary capacity than a state because tribes lack the broad regulatory powers that states possess. *Plains Commerce Bank v. Long*

We offer these arguments not because we are asking the Court to decide this question but to show that the issue is far more complex than the judge's casual analysis suggests.

IV. The Court should not stay proceedings to allow a district court case to make a decision first.

The Employer asks the Court to wait and see how a district court rules in a separate case the Tribe[24] brought against the State of California and the Union. This request makes no sense and is an attempt to use the district court case to collaterally attack the Board's decision.[25]

When the Employer filed this petition for judicial review, it invoked this

---

Family Land & Cattle Co., Inc., 554 U.S. 316, 340 (2008). "By virtue of their incorporation into the United States, the tribe's sovereign interests are now confined to managing tribal land, protecting tribal self-government, and controlling internal relations." *Id.* at 334 (2008) (internal citations and quotation marks omitted). "[T]he retained sovereignty of the tribes is that needed to control their own internal relations, and to preserve their own unique customs and social order. . . . The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe." *Duro v. Reina*, 495 U.S. 676, 685-86 (1990).

[24] The Tribe, rather than Casino Pauma, is the plaintiff in the district court suit. The Tribe owns and operates Casino Pauma, ER 4; and there is no evidence that "Casino Pauma" is anything other than a fictitious business name that the Tribe uses.

[25] When it filed its initial opening brief in this case, the Employer also filed a motion to hold this case in abeyance. (ECF Doc. No. 25). The Appellate Commissioner denied that motion, and also denied the Employer's motion for reconsideration of the denial. (ECF Doc. Nos. 41, 53).

Court's jurisdiction under § 10(f) of the Act, 29 U.S.C. § 160(f), to review the Board's decision that it committed unfair labor practices. The Employer has now contrived two new defenses to the unfair labor practice allegations that it did not raise before the Board, and seeks to litigate one of those defenses in the district court case.

In the district court, the Tribe alleges that the Union agreed, through the Tribal Labor Relations Ordinance, to arbitrate its disputes with Employer, and thereby waived its right to file unfair labor practice charges with the Board. Pet. Br., at 4, 51. Waiver is an affirmative defense that the Employer could have raised in the unfair labor practice proceeding, *see Queen of Valley Hosp.*, 316 NLRB 721, 721 (1995); but it failed to do so. IER 179-83. As a result, the Employer waived its waiver argument, and cannot raise it on appeal. 29 U.S.C. § 160(e).

The Employer also tells this Court that a stay is necessary to allow the district court time to decide whether the Board "ceded its jurisdiction over unfair labor practice charges to the State of California through the TLRO in the 1999 Compact." Pet. Br., at 50.[26] Like its waiver argument, this is an argument the

[26] The Employer offers no reason why the district court, in an action by the Tribe against the State of California and the Union for allegedly breaching the TLRO, would have authority to decide whether the NLRB ceded its jurisdiction over tribal casinos. The Employer does not say, much less show, that any party in the district court case has taken the position that the Tribe's clams in district court turn on whether the NLRA applies to Casino Pauma.

Employer could have made to the Board but did not, and so the Employer cannot make it for the first time to this Court. *See* 29 U.S.C. § 160(e).

The Employer seems to recognize that it waived its waiver and ceded-jurisdiction defenses before the Board because it does not make them to this Court. Instead, the Employer wants to use the district court case to litigate the waiver defense, and so it seeks to halt this Court's review of the Board's decision until the district court rules. But even assuming for the sake of argument the Tribe were to prevail in the district court[27], the district court's decision would not have any

[27] The Tribe's district court claims are meritless, among other reasons because the TLRO, which the Tribe characterizes as a contract between it and the Union, does not contain a "clear and unmistakable waiver" of the Union's statutory right to file unfair labor practice charges. *See Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 80 (1998) (waiver of statutory rights must be clear and unmistakable); *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) (same). In support of this argument, the Employer has asked this Court to take judicial notice of legal arguments the Union made in two amicus briefs over 15 years ago. Judicial notice should be denied because the statements are not relevant to any issue before this Court. *See* Fed. R. Evid. 401(b). If the Court is inclined to consider those briefs, it should read them in their entirely because the Employer misrepresents what the Union argued.

The ceded-jurisdiction argument is frivolous. The Board does not cede or decline to exercise its jurisdiction simply because a tribe and state have made an agreement about labor rights. The Board has authority to cede jurisdiction to state and territorial agencies, but only by "agreement." 29 U.S.C. § 160(a). There is no evidence in the record, or in any of the materials from outside of the record that the Employer presents to this Court, that the Board made an agreement with anyone to cede its jurisdiction over tribal casinos. The Board may also decline to assert its jurisdiction over a class of employers "by rule of decision or by published rule adopted pursuant to the Administrative Procedure Act" but only "where, in the opinion of the Board, the effect of such labor dispute on commerce is not

impact on the outcome of this case.

A decision that the Union violated an agreement with the Tribe by filing NLRB charges would not stop the Board from seeking enforcement of its order in this Court. The Board is the respondent to the Employer's petition to this Court. The Union is merely an intervenor. The Board has an independent interest in enforcement of its order because "[t]he Board asserts a public right vested in a public body, charged in the public interest with the duty of preventing unfair labor practices." *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940).

In addition, a district court proceeding may not be used to "attempt[] an end run around the NLRB under the guise of contract interpretation." *Valley Engineers*, 975 F.2d at 615; *see also Sander v. Weyerhaeuser Co.*, 966 F.2d 501, 502-03 (9th Cir. 1992). "NLRB regulations call for appeals to follow a specified route within a specified period of time. Those procedures become meaningless if the same issue can be raised in another proceeding pursuant to a different set of rules." *Valley Engineers*, 975 F.2d at 615; *Rosen v, NLRB*, 735 F.2d 564, 577 (D.C. Cir. 1984) (district court action challenging NLRB decision properly

---

sufficiently substantial to warrant the exercise of its jurisdiction." 29 U.S.C. § 164(c)(1). The Board has not published any rules involving tribal casinos, and in its first decision involving a tribal casino, the Board asserted jurisdiction because tribal casinos employing non-Indians and catering to non-Indian customers "affect commerce in a significant way." *San Manuel*, 341 NLRB at 1062.

dismissed because plaintiff failed to raise issue before the NLRB and "ha[s] no right to a collateral hearing at variance with the orderly and sound procedures of administrative agency adjudication"); *Smith Steel Workers v. A.O. Smith Corp.*, 420 F.2d 1, 10 (7th Cir. 1969) (union's claim should have been presented to the NLRB as a defense in the unfair labor practice proceeding and not as a basis for a collateral attack on the Board's order). Section 10(f) of the Act, which gives jurisdiction to this Court, provides the exclusive means for the Employer to obtain review of the Board order against it.[28]

The Employer will likely say that the Board did not have authority to interpret the TLRO. Keep in mind that the crux of the Tribe's district court case is that the TLRO is a contract to which the Union is a party.[29] The Board has authority, concurrent with federal court jurisdiction, to interpret labor contracts

---

[28] The court in *Hospital of Barstow, Inc. v. California Nurses Ass'n*, 2013 WL 6095559 (C.D. Cal. Nov. 18, 2013) faced similar claims to the ones that the Tribe makes in its district court case. Like the Tribe here, the *Hospital of Barstow* employer alleged that the union had breached an agreement to arbitrate disputes by filing unfair labor practice charges and sought a declaratory judgment, damages, and specific performance. The court dismissed the case, explaining that it lacked authority to enjoin Board proceedings or review Board decisions. *Id.* at *8 (citing *Amerco v. NLRB*, 458 F.3d 883, 884 (9th Cir. 2006)). A district court order "requiring the parties to engage in arbitration regarding a matter already pending before, or decided by, the NLRB would be tantamount to enjoining a pending NLRB proceeding or reviewing a decision already issued by the NLRB." *Id.*

[29] If it is a contract, it is similar the contracts at issue in *SEIU v. St. Vincent Medical Ctr.*, 344 F.3d 977 (9th Cir. 2003) and *HERE Local 2 v. Marriott Corp.*, 961 F.2d 1464 (9th Cir. 1992).

between unions and employers. *NLRB v. C&C Plywood Co.*, 385 U.S. 421, 428-30 (1967). The Employer will say that it is not a labor contract because it is part of a gaming compact negotiated pursuant to the federal Indian Gaming Regulatory Act. That response will only serve to demonstrate how to Employer keeps changing its theory as the holes in each are revealed. IGRA authorizes, and sometimes requires, states and tribes to negotiate compacts. 25 U.S.C. § 2710(d). It does not apply to agreements tribes make with private parties. The Employer can't have it both ways.

Delaying resolution of this case would not serve any legitimate purpose. The Employer's request for a stay so that it can litigate a waived defense to the NLRB charges in district court should be denied.

CONCLUSION

For all of the foregoing reasons, the Employer's petition for review should be denied and the Board's petition for enforcement should be granted.

//

//

//

//

//

//

/s/Kristin L. Martin
Richard G. McCracken
Kristin L. Martin
McCRACKEN, STEMERMAN & HOLSBERRY, LLP
rmccracken@msh.law
klm@msh.law
595 Market Street, Suite 800
San Francisco, CA 94105
Telephone: 415-597-7200
Fax: 415-597-7201
Attorneys for Intervenor UNITE HERE International Union

Dated at San Francisco, CA this 29th day of March, 2017

STATEMENT OF RELATED CASES

There are no related cases pending before this Court.

/s/Kristin L. Martin
Richard G. McCracken
Kristin L. Martin
McCRACKEN, STEMERMAN & HOLSBERRY, LLP
rmccracken@msh.law
klm@msh.law
595 Market Street, Suite 800
San Francisco, CA 94105
Telephone: 415-597-7200
Fax: 415-597-7201

Attorneys for Intervenor UNITE HERE International Union

Dated at San Francisco, CA this 29th day of March, 2017

ADDENDUM

STATUTORY ADDENDUM

TABLE OF CONTENTS

Statutes

The Board's Rules and Regulations

29 U.S. Code § 164(c) - Construction of provisions

(c) Power of Board to decline jurisdiction of labor disputes; assertion of jurisdiction by State and Territorial courts

> (1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to subchapter II of chapter 5 of title 5, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.
>
> (2) Nothing in this subchapter shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

29 CFR § 102.46 Exceptions and brief in support; answering briefs to exceptions; cross-exceptions and brief in support; answering briefs to cross-exceptions; reply briefs; failure to except; oral argument; filing requirements.

(a)Exceptions and brief in support. Within 28 days, or within such further period as the Board may allow, from the date of the service of the order transferring the case to the Board, pursuant to § 102.45, any party may (in accordance with Section 10(c) of the Act and §§ 102.2 through 102.5 and 102.7) file with the Board in Washington, DC, exceptions to the Administrative Law Judge's decision or to any other part of the record or proceedings (including rulings upon all motions or objections), together with a brief in support of the exceptions. The filing of exceptions and briefs is subject to the filing requirements of paragraph (h) of this section

(1)Exceptions.

(i) Each exception must:

(A) Specify the questions of procedure, fact, law, or policy to which exception is taken;

(B) Identify that part of the Administrative Law Judge's decision to which exception is taken;

(C) Provide precise citations of the portions of the record relied on; and

(D) Concisely state the grounds for the exception. If a supporting brief is filed, the exceptions document must not contain any argument or citation of authorities in support of the exceptions; any argument and citation of authorities must be set forth only in the brief. If no supporting brief is filed, the exceptions document must also include the citation of authorities and argument in support of the exceptions, in which event the exceptions document is subject to the 50-page limit for briefs set forth in paragraph (h) of this section.

(ii) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

(2)Brief in support of exceptions. Any brief in support of exceptions must contain only matter that is included within the scope of the exceptions and must contain, in the order indicated, the following:

(i) A clear and concise statement of the case containing all that is material to the consideration of the questions presented.

(ii) A specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate.

(iii) The argument, presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page citations to the record and the legal or other material relied on.

(b)Answering briefs to exceptions.

(1) Within 14 days, or such further period as the Board may allow, from the last date on which exceptions and any supporting brief may be filed, a party opposing the exceptions may file an answering brief to the exceptions, in accordance with the filing requirements of paragraph (h) of this section.

(2) The answering brief to the exceptions must be limited to the questions raised in the exceptions and in the brief in support. It must present clearly the points of fact and law relied on in support of the position taken on each question. Where exception has been taken to a factual finding of the Administrative Law Judge and the party filing the answering brief proposes to support the Judge's finding, the answering brief must specify those pages of the record which the party contends support the Judge's finding.

(c)Cross-exceptions and brief in support. Any party who has not previously filed exceptions may, within 14 days, or such further period as the Board may allow, from the last date on which exceptions and any supporting brief may be filed, file cross-exceptions to any portion of the Administrative Law Judge's decision, together with a supporting brief, in accordance with the provisions of paragraphs (a) and (h) of this section.
(d)Answering briefs to cross-exceptions. Within 14 days, or such further period as the Board may allow, from the last date on which cross-exceptions and any supporting brief may be filed, any other party may file an answering brief to such cross-exceptions in accordance with the provisions of paragraphs (b) and (h) of this section. Such answering brief must be limited to the questions raised in the cross-exceptions.
(e)Reply briefs. Within 14 days from the last date on which an answering brief may be filed pursuant to paragraphs (b) or (d) of this section, any party may file a reply brief to any such answering brief. Any reply brief filed pursuant to this paragraph (e) must be limited to matters raised in the brief to which it is replying, and must not exceed 10 pages. No extensions of time will be granted for the filing of reply briefs, nor will permission be granted to exceed the 10-page limit. The reply brief must be filed with the Board and served on the other parties. No further briefs may be filed except by special leave of the Board. Requests for such leave must be in writing and copies must be served simultaneously on the other parties.
(f)Failure to except. Matters not included in exceptions or cross-exceptions may not thereafter be urged before the Board, or in any further proceeding.
(g)Oral argument. A party desiring oral argument before the Board must request permission from the Board in writing simultaneously with the filing of exceptions or cross-exceptions. The Board will notify the parties of the time and place of oral argument, if such permission is granted. Oral arguments are limited to 30 minutes for each party entitled to participate. No request for additional time will be granted unless timely application is made in advance of oral argument.
(h)Filing requirements. Documents filed pursuant to this section must be filed with the Board in Washington, DC, and copies must also be served simultaneously on the other parties. Any brief filed pursuant to this section must not be combined with any other brief, and except for reply briefs whose length is governed by paragraph (e) of this section, must not exceed 50 pages in length, exclusive of subject index and table of cases and other authorities cited.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CASINO PAUMA	)	
	)	
Petitioner/Cross-Respondent	)	
	)	
v.	)	Nos. 16-70397, 16-70756
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	
	)	
and	)	
	)	
UNITE HERE INTERNATIONAL UNION	)	
	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), UNITE HERE International Union certifies that its brief contains 11,699 words of proportionally-spaced, 14-point type. The word processing system used was Microsoft Word 2013.

/s/Kristin L. Martin
Kristin L. Martin
McCracken, Stemerman & Holsberry, LLP
595 Market Street, Suite 800
San Francisco, CA 94105

Dated at San Francisco, CA this 29th day of March, 2017

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CASINO PAUMA	)	
	)	
Petitioner/Cross-Respondent	)	
	)	
v.	)	Nos. 16-70397, 16-70756
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	
	)	
and	)	
	)	
UNITE HERE INTERNATIONAL UNION	)	
	)	
Intervenor	)	

CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/Katherine Maddux
Katherine Maddux

Dated at San Francisco, CA this 29th day of March, 2017